

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
TERRY CONNER; JOSEPH DODSON; BARBARA BACHMAN, and MICHAEL SCHIESL
(b) County of Residence of First Listed Plaintiff Brown
(c) Attorneys (Firm Name, Address, and Telephone Number)
SEE ATTACHED SHEET

DEFENDANTS
SEE ATTACHED SHEET
County of Residence of First Listed Defendant Washington D.C.
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question
4 Diversity

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country

IV. NATURE OF SUIT (Place an "X" in One Box Only)
CONTRACT
REAL PROPERTY
PERSONAL INJURY
CIVIL RIGHTS
PRISONER PETITIONS
FORFEITURE/PENALTY
LABOR
IMMIGRATION
BANKRUPTCY
SOCIAL SECURITY
FEDERAL TAX SUITS
OTHER STATUTES

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
40 U.S.C. § 101; 5 U.S.C. § 706
Brief description of cause:
Ultra vires acts of executive officials and agencies, violations of APA, and First Amendment violation.

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions):
JUDGE SEE ATTACHMENT.
DOCKET NUMBER

DATE December 8, 2021
SIGNATURE OF ATTORNEY OF RECORD /s/ Fernando M. Bustos

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

Attachment to civil cover sheet

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Defendants

JOSEPH R. BIDEN in his official capacity as President of the United States;

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT;

KIRAN AHUJA in her official capacity as
director of the Office of Personnel
Management and as co-chair of the Safer
Federal Workforce Task Force;

GENERAL SERVICES ADMINISTRATION;

ROBIN CARNAHAN in her official capacity as administrator of the General
Services Administration and as co-chair of the Safer Federal Workforce
Task Force;

OFFICE OF MANAGEMENT AND
BUDGET;

SHALANDA YOUNG in her official
capacity as Acting Director of the Office

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION**

TERRY CONNER; JOSEPH DODSON; BARBARA
BACHMAN; and MICHAEL SCHIESL,

Plaintiffs,

v.

JOSEPH R. BIDEN in his official capacity as President
of the United States;

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT;

KIRAN AHUJA in her official capacity as
director of the Office of Personnel
Management and as co-chair of the Safer
Federal Workforce Task Force;

GENERAL SERVICES ADMINISTRATION;

ROBIN CARNAHAN in her official capacity as
administrator of the General Services Administration
and as co-chair of the Safer Federal Workforce
Task Force;

OFFICE OF MANAGEMENT AND
BUDGET;

SHALANDA YOUNG in her official
capacity as Acting Director of the Office
of Management and Budget and as a
member of the Safer Federal Workforce Task Force;

SAFER FEDERAL WORKFORCE TASK FORCE;

JEFFREY ZIENTS in his official capacity as co-chair of
the Safer Federal Workforce Task Force and COVID-19
Response Coordinator;

FEDERAL ACQUISITION REGULATORY COUNCIL;

No. _____

**COMPLAINT
FOR DECLARATORY
AND INJUNCTIVE
RELIEF**

LESLEY A. FIELD, in her official capacity as Acting Administrator for Federal Procurement, Office of Management and Budget;

JOHN M. TENAGLIA, in his official capacity as Principal Director of Defense Pricing and Contracting, Department of Defense;

JEFFREY A. KOSES, in his official capacity as Senior Procurement Executive & Deputy Chief Acquisition Officer, General Services Administration; and

KARLA S. JACKSON, in her official capacity as Assistant Administrator for Procurement, National Aeronautics and Space Administration,

Defendants.

INTRODUCTION

1. The Fifth Circuit Court of Appeals held only a few weeks ago that OSHA's Emergency Temporary Standard ("ETS") requiring employers with 100 or more employees to mandate on their employees COVID-19 vaccination or weekly testing, "grossly exceeds" its statutory authority. *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *8 (5th Cir. Nov. 12, 2021).¹

2. The Fifth Circuit reasoned that OSHA's purported sweeping powers

¹ The judicial panel on multidistrict litigation entered a consolidated order and assigned the *BST Holdings* case, along with other petitions challenging the OSHA ETS filed in all circuit courts throughout the country, in the Sixth Circuit Court of Appeals. *See In re OSHA, et al*, Case MCP 165 (J.P.M.L. Nov. 16, 2021).

under the statute were beyond the authority Congress conferred upon it under the Commerce Clause. *Id.* at *21. The Court further reasoned that OSHA’s vaccine or test mandate effectively “commandeers” “the nation’s employer to do what it cannot do directly.” *Id.* at *22.

3. The Court also described the mandate’s effect upon employers as “deputizing their participation in OSHA’s regulatory scheme.” *Id.* at *7. The Court noted President Biden’s candid “displeasure” with those employees across the country who chose not to take the vaccine, causing his Administration to “pore over the U.S. Code in search of authority, or a work-around, for imposing a national vaccine mandate.” *Id.* at 7-8 (cleaned up).

4. Much of the same can be said about President Biden’s separate vaccine mandate for federal government contractors that he issued through an Executive Order on September 9, 2021 (“Executive Order 14042” or “EO 14042”), which is the subject of this lawsuit.

5. Executive Order 14042 requires that many employees of federal contractors and subcontractors take the COVID-19 vaccine. This order is sweeping in scope because employees of federal contractors constitute one-fifth of the U.S. workforce,² i.e., millions of workers.

² Dept. of Labor, *History of Executive Order 11246, Office of Contract Compliance Programs*, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Nov. 16, 2021) (emphasis added).

6. This federal contractor vaccine mandate is more invasive upon civil liberties than the OSHA vaccine mandate that the Fifth Circuit recently struck down. The federal contractor mandate requires and mandates vaccination only (unless a religious or medical exemption applies), with no alternative option for weekly testing.

7. The Fifth Circuit's reasoning in *BST Holdings* also shows that Executive Order 14042 is illegal. The government claims that federal procurement statutes authorizing measures related to efficiency also authorize the vaccine mandate. This claimed "efficiency" is merely a pretext for something that the statutes do not authorize, i.e., commandeering individual employees to participate in its COVID-19 mitigation attempts.

8. In fact, the President and his subordinates boast that the mandate will increase vaccination rates. But that has nothing to do with "efficient" government contracting, and therefore violates federal procurement statutes.

9. Instead, the mandate has everything to do with a question of major political and economic significance, which further demonstrates that Congress never authorized the President to utilize the powers vested in the Executive Branch to mandate vaccines under federal procurement statutes aimed at efficiency.

10. Indeed, according to a report from the Kaiser Family Foundation (KFF) released on Sept. 28, 2021, gaps in vaccination rates across racial and ethnic groups have virtually disappeared—while gaps reflecting political affiliation have widened

substantially.³

11. In other words, the status of whether an individual is vaccinated or unvaccinated is not a racial, ethnic, or medical issue per se; rather it is a political issue and may be determinative based on one's political party affiliation. *Id.*

12. Here, the plaintiffs are employees of the 3M Company ("3M"), a covered federal contractor, and work at 3M facilities in Brownwood, Texas and in Hutchinson, Minnesota, that have been designated as being covered by the federal contractor mandate pursuant to Executive Order 14042.

13. 3M has implemented Executive Order 14042 by requiring that the plaintiffs choose between getting the job or losing their job, since 3M is a covered federal contractor. In order to comply with Executive Order 14042 and in violation of the U.S. Constitution, 3M is further compelling the plaintiffs to disclose their vaccination status, effectively compelling the plaintiffs to engage in protected political speech.

14. Given that Executive Order 14042 effectively commandeers the plaintiffs to participate in the Biden Administration's response to COVID-19 in excess of its authority under federal procurement statutes, they bring this lawsuit.

15. The plaintiffs do so in order to protect their jobs, their rights, and the

³ See *KFF COVID-19 Vaccine Monitor* (Sep. 28, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-september-2021/>.

rights of all Americans not to be subject to ultra vires government action and actions that violate the First Amendment's prohibition against compelled political speech.

PARTIES

16. Plaintiff Terry Conner ("Conner") is a resident of Texas and is employed at 3M's Brownwood, Texas facility.

17. Plaintiff Joseph Dodson ("Dodson") is a resident of Texas and is employed at 3M's Brownwood, Texas facility.

18. Plaintiff Barbara Bachman ("Bachman") is a resident of Texas and is employed at 3M's Brownwood, Texas facility.

19. Plaintiff Michael Schiesl ("Schiesl") is a resident of Minnesota and is employed at 3M's Hutchinson, Minnesota facility.

20. Unless otherwise noted, Bachman, Conner, Dodson, and Schiesl are referred to herein as the "3M employees."

21. Defendants are officials of the United States government and United States governmental agencies responsible for implementing Executive Order 14042.

22. Defendant Joseph R. Biden is the President of the United States. President Biden is sued in his official capacity.

23. Defendant Safer Federal Workforce Task Force was established on January 20, 2021, by Executive Order 13991.

24. Defendant United States Office of Personnel Management ("OPM") is an

independent federal agency.

25. Defendant Kiran Ahuja is director of OPM and co-chair of the Safer Federal Workforce Task Force. She is sued in her official capacity.

26. Defendant Office of Management and Budget (“OMB”) is an office within the Executive Office of the President of the United States.

27. Defendant Shalanda Young is Acting Director of the OMB and is a member of the Safer Federal Workforce Task Force. She is sued in her official capacity.

28. Defendant General Services Administration (“GSA”) is an independent federal agency.

29. Defendant Robin Carnahan is administrator of GSA and co-chair of the Safer Federal Workforce Task Force as well as a member of the Federal Acquisitions Regulation Council (“FAR Council”). She is sued in her official capacity.

30. Defendant Jeffrey Zients is co-chair of the Safer Federal Workforce Task Force and is President Biden’s COVID-19 Response Coordinator. He is sued in his official capacity.

31. Defendant Federal Acquisitions Regulation Council is responsible for “manag[ing], coordinat[ing], control[ing], and monitor[ing] the maintenance of, issuance of, and changes in the FAR.” 41 U.S.C. § 1303(d).

32. Defendants Lesley A. Field, John M. Tenaglia, Jeffrey A. Koses, and

Karla S. Jackson are members of the FAR Council. Field is the Acting Administrator for Federal Procurement of OMB. Tenaglia is the Principal Director of Defense Pricing and Contracting of the Department of Defense. Koses is the Senior Procurement Executive & Deputy Chief Acquisition Officer of GSA. Jackson is the Assistant Administrator for Procurement of NASA. They are sued in their official capacities.

JURISDICTION AND VENUE

33. The Court has jurisdiction under 5 U.S.C. §§ 702 and 703 and 28 U.S.C. §§ 1331, 1346, and 1361, under the United States Constitution, and pursuant to the Court's equitable powers.

34. 5 U.S.C. §§ 702 and 706 and 28 U.S.C. §§ 1361, 2201, and 2202 authorizes the Court to award the requested declaratory and injunctive relief.

35. Venue is appropriate under 28 U.S.C. § 1391(e)(1)(B) because Defendants are agencies or officers of the United States and "a substantial part of the events or omissions giving rise to the claim occurred" in this District. Venue is also appropriate under 28 U.S.C. § 1391(e)(1)(C) because three of the 3M employees/plaintiffs reside or work in this District at 3M's Brownwood facility, no real property is involved, and Defendants are agencies or officers of the United States.

LEGAL BACKGROUND

The Procurement Act

36. Congress enacted the Procurement Act in 1949 “to provide the Federal Government with an economical and efficient system for” certain enumerated activities, including “[p]rocurring and supplying property and nonpersonal services,” “establish[ing] . . . pools or systems of transportation of [g]overnment personnel,” and “manag[ing] of public utility services.” 40 U.S.C. § 101(1).

37. The legislative history of the Procurement Act is replete with references to the need for an “efficient, businesslike system of property management.” *Chamber of Comm. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (citation omitted). The Procurement Act authorizes the President to “prescribe policies and directives that the President considers necessary to carry out” the Act but requires that policies the President prescribes “be consistent with” the Act. 40 U.S.C. § 121(a).

38. Such policies, and regulations established pursuant to them, are not valid unless there is a “nexus between the regulations and some delegation of the requisite legislative authority by Congress,” and “the reviewing court [must] reasonably be able to conclude that the grant of authority contemplates the regulations issued.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 304, 308 (1979).

39. The Procurement Act does not give the President “unlimited authority to make decisions he believes will likely result in savings to the government . . . the procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power.” *Reich*, 74 F.3d 1322 at 1330–31 (emphasis

omitted).

The Federal Acquisition Regulation

40. In 1988, Congress established the Federal Acquisition Regulation Council (“FAR Council”) “to assist in the direction and coordination of [g]overnment-wide procurement policy and [g]overnment-wide procurement regulatory activities in the [f]ederal government.” 41 U.S.C. § 1302(a). The OFPP Administrator, the Secretary of Defense, the Administrator of NASA, and the GSA Administrator make up the FAR Council. 41 U.S.C. § 1302(b).

41. Subject to limited exceptions, the FAR Council has the exclusive authority to issue “a single [g]overnment-wide procurement regulation” that is known as the Federal Acquisition Regulation (“FAR”). 41 U.S.C. § 1302(a)(1); *see also* 41 U.S.C. § 1303. Importantly, no other agency is authorized to issue government-wide procurement regulations. 41 U.S.C. § 1303.

FACTUAL ALLEGATIONS

The Federal Contractor Vaccine Mandate

42. On January 20, 2021, President Biden created the Safer Federal Workforce Task Force by executive order and directed it to “provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.” Exec. Order No. 13,991, 86 Fed. Reg. 7045, 7045-46.

43. The Task Force is headed by three co-chairs, including the Director of OPM (Defendant Ahuja), the Administrator of GSA (Defendant Carnahan), and the COVID-19 Response Coordinator (Defendant Zients). EO 13991 also ordered the GSA to “provide funding and administrative support for” the Task Force. *Id.*

44. Previously, President Biden and his team have denied that the federal government has the power to mandate vaccines. On July 23, 2021, the White House acknowledged that imposing vaccine mandates is “not the role of the federal government; that is the role that institutions, private-sector entities, and others may take [W]e’re going to continue to work in partnership to fight misinformation. And we’re going to continue to advocate and work in partnership with local officials and – and trusted voices to get the word out.” Jen Psaki, White House Press Briefing (July 23, 2021).⁴

45. However, on September 9, 2021, President Biden reversed political course and held a press conference where he said that “[m]any of us are frustrated with the nearly 80 million Americans who are still not vaccinated.” *Remarks by President Biden on Fighting the COVID-19 Pandemic*, White House (Sept. 9, 2021).⁵

⁴ See *Press Briefing by Press Secretary Jen Psaki*, (July 23, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/>

⁵ See *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/>.

46. President Biden claimed that those who make the choice not to take the vaccine “can cause a lot of damage—and they are.” *Id.* The President noted that a minority of Americans have chosen not to get vaccinated and then said: “We cannot allow these actions to stand in the way of protecting the large majority of Americans who have done their part.” *Id.*

47. President Biden blamed these Americans for stalling the economic recovery and said that we cannot let them “undo” the “record job creation” under his Administration. He also stated that his “patience is wearing thin” regarding Americans who chose not to get vaccinated.

48. Accordingly, President Biden stated: “I’m announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health.” *Id.* He stressed that: “we must increase vaccinations among the unvaccinated with new vaccination requirements.” *Id.* He noted: “The bottom line: We’re going to protect vaccinated workers from unvaccinated co-workers.” *Id.*

49. But later in his remarks, the President undermined his assertion that the vaccinated need to be protected from the unvaccinated by saying that “as the science makes clear, if you’re fully vaccinated, you’re highly protected from severe illness, even if you get COVID-19.” *Id.* He then noted: “In fact, recent data indicates there is only one confirmed positive case per 5,000 fully vaccinated Americans per day.” *Id.*

50. Nevertheless, President Biden announced that the federal government was issuing mandates that would “affect about 100 million Americans—two thirds of all workers.” *Id.* The President’s plan includes at least five new mandates:

51. First, he announced the mandate that OSHA recently issued requiring companies with 100 employees or more to either mandate vaccines or to have a policy that required employees to get tested weekly if they chose not to get vaccinated. As previously indicated, the Fifth Circuit recently issued a nationwide stay of that mandate, holding that it likely exceeded OSHA’s statutory authority. *BST Holdings, L.L.C.*, 2021 U.S. App. LEXIS 33698, at *27. The Court also cited the recent retweet from President Biden’s Chief of Staff on September 9, 2021, supporting a vaccine mandate as the “ultimate work-around” to impose an otherwise unconstitutional overbroad government mandate. *Id.* at * 8, n.13.

52. Second, the President also announced a mandate requiring healthcare employees working at facilities that accept Medicare or Medicaid patients to get vaccinated.

53. Third, he announced a mandate requiring all executive branch federal employees to get vaccinated.

54. Fourth, he announced that “we’ll require all of nearly 300,000 educators in the federal paid program, Head Start program, must be vaccinated.” *Remarks by President Biden, supra* note 3.

55. Lastly, he announced he signed an executive order requiring employees of federal contractors to get vaccinated—Executive Order 14042, which is the subject of this lawsuit and is attached hereto as Exhibit 1.

56. That executive order issued on September 9, 2021, invokes the Federal Property and Administrative Services Act (“Procurement Act”), 40 U.S.C. § 101 *et seq.* as authority to require that all federal contracts and “contract-like instruments” include a clause that contractors and subcontractors will comply with future guidance that the Safer Federal Workforce Task Force (“Task Force”) issues.

57. EO 14042 also ordered the Task Force to issue the vaccine mandate by September 24, 2021. The order also claims that the Task Force’s “Guidance” will “promote[] economy and efficiency in Federal procurement.”

58. EO 14042 further ordered the Director of the Office of Management and Budget to publish a “determination” as to whether the Task Force’s Guidance “will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors.”

59. On September 24, 2021, the Task Force released its *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (“Task Force Directive”).⁶ It states that one of the “main goals” of the President’s federal contractor

⁶ *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Sept. 24, 2021), [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20Guidance)

mandate is “to get more people vaccinated.” Although the document is titled “Guidance,” it states that “Covered contractors shall adhere to the requirements of this Guidance” based on the authority of the Procurement Act. *Id.* at 2.

60. The Task Force Directive then states: “Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19 unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021.” *Id.* at 5. (The Task Force later amended this by extending the deadline to January 4, 2021).

61. The Task Force Directive states that a “covered contract” “includes, but is not limited to, any contract that may be covered under any Federal procurement statute.” *Id.* at 3. It defines a “covered contractor employee” as: “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.” *Id.* at 3-4.

62. The Task Force Directive goes out of its way to apply the mandate as broadly as possible. It notes that employees working “in connection with” a covered contract means those who are “not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review,

20guidance%20doc_20210922.pdf.

perform work in connection with a Federal Government contract.” *Id.* at 13

63. It further broadens the mandate by defining “covered contractor workplace” as “a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.” *Id.* at 4.

64. The FAQs clarify this applies even to other floors or buildings of a “covered contractor workplace” if a covered employee is going to work during the performance of the contract at the workplace, “unless a covered contractor can affirmatively determine that none of its employees on another floor or in separate areas of the building will come into contact” with the covered employee. *Id.* at 10

65. This means there can be no contact even in “common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages.” *Id.* at 10. Thus, as a practical matter, most federal contractors will opt to apply the mandate to all their employees at a facility where there is at least one covered employee, given the logistical difficulties of keeping that employee segregated.

66. But the Task Force Directive does not stop there in broadening its reach. It also states that even covered employees working from home must be vaccinated.

67. The Task Force Directive does not provide an exception for individuals with natural immunity. *Id.* at 10.

68. The Task Force Directive states that it applies to small businesses and states that this “broad application” is needed to “decrease the spread of COVID-19.” *Id.* at 12.

69. It also states that it “supersede[s]” any state or local laws that prohibit vaccine and mask mandates. *Id.* at 13.

70. The Task Force Directive states that: “[c]overed contractors must require covered contractor employees to show or provide their employer with one of the following documents: a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020), a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.” *Id.* at 5-6

71. In addition to this vaccine mandate, the Task Force Directive also requires “covered contractors” to impose a mask mandate on its employees where CDC guidance so requires, including in areas of “high or substantial community transmission.” *Id.* at 6. This is so despite President Biden previously disclaiming that

the president has the power to impose a nationwide mask mandate.⁷

72. On September 28, 2021, OMB Director Young published in the Federal Register its Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042 (the “OMB Determination”). In the OMB Determination, Young states that: “I have determined that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.” 86 Fed. Reg. 53,691 (Sept. 28, 2021).

73. The FAR Council is responsible for issuing the Federal Acquisition Regulation, which is a standard regulation that governs federal contractors. 41 U.S.C. § 1303(a)(1). Federal agencies are generally required to comply with that regulation when soliciting and making contracts but are allowed to issue “deviations” in certain circumstances.

74. On September 30, 2021, the FAR Council issued Class Deviation Clause 252.223-7999 (the “FAR Deviation Clause”) along with a memo, stating the memo’s purpose was providing “initial direction” for incorporating a clause into solicitations

⁷ Tyler Olson, *Biden changes answer on national mask mandate authority again, says he would not have power to enforce it*, FOX NEWS (Sept. 18, 2020), <https://www.foxnews.com/politics/biden-mask-mandate-change-town-hall>.

and contracts to implement EO 14042 and the Task Force Directive.

75. The memo stated that federal agencies should comply with EO 14042 and issue deviations that incorporate the FAR Deviation Clause that the FAR Council drafted. The memo reiterated the Task Force's Directive that "To maximize the goal of getting more people vaccinated and decrease the spread of COVID-19" agencies should include the Task Force's requirements in "contracts that have been or will be awarded prior to November 14 on solicitations issued before October 15; and contracts that are not covered or directly addressed by the order because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products."

76. The memo also states that agencies that use the model deviation clause "will be presumed to have consulted with the Chair of the Civilian Agency Acquisition Council (CAAC) required by FAR 1.404(a)(1)" for deviations from the FAR.

77. The FAR Deviation Clause itself states: "[t]his clause implements Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, dated September 9, 2021 (published in the Federal Register on September 14, 2021, 86 FR 50985)." It goes on to state: "The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force

Guidance) at <https://www.saferfederalworkforce.gov/contractors/>.”

78. It also requires contractors to include the “substance of this clause” in certain subcontracts. In other words, when inserted into a contract, the FAR Deviation Clause imposes the Contractor Mandate.

79. Altogether, EO 14402, the Task Force Directive, the OMB Determination, and the FAR Deviation Clause and memo constitute the “Contractor Mandate.”

The 3M employees

80. The 3M employees are employed by 3M, a private company, which has locations throughout the United States and manufactures a variety of products. It has 40,000 employees in the United States and about 100,000 worldwide.

81. 3M has a multitude of contracts with federal agencies to provide numerous services.

82. In response to the Contractor Mandate, on October 19, 2021, 3M announced a rule implementing and enforcing the Biden Administration’s Contractor Mandate upon covered 3M federal contracts and employees, including the 3M employees who are plaintiffs in this lawsuit.

83. As such, 3M has designated twenty worksites, its St Paul headquarters, and associated operations, where all employees must take a COVID-19 vaccine or apply for a religious or medical exemption as a condition of employment. The company

recently announced that the deadline to be “fully vaccinated” is now January 4 in line with the federal government’s extension of the deadline for compliance with the Contractor Mandate.

84. These 3M employees are subject to the Contractor Mandate and 3M’s rule implementing that mandate, because they work at sites that 3M has designated as falling under the Contractor Mandate, including the Brownwood, Texas facility.

85. For a variety of personal reasons, the 3M employees do not wish to take any of the COVID-19 vaccines, but wish to continue working in their current roles at 3M in the Brownwood and Hutchinson facilities.

CLAIMS FOR RELIEF

CLAIM I

Ultra Vires Acts of the President

86. The allegations in all preceding paragraphs are incorporated herein by reference.

87. Under the Administrative Procedures Act (“APA”), a court must “hold unlawful and set aside agency action” that is arbitrary or capricious or otherwise not in accordance with law or contrary to the Constitution. 5 U.S.C. § 706(2)(A).

88. The APA also prohibits agency action that is “in excess of statutory jurisdiction, authority, limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

89. The purpose of the Procurement Act is to provide the Federal Government with an “economical and efficient system” for, among other things,

procuring and supplying property and nonpersonal services. 40 U.S.C. § 101.

90. The Procurement Act permits the President to prescribe certain policies and directives, but they “must be consistent with” the Act. 40 U.S.C. § 121. Thus, the President’s power under the Procurement Act must be exercised consistently with the structure and purposes of the statute that delegates that power—namely, efficiency and economy in procurement. Executive orders that lack a nexus to the purposes of the Procurement Act are *ultra vires*.

91. The Contractor Mandate lacks a nexus to the Procurement Act’s purpose of providing an “economical and efficient system” of procurement. 40 U.S.C. § 101. In fact, the Contractor Mandate is the opposite of “economical and efficient,” because it will cause unvaccinated employees to resign in droves. The Contractor Mandate also sweeps too broadly by applying to employees working remotely, employees that have minimal contact with employees working on a contract, and to subcontractor employees.

92. Additionally, Defendants’ attempt to impose a vaccine mandate on large portions of the American workforce (one-fourth) is a question “of deep ‘economic and political significance.’” *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)); see also *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

93. Under the Major Questions Doctrine, the power to answer that question

cannot be inferred from the Procurement Act given that Congress did not “speak clearly” on that issue when it passed the Act. *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014)).

94. Additionally, the federalism canon requires that courts not interpret a statute as intruding on state sovereignty without a “plain statement” from Congress that it intended that result. *Gregory v. Ashcroft*, 501 U.S. 452, 463–64 (1991).

95. Here, the Contractor Mandate attempts to force large portions of the American economy to vaccinate even though the U.S. Constitution leaves public health decisions, including those related to COVID-19, to the states. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (“Our Constitution principally entrusts the ‘safety and the health of the people’ to the politically accountable officials of the States to ‘guard and protect.’”)).

96. Therefore, the President acted *ultra vires* in imposing the Contractor Mandate.

CLAIM II
The OMB Determination Exceeds Statutory Authority
and Is Not in Accordance with Law

97. The allegations in all preceding paragraphs are incorporated herein by reference.

98. Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory . . . authority, or limitations, or short of statutory right.” *See* 5 U.S.C. § 706(2)(A), (C).

99. The Contractor Mandate lacks a nexus to the procurement policy objectives that the law authorizes.

100. It also violates the Major Questions Doctrine by answering a major economic and legal question without adequate statutory authority.

101. Therefore, OMB did not act in accordance with the law and exceeded its statutory authority when it issued its Determination that helped impose the Contractor Mandate.

CLAIM III
FAR Council Directive and Deviation Clause Exceeds
Statutory Authority and Is Not in Accordance with Law

102. The allegations in all preceding paragraphs are incorporated herein by reference.

103. Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory . . . authority, or limitations, or short of statutory right.” *See* 5 U.S.C. § 706(2)(A), (C).

104. The Contractor Mandate lacks a nexus to the procurement policy

objectives that the law authorizes.

105. It also violates the Major Questions Doctrine by answering a major economic and legal question without adequate statutory authority.

106. Therefore, the FAR Council did not act in accordance with the law and exceeded its statutory authority when it issued the Task Force Guidance and Deviation Clause that imposed the Contractor Mandate.

CLAIM IV
Carnahan, Nelson, and Austin Acted Ultra Vires in
Promulgating the FAR Guidance and Deviation Clause

107. The allegations in all preceding paragraphs are incorporated herein by reference.

108. Under 41 U.S.C. §§ 1301–1303(a), Defendants Carnahan, Nelson and Austin constitute the FAR Council and they issue the FAR, which is a standardized government-wide procurement regulation.

109. As discussed above, the FAR Council did not act in accordance with the law and exceeded its statutory authority when it issued the Contractor Mandate.

110. Therefore, Defendants Carnahan, Nelson and Austin also acted *ultra vires* and exceeded the scope of their statutory authority.

CLAIM V
First Amendment Compelled Political Speech

111. The allegations in all preceding paragraphs are incorporated herein by reference.

112. Under the APA, a court must “hold unlawful and set aside agency action” that is “contrary to constitutional right, power, privilege, or immunity.” *See* 5 U.S.C. § 706(2)(B).

113. The First Amendment to the U.S. Constitution not only *protects* the right to free speech, but it also *prohibits* compelled political speech and includes “the right to refrain from speaking at all.” *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quoting *Wooley v. Maynard*, 430 U. S. 705, 714 (1977)) (emphasis added).

114. Being coerced to provide documentation of one’s COVID-19 vaccination status, or otherwise being coerced to disclose one’s COVID-19 vaccination status as 3M and the Contractor Mandate require of the 3M employees, is a form of compelled commercial and political speech, as studies have shown that a person’s COVID-19 vaccination status is principally political.

115. The Contractor Mandate’s requirement that federal contractors such as 3M demand proof of their employees’ COVID-19 vaccination status violates the First Amendment’s prohibition against compelled political speech.

PRAYER FOR RELIEF

Plaintiffs 3M employees Conner, Dodson, Bachman, and Schiesl respectfully request and pray that this Court:

a. Hold unlawful and set aside the Contractor Mandate, i.e., the Executive Order 14042, the OMB Rule, the FAR Council Directive and Deviation Clause, and

the Task Force Directive;

- b. Issue declaratory relief declaring the Defendants' actions unlawful;
- c. Issue preliminary and permanent injunctive relief enjoining Defendants from enforcing the Contractor Mandate, including the Executive Order 14042, the OMB rule, the Task Force Directive, and the FAR Council Directive and Deviation Clause;⁸
- d. Award any further relief to which Plaintiffs may be entitled, including attorneys' fees and costs; and
- e. Award such other relief as the Court deems equitable and just.

Dated: December 8, 2021.

Respectfully Submitted,

/s/ Fernando M. Bustos

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and

⁸ Prior to filing, another district court recently issued preliminary relief enjoining enforcement of the federal contractor mandate in all fifty states. *See Georgia v. Biden, et al.*, No. 1:21-cv-00163 (S.D. Ga. Dec. 7, 2021) (order granting preliminary injunction).

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EXHIBIT 1

BRIEFING ROOM

Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Sec. 2. Providing for Adequate COVID-19 Safety Protocols for Federal Contractors and Subcontractors. (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as described in section 5(a) of this order) include a clause that the contractor and any subcontractors (at any tier) shall incorporate into lower-tier subcontracts. This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided that the Director of the Office of Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in Federal contracting. This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in

connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(b) By September 24, 2021, the Safer Federal Workforce Task Force (Task Force) shall, as part of its issuance of Task Force Guidance, provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).

(c) Prior to the Task Force publishing new Guidance related to COVID-19 for contractor or subcontractor workplace locations, including the Guidance developed pursuant to subsection (b) of this section, the Director shall, as an exercise of the delegation of my authority under the Federal Property and Administrative Services Act, *see* 3 U.S.C. 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors and subcontractors. Upon an affirmative determination by the Director, the Director's approval of the Guidance, and subsequent issuance of such Guidance by the Task Force, contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order), shall adhere to the requirements of the newly published Guidance, in accordance with the clause described in subsection (a) of this section. The Director shall publish such determination in the *Federal Register*.

(d) Nothing in this order shall excuse noncompliance with any applicable State law or municipal ordinance establishing more protective safety protocols than those established under this order or with any more protective Federal law, regulation, or agency instructions for contractor or subcontractor employees working at a Federal building or a federally controlled workplace.

(e) For purposes of this order, the term "contract or contract-like instrument" shall have the meaning set forth in the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38816, 38887 (July 22, 2021). If the Department of Labor issues a final rule relating to that proposed rule, that term shall have the meaning set forth in that final rule.

Sec. 3. Regulations and Implementation. (a) The Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations and contracts subject to this order the clause described in section 2(a) of this order, and shall, by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority under subpart 1.4 of the Federal

Acquisition Regulation.

(b) By October 8, 2021, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments as described in section 5(a) of this order that are not subject to the Federal Acquisition Regulation and that are entered into on or after October 15, 2021, consistent with the effective date of such agency action, include the clause described in section 2(a) of this order.

Sec. 4. Severability. If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 5. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation for a contract or contract-like instrument; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if:

- (i) it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
- (ii) it is a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*;
- (iii) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or
- (iv) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public;

(b) This order shall not apply to:

- (i) grants;
- (ii) contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended;
- (iii) contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, as that term is defined in section 2.101 of the Federal Acquisition Regulation;
- (iv) employees who perform work outside the United States or its outlying areas, as those terms are defined in section 2.101 of the Federal Acquisition Regulation; or
- (v) subcontracts solely for the provision of products.

Sec. 6. Effective Date. (a) Except as provided in subsection (b) of this section, this order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations for contracts or contract-like instruments; extensions or renewals of existing

contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 5(a) of this order, where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) October 15, 2021, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 3(a) of this order; or

(ii) for contracts and contract-like instruments that are not subject to the Federal Acquisition Regulation and where an agency action is taken pursuant to section 3(b) of this order, October 15, 2021, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 3 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 30 days of such effective date, such agencies are strongly encouraged to ensure that the safety protocols specified in section 2 of this order are applied in the new contract or contract-like instrument. But if that contract or contract-like instrument term is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the safety protocols specified in section 2 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements specified in section 2 of this order.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or

procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,

September 9, 2021.