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Shalanda Young  
Acting Director  
Executive Office of the President  
Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, DC 20503

Submitted Electronically via Regulations.gov

**Re: Comments by the Commonwealth of Kentucky, and the States of Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia, on *Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis* (Docket No. OMB-2021-0007)**

Dear Acting Director Young:

The undersigned States submit the following comments on the *Determination Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis* issued in 86 Fed. Reg. 63,418 (Nov. 16, 2021) ("OMB Determination"). Several of the States have already filed actions throughout the country<sup>1</sup> challenging the OMB Determination, the Safer Federal Workforce Task Force Guidance for Federal Contractors, and Executive Order 14042, all of which taken together mandate COVID vaccination of employees working for federal contractors and other COVID related health

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<sup>1</sup> See *Kentucky v. Biden, et. al.*, Case No. 21-cv-00055-GFVT (E.D. Ky.); *Georgia et. al. v. Biden, et. al.*, Civil Action No. 1:21-cv-163 (S.D. Ga.); *Florida v. Biden, et. al.*, Case 8:21-cv-02524 (M.D. Flor.); *Missouri, et. al. v. Biden, et. al.*, Case No. 4:21-cv-01300 (E.D. Mo.); *Texas v. Biden, et. al.*, Civil Action No. 3:21-cv-309 (S.D. Texas); and *Brnovich v. Biden, et. al.*, Case No. 21-cv-01568-MTL (D. Ariz.).

measures such as masking (the “federal contractor mandate” or “mandate”). Federal contracts represent a significant segment of the national economy<sup>2</sup> and amount to tens of billions of dollars in revenue to the States.<sup>3</sup> If the mandate stands, the States will suffer irreparable harm. We submit these comments to reiterate that the President, and agencies acting under his direction, lack authority under 40 U.S.C. § 121(a) to impose this mandate. In submitting these comments, we do not waive our right to continue the pending or institute any new legal challenge but rather request that OMB voluntarily vacate its determination.

**I. The OMB exceeded the scope of its delegated presidential authority granted by 40 U.S.C. § 121(a) when it approved the mandates set forth in the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors.**

40 U.S.C. § 121(a) of the Federal Property and Administrative Services Act (“Act”) grants authority to the President of the United States to “prescribe policies and directives that the President considers necessary to carry out” that Act. These policies must in turn be consistent with the other provisions of the Act and its purpose of providing the federal government with an economical and efficient system for procuring goods and services. *See id.* (noting that policies must be consistent with the Act); 40 U.S.C. § 101 (stating the Act’s purposes). The OMB has exceeded this authority by commandeering federal contractors to institute public health initiatives, to include requiring their employees to be vaccinated against COVID-19.

*First*, the President’s authority, and OMB’s power by delegation, does not extend to issuing a government-wide procurement regulation. Congress specified that such power is granted exclusively to the Federal Acquisition Regulation Council. 41 U.S.C. § 1303(a)(1). Despite this, the President’s Executive Order purports to allow the OMB to issue a government-wide procurement regulation mandating vaccination of employees working for certain federal contractors. 86 Fed. Reg. at 50,985–96. This action is unlawful.

The Act does not grant the President the power to issue orders with the force or effect of law. Congress authorized the President only to “prescribe policies and directives that the President considers necessary to carry out” the Act. 40 U.S.C. § 121(a). “Policies and directives” describe the President’s power to direct the *exercise* of procurement authority throughout the government. *See Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. O.L.C. 22, 23 (2002) (“Congress may prescribe that a particular executive

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<sup>2</sup> “Workers employed by federal contractors” account for “approximately *one-fifth of the entire U.S. labor force*.” Office of Contract Compliance Programs, Dep’t of Labor, History of Executive Order 11246, *available at* <https://perma.cc/9NF2-WX2B> (last visited Nov. 6, 2021), (emphasis added).

<sup>3</sup> For example, according to official reports from the federal government’s System for Award Management (SAM.gov), \$9,934,033,221 worth of federal contracts are held by vendors located in Kentucky, including numerous Kentucky agencies; \$12,498,379,202 worth of federal contracts are held by vendors located in Ohio, including numerous Ohio agencies; and \$10,010,028,677 worth of federal contracts are held by vendors located in Tennessee, including numerous Tennessee agencies. *See* SAM.gov (click on “Data Bank” tab; then click on “Geographical Report by Vendor Location” hyperlink on second page of the “Contract Data Reports”; search from date field for “1/1/2020” and to date field for “12/31/2020”).

function may be performed only by a designated official within the Executive Branch, and not by the President.”). It does not authorize the President to issue regulations himself.

We know this to be true for two reasons. First, Congress authorized the Administrator of the General Services Administration—in the same section of the statute—to “prescribe regulations.” 40 U.S.C. § 121(c); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”). And second, Congress is more than capable of bestowing the power to prescribe regulations on the President. In fact, Congress gave the President, in another section of the Act, the power to “prescribe *regulations* establishing procedures to carry out” the establishment of motor vehicle pools and transportation systems. 40 U.S.C. § 603(b)(1) (emphasis added). And Congress has given the President the power to “prescribe regulations” in other contexts, typically in the realm of foreign affairs and national defense. *See, e.g.*, 18 U.S.C. § 3496 (“The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular officers.”); 32 U.S.C. § 110 (“The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.”). If Congress had wanted the President to authorize procurement regulations it would have done so with a similar specific grant of authority. The omission of any such power in 40 U.S.C. § 121(a) is an intentional one by Congress. The President lacks the requisite authority to issue a government-wide procurement regulation.

*Second*, the Act also does not authorize the President, or the OMB, to issue whatever contracting requirements that they think are “economical” and “efficient.” The President seems to assume that the Act’s prefatory statement of purpose authorizes him and his delegates to issue any order they believe promotes “an economical and efficient” procurement system. 40 U.S.C. § 101; *see* 86 Fed. Reg. at 50,985 (“This order promotes economy and efficiency in [f]ederal procurement.”). In doing so, the President and OMB mistakenly construe the prefatory purpose statement for a grant of authority. *Dist. of Columbia v. Heller*, 554 U.S. 570, 578 (2008) (“[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”); *see also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 n.9 (D.C. Cir. 1995) (“[T]he agency may not simply disregard the specific scheme Congress has created . . . in order to follow a broad purpose statement.”).

Indeed, the grant of authority to the President in the Act is quite narrow. Beyond the fact that he is not authorized to issue regulations, his power is limited to prescribing policies and directives he “considers necessary to carry out this subtitle.” 40 U.S.C. § 121(a) (emphasis added). “Necessary” is a “word of limitation” and is synonymous with “required,” “indispensable,” and “essential.” *Vorheimer v. Phila. Owners Assoc.*, 903 F.3d 100, 105 (3d Cir. 2018); *accord In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 327 (4th Cir. 2004). Not only is the indispensable nature of the President’s action belied by the length of time it took the administration to evoke this authority, but the President’s actions also are not “essential” or “indispensable” to carry out the operative provisions of the Act.

To the contrary, the President’s order and OMB’s determination to impose a vaccine mandate on federal contractors violate 41 U.S.C. §3301(a)(1), which is part of the Act. *See* 40

U.S.C. § 121(a) (requiring “policies” issued by the President pursuant to the Act be “consistent with this subtitle”); 40 U.S.C. § 111 (defining “this subtitle” to include portions of Title 41, including § 3301). Commonly referred to as the Competition in Contracting Act, this statute requires “full and open competition through the use of competitive procedures” in procurement. 41 U.S.C. § 3301(a)(1). Agencies implementing the federal contractor mandate must refuse to consider the specific situation of particular bidders, and instead categorically exclude contractors that refuse to acquiesce to the Biden Administration’s sweeping COVID policies. By excluding an entire class of contractors without regard to their ability to perform the contract, the challenged actions are contrary to the spirit and intent of Section 3301. With the nation already experiencing labor shortages, supply chain disruptions and inflation, the unlawful exclusion of these contractors hampers the government’s ability to provide services to the taxpaying public in an efficient and economical manner. Thus, the President’s and OMB’s actions are not consistent with the Act and therefore unlawful.

*Last*, the OMB’s actions are not consistent with more expansive judicial interpretations of the President’s authority under 41 U.S.C. § 121(a), as announced in cases like *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), and its progeny. Under those interpretations, the Act “grants the President particularly direct and broad-ranging authority over those large administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.” *Id.* at 789. But the President, and OMB acting under his authority, cannot justify every policy by simply claiming that there is an attenuated connection between the policy and government savings. Even courts that adopt a broader reading of the President’s power under the Act require a “reasonably close nexus between the efficiency and economy criteria of the [Act] and any exactions imposed upon federal contractors.” *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981).

Imposing a vaccine mandate on employees of federal contractors fails this nexus test because the requirements are clearly related to a public health initiative of increasing vaccination rates in our nation rather than promoting efficiency and economy in federal contracting. Courts hearing challenges to this federal contractor vaccine mandate have agreed and have already enjoined the President’s order on this basis.<sup>4</sup>

## **II. The OMB Determination and President’s order violate the Constitution.**

The President is interpreting his authority in a manner contrary to the United States Constitution. First, the President’s actions run afoul of the separation of powers doctrine. If Congress had intended for him to impose a vaccination requirement on such a large swath of employees, Congress would have delegated the authority to do so with a clear, intelligible principle that the present text of the Act does not provide. Second, the President’s actions fray the fabric of our federalist system of government. If such power to impose vaccine mandates exists, the Tenth

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<sup>4</sup> See e.g., Opinion & Order (Doc. # 50), *Commonwealth of Kentucky, et. al. v. Biden*, Civil Action No. 21-cv-00055 (E.D. Ky.); Opinion & Order (Doc. # 94); *Georgia et. al. v. Biden, et. al.*, Civil Action No. 1:21-cv-163 (S.D. Ga.).

Amendment reserves such police power to States. The President cannot appropriate that power for himself. Even Congress itself likely lacks the power under the Commerce Clause to make personal health care decisions for millions of workers. *See BST Holdings v. OSHA*, 17 F.4th at ---, 2021 WL 5279381, at \*7 (noting that a person’s choice to remain unvaccinated and forgo regular testing is noneconomic activity) (citing to *NFIB v. Sebelius*, 567 U.S. 519, 522 (2012) (Roberts, C.J., concurring)). And last, the mandate exceeds Congress’s spending power. The government must “state all conditions on the receipt of federal funds ‘unambiguously’ so as to ‘enabl[e] the states to exercise their choice knowingly.’” *Cutter v. Wilkinson*, 423 F.3d 579, 585 (6th Cir. 2005) (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)). The mandate deprives the states of any meaningful ability to make an informed choice with respect to federal contracting. The executive order contemplates that the Safer Federal Workforce Task Force may continually issue revised guidance, approved by OMB, with which agencies must require contractors to comply. 86 Fed. Reg. at 50,985–87. Contractors therefore must continually implement ever-changing public health measures. The mandate is a moving target, issued beyond the President’s Constitutional authority.

### **III. The OMB Determination is pre-textual, arbitrary, and capricious.**

The OMB’s finding that the federal contractor mandate will promote economy and efficiency is patent pretext for the true motive for the federal contractor mandate – the Biden Administration’s public health initiative to force people to get vaccinated against COVID-19. And even if this finding were not pretext, it is based on flawed reasoning and insufficient data. For these reasons, the OMB Determination is arbitrary and capricious and should be set aside.

When announcing the federal contractor mandate on September 9, 2021, President Biden made clear that he intended to increase vaccination rates to address a public health concern.<sup>5</sup> After stating “his patience was wearing thin” with the unvaccinated, he threatened, “If you want to work with the federal government, vaccinate your workforce.”<sup>6</sup> Even the OMB Determination discloses that “[o]ne of the main goals of this science-based plan is to get more people vaccinated.” 86 Fed. Reg. at 63,418. With that main public health initiative in mind, the President’s order pre-textually couched the vaccine mandate in terms of achieving “economy and efficiency in federal contracting.” And the Administration did so for the purpose of grasping for some type of legal justification to create a vaccine mandate that it had no authority to create in the first place.

The first OMB determination issued on September 28, 2021, is further evidence of pretext because it demonstrates that the Biden Administration never seriously considered economy and efficiency in federal contracting prior to setting the mandate in motion. *See Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042*, 86 Fed. Reg. 53,691 (Sept. 28, 2021). The Safer Federal Workforce Task Force published its initial guidance that would require vaccines for federal contractors on September 24, 2021, as directed by the President’s order. Only four days later, the OMB approved the guidance based on a 210-word finding that guidance will “reduc[e] absenteeism and decreas[e] labor costs for

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<sup>5</sup> Joseph Biden, Remarks at the White House (Sep. 9, 2021), *available at* <https://perma.cc/GQG5-YBXK> (last visited Nov. 2, 2021).

<sup>6</sup> *Id.*

contractors and subcontractors working on or in connection with a Federal Government contract.” *Id.* This finding fell woefully short of explaining how the guidance created contracting efficiencies and was attacked as arbitrary in a barrage of lawsuits, including the ones brought by the undersigned States.<sup>7</sup>

As noted in the pending litigation, the vaccine mandate will cause additional cost and inefficiencies for contractors. Employers must spend time and resources determining who does or does not fall under the mandate. Employees who wish to be vaccinated must be given time off to receive and to recover from effects of the vaccine. Employees who do not wish to be vaccinated must prove they qualify for an exemption. Employers must process those requests, which will involve difficult decisions, and will certainly lead to litigation.<sup>8</sup> Many employees whose exemption requests are denied will quit.<sup>9</sup> For example, the CEO of Raytheon Technologies warned that it would lose “several thousand” employees because of the mandate.<sup>10</sup> That does not bode well for Kentucky because Raytheon maintains a plant in Louisville where it manufactures missile system components. Employers will have to find new employees, likely at great cost given the many employers currently looking for employees. The first OMB determination provided no explanation whether, or how, this egregious effort is outweighed by unidentified contracting efficiencies.

Facing a barrage of legal actions concerning the inadequacy of its first pretextual determination, the OMB filed the subject determination with the Federal Register on November 11, 2021. *See* 86 Fed. Reg. 63,418. This determination purports to provide an economic analysis for its finding that a revised version of the Safer Federal Task Force Guidance promoted efficiency and economy in federal contracting. Given the short time that elapsed after these lawsuits were filed and the issuance of the OMB Determination, it is not surprising that this rushed determination lacks a well-reasoned economic analysis supported by relevant data. It is therefore arbitrary and capricious for at last three reasons.<sup>11</sup>

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<sup>7</sup> *Commonwealth of Kentucky, et. al. v. Biden, et. al.*, Civil Action No. 21-cv – 00055 (E.D. Ky.) (filed on November 4, 2021); *Brnovich v. Biden, et. al.*, Case No. 21-cv-01568-MTL (D. Ariz.) (first amended complaint filed on October 22, 21); *Florida v. Biden, et. al.*, Case 8:21-cv-02524 (M.D. Flor.) (filed October 28, 2021); *Georgia, et. al. v. Biden, et. al.*, Civil Action No. 1:21-cv-163 (S.D. Ga.) (filed October 29, 2021); *Missouri, et. al. v. Biden, et. al.*, Case No. 4:21-cv-01300 (E.D. Mo.) (filed October 29, 2021); *Texas v. Biden, et. al.*, Civil Action No. 3:21-cv-309 (S.D. Texas) (filed on October 29, 2021).

<sup>8</sup> *See* Karl Evers-Hillstrom, *9 in 10 Employers Say They Fear They’ll Lose Unvaccinated Workers Over Mandate: Survey*, The Hill (Oct. 18, 2021), available at <https://perma.cc/V5ZJ-7XUQ> (last visited Nov. 2, 2021).

<sup>9</sup> *See* Jordan Burrows, *Employees Not Given Exemption Prefer to Quit Job Than Get COVID Vaccine, Poll Shows*, Salt Lake City (ABC4) (Sept. 15, 2021), available at <https://perma.cc/6A95-CJXD> (last visited Nov. 2, 2021); *see also* Isidore & Langmaid, *72% of unvaccinated workers vow to quit if ordered to get vaccinated*, CNN, available at <https://perma.cc/7JMV-SULY> (last visited Nov. 6, 2021).

<sup>10</sup> Tina Bellon and Eric Johnson, *From Boeing to Mercedes, a U.S. worker rebellion swells over vaccine mandates*, Reuters (Nov. 2, 2021), available at <https://perma.cc/R7HJ-TJBQ>.

<sup>11</sup> The undersigned States also assert the OMB Determination is arbitrary and capricious for the other reasons identified in the lawsuits they have filed in opposition to the federal contractor mandate. But to keep this comment letter a manageable length, the States have chosen to highlight only three points.

*First*, the OMB Determination economic analysis is fundamentally flawed because it fails to view the alleged costs and benefits of the federal contractor mandate from the perspective of the federal government. Instead, it focuses on the alleged costs to contractors based on their workers being unable to work due to COVID quarantine or illness. *See* 86 Fed. Reg. at 63,422. But contractors agree to provide services at a certain cost regardless of whether some employees of the contractor become sick from COVID or whatever other illness plagues humanity. The OMB also fails to consider that breakthrough infections occur in vaccinated people which likely will be more commonplace with the Omicron variant,<sup>12</sup> and that such infections still require quarantine or convalescent leave. The OMB Determination also neglects to offer any discussion why contractors would pass these costs onto the federal government under their contracts. Moreover, the OMB Determination does not even attempt to identify any federal contracting disruptions that have occurred because of a lack of a federal contractor vaccine mandate since the pandemic began. Clearly, the federal government should have experience with several types of contractors—contractors with vaccine mandates, contractors without vaccine mandates, contractors with mask mandates, and so on. But the OMB Determination does not identify even one historical contracting disruption or the cost to the federal government caused thereby.

*Second*, the OMB Determination downplays the burdens of the vaccine mandate with incomplete data. Namely, the analysis suggests that workers will not quit because of the mandate based on data reported by three major United States companies, one of which placed employees on administrative leave (Kaiser Permanente) and one of which did not report the number of employees who quit (Tyson). *See* 89 Fed. Reg. 63,422. The OMB Determination does not explain why this data is an appropriate sample size of all federal contractors and subcontractors. And placing one or two percent of workers on leave has the potential of inflicting massive harm on federal contractors, who often operate on thin margins and cannot easily replace employees.

*Last*, the OMB Determination neglects to explain how the certain provisions of the mandate reduce COVID transmission and employee absenteeism – the noted linchpin underlying the finding of efficiency and economy in federal procurement. For example, the analysis makes no mention of the minimal transmissibility of COVID–19 in outdoor settings and, in fact, concludes only that “COVID–19 is a highly communicable disease that tends to spread between people who are indoors, sharing space, and in close quarters[.]” *See* 86 Fed. Reg. 63,421. Yet, the FAQs on the Task Force website, which the OMB Determination purports to incorporate by reference, make clear that the mandate “applies to contractor or subcontractor workplace locations that are outdoors.” *See* Safer Federal Workforce Task Force Website FAQs, *available at* <https://perma.cc/F7SM-KMCW> (first question within the “Workplaces” tab). The same is true for requiring employees who only work at home to be vaccinated. *Id.* (fifth question within the “Workspaces” tab).<sup>13</sup>

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<sup>12</sup> Michaelleen Doucleff, *Studies suggest sharp drop in vaccine protection vs. omicron – yet cause for optimism*, NPR (Dec. 8, 2021), *available at* <https://perma.cc/4DS4-72NT>

<sup>13</sup> The Federal Acquisition Council deviation clause and this online guidance are separately problematic, including, especially, their failure to go through notice-and-comment procedures.

**IV. The mandate attempts to regulate employees who do not even work in connection with a federal contract.**

Even if the OMB had provided evidence of how the mandate will provide benefit to the federal government in terms of cost savings or increased reliability of contractor services, the mandate again reveals its pre-textual nature by requiring vaccination of employees who do not even work on federal contracts. Some of these employees are required to get vaccinated even if they briefly “come into contact” with someone who does, whether it be in a lobby, breakroom, parking garage, stairwell, or dining area. *See id.* (second and third question with “Workspaces” tab). The rule applies even if the two employees spend most of the day working on different floors or in entirely different buildings. *Id.* Even the CDC’s quarantine protocols suggest that such fleeting encounters do not result in a serious risk of COVID transmission.<sup>14</sup> These overinclusive rules are simply more evidence of the mandate’s true purpose of getting more people vaccinated and belie the OMB Determination that the mandate will increase efficiency and economy in federal contracting.

**V. The federal contractor mandate will exacerbate an existing labor crisis and negatively impact small businesses.**

This mandate applies to all federal contractors, even small businesses. The pandemic and government-mandated shutdowns wreaked havoc on the economy, causing many small businesses to fold. As the United States tries to recover from these shutdowns, businesses that did not fold face unprecedented labor shortages, inflation, rising materials cost, and supply chain problems.<sup>15</sup> Requiring vaccination eliminates the possibility of hiring qualified candidates who, for whatever reason, do not want to take the vaccine.<sup>16</sup> Not only that, but this mandate is also expected to apply to all subcontractors on covered contracts. This only exacerbates the problems federal contractors will have in finding sufficient labor to perform their contracts. As stated above, the OMB Determination fails to adequately consider the widespread economic damage the vaccine mandate may cause. This impact will be especially felt by vulnerable small businesses who cannot easily absorb the loss of workers who choose not to comply with the mandate.

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<sup>14</sup> See CDC, *Quarantine and Isolation*, at <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html> (noting that quarantines are recommended only when a person has been in close contact (within 6 feet for a cumulative total of 15 minutes or more over a 24-hour period) with someone who has COVID-19) (last visited Dec. 8, 2021).

<sup>15</sup> Caroline Valetkevitch, *No end in sight for labor shortages as U.S. companies fight high costs*, Reuters (Oct. 26, 2021), available at <https://perma.cc/9CTQ-URL7>; Patti Domm, *Labor shortage, supply constraints and inflation hold back economy trying to emerge from pandemic*, CNBC (Oct. 29, 2021), available at <https://perma.cc/74KR-GPGM>.

<sup>16</sup> See, e.g., Maria Caspani & Nathan Layne, *New York Hospitals Fire, Suspend Staff Who Refuse COVID Vaccine*, Reuters (Sept. 28, 2021), available at <https://perma.cc/8DXR-ZVWT> (“[S]taff shortages prompted some hospitals to postpone elective surgeries or curtail services.”); Karen Zraick, *A Long Island Emergency Room Goes Dark As a Vaccine Mandate Gets Stricter*, N.Y. Times (Nov. 23, 2021) (“A Long Island emergency room was forced to close its doors on Monday because of a nursing staff shortage, as a New York state rule took effect that bars unvaccinated medical workers from their jobs.”).



**VI. Two other federal mandates with different requirements than this mandate create a regulatory morass for employers.**

The Biden administration has issued the federal contractor mandate in conjunction with two other vaccine mandates that were issued on November 5, 2021. OSHA promulgated an emergency temporary standard (ETS) that applies to private employers with greater than 100 employees.<sup>17</sup> The Centers for Medicare & Medicaid Services (CMS) issued a final interim rule applying to healthcare providers receiving Medicare or Medicaid reimbursement.<sup>18</sup> These three vaccine mandates are not only unlawful, but they also impose different requirements. For example, the CMS and federal contractor mandates do not provide a testing alternative to vaccination and apply regardless of the number of employees an employer has. The federal contractor mandate applies to all employees working in connection with a federal contract, even if they work exclusively outside, or at home. But the OSHA ETS exempts people who work exclusively outside or at home. And a federal contractor must determine whether its employees who do not work in connection with a federal contract nonetheless encounters an employee who does. If so, that employee must also be vaccinated. If these and other inconsistent rules withstand judicial scrutiny, they will create a regulatory morass for employers who may have some employees subject to one set of rules and other employees subject to another.

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We appreciate the opportunity to provide input on the OMB Determination. But to be clear, the undersigned believe that the President, and the OMB acting at his direction, have overstepped their authority by coercing employees to undergo vaccination through an unprecedented use of a statute intended to foster an economical and efficient federal procurement system. The OMB Determination should be vacated, and we hope that the Biden Administration reconsiders its position and abandons its future efforts to force vaccination on the American public.

Respectfully submitted,



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<sup>17</sup> See *COVID-19 Vaccination and Testing; Emergency Temporary Standard* issued in 86 Fed. Reg. 61,402 (Nov. 5, 2021).

<sup>18</sup> See *Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination*, 86 Fed. Reg. 61,555 (Nov. 5, 2021).



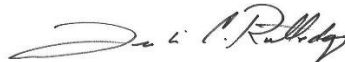
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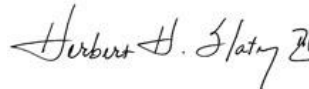
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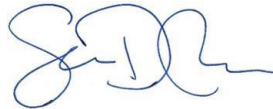
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