IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,

Plaintiffs

v.

WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, OFFICE OF GOVERNMENT-WIDE POLICY, GENERAL SERVICES ADMINISTRATION, *et al.*

Defendants.

Case No. 24-cv-318-WWB-MCR

PLAINTIFFS' MOTION FOR EXPEDITED SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION, AND MEMORANDUM OF LAW IN SUPPORT

Plaintiffs Associated Builders and Contractors Florida First Coast Chapter ("ABCFFC") and Associated Builders and Contractors ("ABC" or "ABC National") (collectively "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 56, by and through their undersigned attorneys, move for summary judgment against the Federal Acquisition Regulatory ("FAR") Council Defendants, William F. Clark, Christine J. Harada, John M. Tenaglia, Karla S. Jackson, Jeffrey A. Koses, and Shalanda Young ("Defendants"). Plaintiffs have previously moved – and hereby seek to expedite consideration of their motion – to preliminarily enjoin the implementation and enforcement of Executive Order 14063 (the "EO"), "Use of Project Labor Agreements for Federal Construction Projects," 87 Fed. Reg. 7363 (Feb. 9, 2022); as implemented by the Final Rule having the same title, promulgated by the FAR Council, 88 Fed. Reg. 88708 (Dec. 22, 2023) (the "PLA Rule"), and by the Office of Management and Budget's ("OMB") Guidance Memorandum M-24-06 ("Memo"). In addition to the continuing urgent need for the preliminary injunction, Plaintiffs now seek expedited summary judgment on the merits to set aside and vacate the above cited unlawful orders on a permanent basis.

As explained in Plaintiffs' pending motion for preliminary injunction, the PLA Mandate is an *ultra vires* action that exceeds the Executive Branch's authority under and/or directly conflicts with the Federal Property and Administrative Services Act ("FPASA"), 40 U.S.C. § 121, *et seq.*, Competition in Contracting Act ("CICA"), 41 U.S.C. § 3301, National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), and First Amendment. The PLA Rule further violates the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq.*, Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Act ("SBREFA"), 5 U.S.C. § 601, and the Small Business Act ("SBA"), 15 U.S.C. § 644. For these reasons, and as further explained below, the PLA Mandate is unlawful and summary judgment should be granted to vacate it in its entirety.

MEMORANDUM OF LAW

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. No President in American history had issued an order mandating union PLAs as a condition of awarding work on federal construction projects, until President Biden issued EO 14063 on February 4, 2022. (ABC Rulemaking Comments, ECF 18-2).[1]

[1] The ABC Comments can also be found in the Administrative Record: *see* ABC_FAR Council Federal Acquisition Regulation Use of Project Labor Agreements for Federal Construction Projects_101822.pdf

2. In 2009, former President Obama issued Executive Order 13502, "encouraging" – but not mandating – PLAs on federal projects above $25 million. Between fiscal years 2009 and 2024 (under Presidents Obama and Trump), just 12 federal contracts valued at $1.26 billion contained a government-mandated PLA, out of 3,222 contracts of $25 million or more valued at a total of $238 billion., This means that federal procurement officials overwhelmingly saw no benefit or need to impose PLAs on more than 1 percent of applicable federal construction contracts. (*See* Brubeck 1st Aff., ECF No. 18-16, Ex. 14 to PI Mot. ¶ 15; and ABC Comments at 18). During this period ABC members won and successfully performed a majority of the $238 billion in total value of direct prime construction contracts exceeding $25 million awarded by federal agencies during fiscal years 2009 to 2023. (Brubeck 2d Aff., attached to this Motion; *see also* Brubeck's previous affidavit at ECF No. 18-16, Ex. 14 to PI Mot. ¶ 15; and ABC's Comments).

3. Notwithstanding the foregoing undisputed evidence that federally mandated PLAs were found not to be needed for purposes of economy or efficiency on 99 percent of covered federal projects over the previous decade(s), President Biden issued EO 14063 mandating PLAs on all federal construction projects above $35 million. (AR, EO 14063, §§ 2-4).

4. On December 18, 2023, OMB issued—without notice and comment—the OMB Memo, purporting to provide guidance to agencies regarding exceptions to the PLA Rule. (*See* OMB Memo, ECF No. 18-5, Ex. 3 to PI Mot.). The OMB Memo acknowledged PLAs could create "unintended barriers to entry" but nevertheless expanded the Rule's PLA requirements. (*Id.* at 4-5).

5. On December 22, 2023, following notice and public comment (including opposing comments filed by ABC and others), the FAR Council published the final PLA Rule. (AR*,* 88 Fed. Reg. 88708). The PLA Rule requires contractors and subcontractors to enter into PLAs as a condition of being awarded work on federal construction projects valued at more than $35 million, absent extremely narrow (and ultimately phantom) exceptions. (*See id.* at 88709).

6. ABC conducted a survey of its contractor members about government-mandated PLAs and the proposed version of the PLA Rule: 99 percent of respondents said they would be less likely to begin or continue bidding on federal contracts if the proposed rule was finalized; and 97 percent said government-mandated PLAs decrease economy and efficiency in government contracting.[2]

7. 97 percent of respondents "who self-identified as small businesses said they would be less likely to bid on contracts if the rule is finalized" and "73 percent of small businesses stated PLAs decrease hiring of minority, women, veteran and disadvantaged business enterprises." (ABC Comments at 37; *see also* SBA Comments, at 2-3).[3]

8. Just 11 percent of the U.S. construction industry is unionized nationally, according to the government's own Bureaus of Labor Statistics; fewer in this District.[4] There is also an ongoing skilled labor shortage in the construction industry of more than

[2] *See* https://www.abc.org/News-Media/Newsline/survey-97-of-abc-contractors-say-bidens-government-mandated-project-labor-agreement-policies-would-make-federal-construction-more-expensive (last visited Aug. 31, 2024). In their Answer, Defendants did not deny the accuracy of ABC's survey. (Ans. ¶ 45).

[3] SBA's Comments are part of the administrative record, available at https://www.regulations.gov/comment/FAR-2022-0003-8301; AR 363-67.

[4] *See* Industries at a Glance: Construction: NAICS 23 : U.S. Bureau of Labor Statistics (bls.gov) (last visited Sep. 8, 2024).

500,000 in the combined union and non-union sectors.[5] Restricting government procurement access to more than 90 percent of the workers in the industry during a period of such a shortage of workers is the antithesis of economy and efficiency.

9. Numerous identified ABC members, representative of many more members locally and nationally, have provided sworn, undisputed evidence of irreparable injury to themselves and to the federal procurement process – including substantial impairment of competition, economy and efficiency in the bidding and award of government construction contracts under the PLA Mandate.[6] The declarants include members of both ABCFFC who are based in and/or seeking to perform work in Jacksonville and/or members of ABC nationally who have successfully performed large federal construction projects throughout the country.[7] The declarants include contractors large and small, as well as both prime contractors and subcontractors.[8] The declarants are mostly nonunion but include union[9] signatory contractors as well. All of the declarants have successfully performed work on projects exceeding $35 million and many have identified work for

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[5] *See* https://www.abc.org/News-Media/News-Releases/abc-2024-construction-workforce-shortage-tops-half-a-million.

[6] *See* Affidavits filed at ECF No. 18- 2-13, further detailed below.

[7] (Haskell Co. Aff., ECF No. 18-6, Ex. 4 to PI Mot.); (Brasfield & Gorrie Aff., ECF No. 18-7, Ex. 5 to PI Mot.); Hensel Phelps Aff., ECF No. 18-8, Ex. 6 to PI Mot.); (Cianbro Aff., ECF No. 18-9, Ex. 7 to PI Mot,); (American Electrical Aff., ECF No. 18-10, Ex. 8 to PI Mot.); (M.C. Dean Aff., ECF No. 18-11, Ex. 9 to PI Mot.); (Interstate Sealant, ECF No. 18-12, Ex. 10 to PI Mot.); (JCM Aff., ECF No. 18-14, Ex. 12 to PI Mot.); (ECC Aff., , ECF No. 18-15, Ex. 13 to PI Mot.); (*See also* Ex. 2 to this Motion, Robins & Morton Grp. Aff.)

[8] (Haskell Aff. ¶¶ 1-2) (general contractor); (Robins & Morton Aff. ¶¶ 1-2) (general contractor); (Brasfield & Gorrie Aff. ¶¶ 1-2) (general contractor); (Hensel Phelps Aff. ¶¶ 1-2) (general contractor); (Cianbro Aff. ¶¶ 1-2) (general contractor); (American-Electrical Aff. ¶ 1) (subcontractor); (M.C. Dean Aff. ¶¶ 1-2) (subcontractor); (Interstate Sealant Aff., ¶¶ 1-2) (small contractor/subcontractor).

[9] (JCM Aff. ¶ 2) (union subcontractor).

which they are qualified that is now being solicited by the federal government under the PLA Rule.[10]

10. While Plaintiffs' motion for preliminary injunction has been pending, ABC has been monitoring the Defendants' procurement website (http://sam.gov) and has identified at least 64 federal projects subject to PLA mandates resulting from the challenged PLA Rule. (Brubeck 2nd Aff.¶ 2). According to the Defendants' own website, confirmed by ABC, no federal agency has to date exempted any covered project from the PLA mandate. *Id*; *See also* Project Labor Agreements (PLA) | Acquisition Gateway.

11. The PLA mandate continues to irreparably harm ABC and ABCFFC member contractors, as they are unable to bid on and be awarded work without a PLA in place. (Brubeck 2nd Aff. ¶ 4). In addition, ABC has compiled substantial evidence of greatly reduced numbers of bidders, delayed procurements, and higher bid prices on federal construction projects resulting from the PLA Rule. (*Id.* at ¶¶ 8-13)[11]

12. Multiple bid protests have been filed against bid solicitations mandating PLAs. The bid protests have been consolidated before the Court of Federal Claims. *See MVL USA Inc. v. USA*, Case No. 24-cv-01057 (filed Jul. 12, 2024).[12] The resulting delays

[10] (Haskell ¶¶ 2, 5); (Brasfield &Gorrie ¶¶ 4, 6); (Hensel Phelps ¶¶ 2, 5); (Cianbro ¶ 2); (American-Electrical ¶¶ 2, 4); (M.C. Dean ¶¶ 2, 3); (Interstate-Sealant ¶ 2); (JCM ¶¶ 1, 4); (ECC ¶¶ 2, 5); (Robins & Morton ¶¶ 3, 5-6).

[11] Citing example of a large project on which only one out of six short listed (qualified) bidders was able to bid due to the PLA mandate. Also citing testimony before the House Oversight Committee on June 27, 2024. Cutting Competition in Contracting: The Administration's Pricey Project Labor Agreement Mandate (youtube.com), and evidence received from federal procurement officials.

[12] The filings in these cases have been sealed under rules of the Court of Federal Claims. On information and belief, however, the focus of these cases is on individual solicitations. Plaintiffs here challenge the PLA Mandate in its entirety.

to the procurement process further contradict Defendants' claim to promoting increased economy and efficiency under the PLA Rule.

II. STANDING AND STANDARD OF REVIEW

As previously demonstrated in their motion for preliminary injunction, ABCFFC and ABC are trade associations representing federal contractors in this District and nationwide, who have standing to bring this action on behalf of their members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).[13] Specifically, Plaintiffs conclusively meet the following *Hunt* criteria: (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to Plaintiffs' organizational purposes; and (3) neither the claims nor relief require the participation of Plaintiffs' individual members.

As to the first criterion, ABCFFC and ABC have identified numerous members who have standing to sue. (*See* SOF ¶¶ 8-12, and the affidavits of representative ABC members cited therein, fully complying with *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). Sworn declarations have been submitted by ABC member contractors and subcontractors – both union and non-union - who have successfully performed projects above $35 million but who are now irreparably harmed in their ability to compete for

[13] *See also America's Health Ins. Plans v. Hudges*, 742 F.3d 1319, 1326 n.5, 1327-28 (11th Cir. 2014) (trade association had standing to challenge law on behalf of its members); *ABC of SE. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *6 (E.D. Tex. Oct. 24, 2016) (ABC had standing to challenge certain FAR regulations and guidance threatening injury to the association's government contractor members); *see also Am. Sec. Ass'n v. U.S. Dept. of Labor*, 2023 U.S. Dist. LEXIS 24076 (M.D. Fla. Feb. 13, 2023) ("little question" of standing where association members are the "objects of the [challenged] regulation").

specifically identified work due to the PLA Mandate.[14] It is undisputed that the PLA Rule makes it impossible for ABC and ABCFFC members to compete on equal footing with unionized contractors. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (group members have standing to challenge barriers erected by the government making it more difficult for them to compete for government contracts).

Although the PLA Rule purports to recognize certain exemptions, ABC's members and staff have found – and Defendants' own website confirms – that no exemptions have been granted in the nine months since the PLA Rule went into effect. Thus, the supposed exemptions have proved to be nonexistent. (*E.g.*, Brubeck 1st Aff. ¶¶ 12-14; Haskell Aff.¶ 6; Hensel Phelps Aff.¶ 5; American Electrical Aff. ¶ 5; M.C. Dean Aff. ¶ 3).[15] ABC submits that the drastic expansion of PLA mandates regardless of union market share is the inevitable result of the restrictive terms of the EO, Rule, and OMB Memo. (Brubeck 2nd Aff.). But regardless of the reason, the Defendants' imposition of the PLA mandate across the board, with or without the hollow exemptions, is itself directly injuring Plaintiffs' members.

[14] "Courts routinely rely on extra-record evidence to support standing in APA cases." *Texas v. Biden*, 2021 U.S. Dist. LEXIS 195393 (N.D. TX 2021), citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010).

[15] This fact distinguishes the case of *AGC v. FAR Council*, 2024 WL 1078260 (W.D. LA. Mar. 12, 2024), on which Defendants relied in their previous Opposition to Preliminary Injunction. The Plaintiffs in that case offered no proof of injury and no plaintiffs who had performed qualifying projects. And prior to implementation of the Rule, the judge had no evidence before him that the government would not allow any exemptions to PLAs. Now there is ample proof that the Rule has eviscerated the fair and open competition requirements of federal procurement laws to the detriment of ABC's members and the public.

Plaintiffs also meet the second requirement for associational standing, as the present action is clearly germane to each association's organizational purposes of advocating for fair and open competition for construction work, including federal construction contracts (Brubeck 1st Aff. ¶ 8; Hoffman Aff., Ex. 15 to PI Mot., ECF. No. 18-17 ¶¶ 3, 6; Brubeck 2d Aff.); (*see also* ABC Comments at 1-2).[16] Finally, Plaintiffs meet the third *Hunt* criterion, *i.e*., that individual members need not participate as plaintiffs, because the Complaint seeks only injunctive relief based on the administrative record.[17]

Plaintiffs further have organizational standing to sue on their own behalf because the PLA Mandate is directly and currently harming their organizational interests by requiring ABC and ABCFFC to divert their attention away from other activities, such as management training, workforce development, and jobsite safety. (Brubeck 1st Aff. ¶ 5; Hoffman Aff. ¶ 9); *see Plaintiffs v. Kemp,* 2023 U.S. Dist. LEXIS 144918, at *55-56 (N.D. Ga. Aug. 18, 2023) (organization injured by diverting resources).

The dispute is ripe for review as it raises pure questions of law and Plaintiffs are suffering hardship that will continue absent judicial relief. *See Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019). Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff ABCFFC maintains its principal place of business in this District and because facts and circumstances relating to the enforcement of the challenged PLA Mandate are taking place in this District, directly injuring ABCFFC

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[16] *Schalamar Creek Mobile Homeowners' Ass'n v. Adler*, 855 Fed. App'x 546, 553 (11th Cir. May 7, 2021) ("[G]ermaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose.").

[17] *Fla. Auto. Dealers Ass'n, Inc. v. Ford Motor Co.*, 2024 U.S. Dist. LEXIS 50834, at *8 (N.D. Fla. Jan. 25, 2024) ("[T]he Eleventh Circuit has held that the third prong...was satisfied where an organization's members sought prospective injunctive relief.").

members.

"Summary [j]udgment is particularly appropriate in cases in which a district court is asked to review [an action] rendered by a federal administrative agency." *See Mahon v. USDA,* 485 F.3d 1247 (11th Cir. 2007). The Supreme Court has recently held that agencies are not entitled to previous *Chevron* deference: "In an agency case as in any other... there is a best reading" of an applicable statute —"'the reading the court would have reached' if no agency were involved." *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2263 (2024). The Court has further held that agency actions must be set aside where the agency fails to adequately consider and address commenters' concerns. *See Ohio v. EPA*, 144 S. Ct. 2040, 2055-56 (2024); *see also Sierra Club v. USACE*, 2022 U.S. Dist. LEXIS 158322, at *32-33 (M.D. Fla. Sept. 1, 2022).

III. ARGUMENT ON THE MERITS

A. The EO, PLA Rule, and OMB Memo Exceed the Authority of the Executive Branch Under FPASA

The EO, PLA Rule and OMB Memo are impermissible *ultra vires* actions by the President that are being carried out by other executive officers, *i.e.*, the FAR Council and OMB. FPASA is designed "to provide the Federal Government with an economical and efficient system" for procurement activities. *See* 40 U.S.C. § 101; *Georgia v. Biden*, 46 F.4th 1283, 1298 (11th Cir. 2022). "[T]he President's authority should be based on a 'specific reference' [in] [FPASA]." *Georgia*, 46 F.4th at 1294, 1297-98, 1301 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979)) (Plaintiffs likely to succeed on the merits of claim President exceeded authority under FPASA where "no statutory provision" contemplated mandate).[18] Here, like in *Georgia*, Defendants have pointed to no "specific reference" in FPASA allowing Defendants' actions; instead, Defendants cite various general provisions regarding procurement. This Circuit has expressly held "[a]n executive order cannot rest merely on the 'policy objectives of [a statute].'" *Georgia*, 46 F.4th at 1298.

Analysis under the major questions doctrine further reveals the President, FAR Council, and OMB lacked authority to issue the EO, PLA Rule, and OMB Memo, as the PLA Rule and EO assert issues of "economic and political significance," and therefore require "clear congressional authorization." *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).[19] Major questions appear where, as here, government action impacts contracts and solicitations "across broad procurement categories" in an unprecedented way. *See Georgia*, 46 F.4th at 1295-96.

In their Opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants contended the Eleventh Circuit's *Georgia* decision is somehow not controlling because Judge Edmondson concurred only in the result. (Opp'n to PI Mot. 8). But the *Georgia* decision is plainly controlling here. Judge Edmondson's concurrence stated that he "easily believe[d] plaintiffs ha[d] a reasonable chance to succeed on the merits;" and the sole issue on the merits before the appeals court was whether FPASA authorized the

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[18] *See also Florida v. Nelson*, 576 F. Supp. 3d 1017, 1038 (M.D. Fla. 2021) ("FPASA confers no 'blank check for the President to fill in at his will' and requires power to 'be exercised consistently with the structure and purposes' of FPASA.").

[19] *See also Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *FDA v. Brown & Williamson* (2000); *Georgia*, 46 F.4th at 1295-96 (applying major case doctrine to Presidential actions restricting government contractor rights under FPASA); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (same).

President's action. Judges Edmondson and Grant joined to affirm the district court's injunction to that same effect. Thus, the Eleventh Circuit's decision constitutes binding precedent. *See Georgia*, 46 F.4th at 1289, 1308.

Further contrary to Defendants' claim (Opp' to PI Mot. 8), Judge Grant's opinion is not "inconsistent" with FPASA precedent. Judge Grant relied on *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and based her interpretation, in part, on *Chrysler's* requirement that presidential authority under FPASA must "be based on a 'specific reference' within [FPASA]." *See Georgia*, 46 F.4th at 1294 (quoting *Chrysler*, 441 U.S. at 304 n.34). Defendants did not address *Chrysler*, much less distinguish the case. *See also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (vacating executive order restricting government contractors' use of strike replacements); *ABC SE Tex.*, 2016 WL 8188655, at *15 (E.D. TX 2016) (enjoining Executive Order and FAR Council rule unlawfully imposing labor reporting requirements on federal government contractors).[20]

Defendants have asserted FPASA provides presidents with broad authority but their argument relies primarily on distinguishable cases from outside this Circuit. (Opp'n to PI Mot. 4-5). For example, Defendants cited *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc) (Opp' to PI Mot. 4), where the D.C. Circuit held the President had the authority under FPASA to require contractors to comply with wage and price standards; but in *Kahn*, the D.C. Circuit "wish[ed] to emphasize" it found a "nexus between...wage and price standards and likely savings to the Government" and its

[20] Defendants have pointed only to general provisions discussing government contracting powers, but no specific language authorizing a PLA Mandate. (Opp'n to PI Mot. 9).

"decision today [did] not write a blank check for the President to fill at his will." *Id.* at 785, 793. In contrast, the PLA Mandate goes far beyond "wage and price" standards, unlike *Kahn*, and also unlike *Bradford v. DOL*, 2024 WL 1866432 (10th Cir. Apr. 30, 2024), on which Defendants also have relied (Opp'n to PI Mot. 4). In *Bradford*, the 10th Circuit merely upheld a $15 minimum wage for government contractors.[21] *Contra*, *Reich*, 74 F.3d at 1324; *ABC SE Tex.*, 2016 WL 8188655, at *15.[22]

The other cases Defendants have cited to say FPASA provides broad authority to presidents (Opp'n to PI Mot. 4 n.1-2) are similarly inapposite. *Mayes v. Biden*, 67 F.4th 921, 941 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023), "has no legal force." *See Moore v. Pederson*, 806 F.3d 1036 (11th Cir. 2015). In *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004), the party challenging an executive order "[did] not argue [the executive order went] beyond the scope of authority Congress delegated." *Id.* at 914 n.8. Defendants also cited *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) and *Chamber of Com. of U.S. v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), two cases which relied heavily on *Kahn*. *See Chao*, 325 F.3d at 366-67; *Napolitano*, 648 F. Supp. 2d at 735-38. But this Circuit "disagree[s]" with the "purpose-based approach" of *Kahn* and its progeny, "detached as it is from [FPASA's] remaining text and structure." *See Georgia*, 46 F.4th at 1300.

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[21] Defendants cite *Farkas v. Tex. Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967). (Opp'n to PI Mot. 4 n.1). But as the 11th Circuit explained in *Georgia v. Biden*, 46 F.4th 1283 (11th Cir. 2022), "the former Fifth Circuit's decision is dicta." *See id.* at 1300 n.11. Defendants also cite *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940), but the court in *Georgia* distinguished that case. *See Georgia*, 46 F.4th at 1292-93.

[22] Defendants wrongly claimed the PLA Mandate applies a "longstanding understanding of FPASA" (Opp'n to PI Mot. 5), but as Plaintiffs have noted, no president has previously issued a PLA Mandate under the FPASA.

Ultimately, in issuing the PLA EO, the President has ignored the boundaries of FPASA and has exercised authority Congress explicitly refused to grant him. The President's EO has been enforced by his officers: the FAR Council[23] and OMB. *E.g.*, 88 Fed. Reg. 88708; (OMB Memo). Therefore, Plaintiffs have rightly challenged both the EO and the PLA Rule implementing it. *See Reich,* 74 F.3d at 1324.

B. <u>The EO, PLA Rule, and OMB Memo Violate CICA</u>

Congress passed CICA, 41 U.S.C. § 3301, to require federal agencies awarding contracts to "obtain full and open competition through ... competitive procedures." CICA bars federal agencies from using restrictive bid specifications to "effectively exclude" potential bidders or offerors.[24] "[I]mposing more criteria than necessary works against the... oft-repeated priority of achieving 'full and open competition' in the procurement process." *Georgia,* 46 F.4th at 1297.

Contrary to Defendants' claim that non-union contractors "may compete for contracts" under the PLA Rule, (AR, 88 Fed. Reg. 88709), non-union contractors cannot do so unless they give up their non-union status and accept costly burdens of unionization. (*E.g.*, Contractor Affidavits, SOF ¶ 9). The Rule's preamble concedes "union contractors...are more likely to work on PLA-covered projects." (AR, 88 Fed. Reg. 88713). And the OMB Memo acknowledges "many PLAs require contractors to use the union's hiring hall for referrals" and further concedes PLAs could create "unintended barriers to

[23] The FAR Council's rulemaking authority is prescribed within the confines of the OFPP Act and FPASA, which establish the limited rulemaking power within which the FAR Council must operate. No delegation of authority to issue the presently challenged Rule can be presumed by the agency. *Georgia*, 46 F.4th at 1297-1301.

[24] *Competition in Federal Contracting: Legal Overview*, Congressional Research Service, p. 19, Jan 21, 2015.

entry." (*See* OMB Memo).

The existence of potential exemptions to the PLA Mandate compels no different result. As noted above, it is undisputed and a matter of public record that dozens of covered projects are being solicited and/or awarded without any exemption, even in areas (such as Jacksonville) where few if any union contractors are available to perform the work. (Brubeck 2d Aff. ¶ 6; Hensel Phelps Aff. ¶ 5; American-Electrical Aff. ¶ 5; M.C. Dean Aff. ¶ 3; Robins Aff. ¶ 3).[25] Further, the OMB Memo undermines the exemption process by stating: "[a] likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage" and "two [or three] qualified offers is sufficient to provide adequate price competition…." (OMB Mem. at 6-7). In other words, exemptions will not apply *even where the PLA mandate prevents agencies from achieving "full and open competition" consistent with the CICA. See* 41 U.S.C. § 3301. This case is like *Georgia*, where the Eleventh Circuit found the President exceeded his authority after his order "impos[ed] more criteria than necessary" on contractors, contrary to the CICA. *See Georgia*, 46 F.4th at 1294.

Defendants have relied on *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1293 (Fed. Cir. 2020) to contend agencies can anticipate only certain entities can meet the needs of a solicitation.[26] (Opp'n to PI Mot. 13). But *Oracle* is inapposite. The PLA Mandate

[25] The PLA Rule estimated that as many as 50 percent of all projects would be exempt from PLA requirements. This false estimate cannot be squared with the undisputed fact that no projects have been exempted under the Rule as applied.

[26] Defendants contend commenters submitted research showing no statistically significant difference in bids between PLA and non-PLA projects (Opp'n to PI Mot. 13) but Defendants cited only one such study, relating to only one type of construction in only one state. *See* 88 Fed. Reg. 88709. Numerous contrary studies were cited in ABC's Comments opposing the PLA Rule, ignored by Defendants. (ABC Comments at 22-23)).

here has nothing to do with agency "minimum needs," which were being fully served without any need for PLAs 99 percent of the time in the decade prior to the new Rule. (SOF ¶ 2). This case is much more like *NGS v. United States*, 923 F.3d 977 (Fed. Cir. 2019), where an agency's solicitation did not provide for full and open competition when a solicitation requirement "effectively exclude[d] offerors" and was "not based on some capability or experience requirement." *Id.* at 986; *see also Georgia*, 46 F.4th at 1294 (mandate found to violate full and open competition). Accordingly, the PLA Mandate violates CICA and must be vacated.

C. **The PLA Rule and OMB Memo Violate the APA and OFPP**

The APA, 5 U.S.C. § 706(2)(A), (D) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found. . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," and "found to be...without observance of procedure required by law." An agency "must...provide good reasons" for changing positions. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–43 (1983); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). An agency's action is arbitrary and capricious where it fails to consider important aspects of the problem, offers explanations counter to evidence, and relies on factors it should not have considered. *State Farm*, 463 U.S. at 41-43; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913; *see also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must also consider costs and reliance interests for regulated parties *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*). Defendants did none of the foregoing things and thereby plainly violated the APA.

Defendants contend the APA does not apply because the President is not an "agency." (Opp'n to PI Mot. 13-14). But various courts have held the APA remains available when agency action relates to a presidential directive.[27] Indeed, the APA applies to agency action stemming from executive orders where "there is 'law to apply.'" *See City of Carmel-by-the-Sea v. DOT*, 123 F.3d 1142 (9th Cir. 1997). Here, of course, FPASA and CICA regulate government procurement; accordingly, APA review remains available.

Defendants have failed to give an adequate explanation (other than political favoritism) for imposing a PLA Mandate. Defendants have instead offered explanations for the PLA Mandate that run counter to the evidence, claiming without support that a PLA Mandate will "promote economy and efficiency in federal procurement." (AR, 88 Fed. Reg. 88711). To the contrary, PLAs discourage bidding from the employers of 89 percent of the construction industry, *reducing* economy and efficiency, facts which the PLA Rule ignored. (*See* ABC Comments at 21-24). In response to Comments that Defendants did not provide data on costs and benefits of the PLA rule, Defendants conceded they relied only on the President's "judgment." (AR, 88 Fed. Reg. 88711). Finally, as noted above, Defendants failed to explain why the PLA mandate was needed in light of the undisputed

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[27] Defendants cite *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 835 (S.D. Tex. 2022), *aff'd*, 63 F.4th 366 (5th Cir.) (en banc), but that case is not good law, as it was vacated. Defendants also cite *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001) for the assertion arbitrary and capricious review is unavailable when an agency carries out presidential directives, (Opp'n to PI 14), but other courts disagree. *E.g.*, *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1156 (D. Minn. 2010); *Indigenous Envt'l Network v. Dep't of State*, 2017 U.S. LEXIS 193546, at *10-23 (D. Montana Nov. 22, 2017); *Protect Our Cmtys. Found. v. Chu*, 2014 U.S. Dist. LEXIS 42410, at *12-18 (S.D. Cal. Mar 27, 2014); *ABC SE Tex.*, 2016 WL 8188655, *12 (examining whether FAR Council action was arbitrary and capricious under the APA); *see also Reich,* 74 F.3d at 1324.

fact that the government's procurement officials had rejected any need for PLAs on 99 percent of large federal construction projects built in the previous 14 years under President Obama's EO. (SOF ¶ 2; ABC Comments; Brubeck Affidavits).[28] Defendants thus failed to meaningfully consider important aspects of the problems with a PLA mandate, in direct violation of *State Farm*.[29]

Defendants also did not meaningfully consider the impact of the PLA Rule on non-union contractors, plainly violating the Supreme Court's recent holding in *Ohio v. EPA*, 144 S. Ct. 2040, 2055-56 (2024).[30] In response to numerous concerns expressed in the administrative record, Defendants merely stated parties could somehow negotiate for less objectionable PLA provisions. (*E.g.*, AR, 88 Fed. Reg. 88710, 88713-88716). Defendants further contend "there is no data to suggest...bad-faith bargaining by unions." (AR, 88 Fed. Reg. 88712). But Defendants again miss the point. The PLA Mandate on its face grants unwarranted leverage to unions: bidding contractors must reach agreement in short periods to bid or receive awards; the unions, even if acting in good faith, have no corresponding incentive to reach agreement on any but their own terms. The PLA Rule

[28] Plaintiffs are not required to show that no covered projects will <u>ever</u> be found to be exempt from the PLA mandate. It is enough that the Defendants have increased the imposition of PLAs from one percent of covered projects up to 100 percent or any number approaching that magnitude, without any meaningful explanation or justification for this action, as required by *Ohio v. EPA, State Farm*, and *Encino Motorcars*.

[29] Defendants failed to meaningfully engage with concerns about delays and costs from PLAs (*see* ABC Comments at 21-22,), noting only "there is no conclusive evidence to support that specifically requiring a PLA will be the *sole* reason for additional delays or litigation." (88 Fed. Reg. 88172) (emphasis added).

[30] Defendants contend Plaintiffs have not pointed to data showing the government did not consider their comments. (Opp'n 14). Defendants miss the point of Plaintiffs' concerns. As explained in the Comments ABC submitted (which Defendants were required to consider and address), a PLA Mandate makes it much more difficult for non-union contractors to compete in the first place. (ABC Comments at 7, 12).

and OMB Memo failed to address at all the practical realities of negotiating PLAs as explained in ABC's comments.

Defendants rely heavily on their supposed exemptions to the PLA Mandate, but as explained above, the exemptions do not salvage the Rule. They are phantoms: improperly narrow on their face, posing numerous arbitrary obstructions, and without any meaningful criteria for agencies to use in determining whether an exemption is appropriate. (AR, 88 Fed. Reg. 88712); *see also East Bay Sanctuary Covenant v. Biden*, 2023 U.S. Dist. LEXIS 128360, at *38, 42-43 (N.D. Cal. July 25, 2023) (rule arbitrary and capricious where plaintiffs argued government was relying on rule's exceptions to justify it).

Finally, OMB promulgated the OMB Memo without providing notice and opportunity for public comment, in violation of the plain language of the OFPP Act. *See Louisiana v. Biden*, 575 F. Supp. 3d 680, 694 (W.D. La. 2021) (OMB violated the APA when it issued binding guidance without following OFPP notice and comment requirements). Defendants have claimed, citing *Kentucky v. Biden*, 571 F. Supp. 3d 715, 731 (E.D. Ky. 2021), that the OMB Memo has no independent legal force and therefore no notice or comment was required. (Opp'n to PI Mot. 15). But in *Kentucky*, the nonbinding guidance document at issue simply helped agencies comply with an executive order. *See Kentucky*, 571 F. Supp. 3d at 731. In contrast, the OMB Memo here goes beyond the PLA Rule or EO to set new requirements of its; for example, OMB arbitrarily declares that "two...qualified offerors is sufficient to provide adequate price competition," instructions appearing nowhere in the EO or PLA Rule (or in CICA). (OMB Memo 2(b)(ii)). The OMB Memo further contains mandatory language, explaining how agencies "must" conduct market analysis and how they "must" require a PLA under certain circumstances.

(OMB Memo); *see also Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (explaining, in the analogous APA context, that "[c]ourts have looked for mandatory language to determine whether an agency's action binds it and accordingly gives rise to legal consequences"). Accordingly, the EO, PLA Rule, and OMB Memo – separately and together—violate the APA and OFPP.

D. **The PLA Rule, EO, and OMB Memo Violate Plaintiffs' First Amendment Free Association Rights**

First Amendment protections apply to government contractors. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests" such as "protected ... associations," and the government may not restrict First Amendment rights as "the price of maintaining eligibility to perform government contracts." *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *ABC SE Tex.*, 2016 WL 8188655, at *8; *White v. Sch. Bd. of Hillsborough County*, 2009 U.S. App. LEXIS 1532, at *7 (11th Cir. Jan. 27, 2009); *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1229 (N.D. Ga. 2021).

Union association is a type of protected expressive association under the First Amendment. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463-66 (2018). "Just as '[t]he First Amendment clearly guarantees the right to join a union...it presupposes a freedom not to associate' with a union." *See Mulhall*, 618 F.3d at 1287. "[M]andatory associations are permissible only when they serve a 'compelling state interes[t]...that cannot be achieved through means significantly less restrictive of associational freedoms.'" *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012).

Here, the challenged PLA Mandate infringes on Plaintiffs' freedom of association by requiring Plaintiffs' members to associate with unions to bid on and/or perform contracts that the PLA Rule covers. (*See also* Haskell Aff. ¶ 8; Hensel Phelps Aff. ¶ 10; Cianbro Aff. ¶¶ 6-7; American-Electrical Aff. ¶ 9; M.C. Dean Aff. ¶ 8). Defendants' have offered no compelling government interest justifying such infringement on the rights of Plaintiffs' members. As discussed above, the PLA Rule does not serve the government's claimed interest in increased economy or efficiency. Further, the government has previously encouraged (not required) PLAs, and Defendants have not shown the previous approach was insufficient to meet any compelling government interest "that cannot be achieved through means significantly less restrictive of associational freedoms.'" *See Knox*, 567 U.S. at 310. [31]

Defendants have contended the PLA mandate involves non-expressive commercial decisions (Opp'n to PI Mot. 15-16), citing inapposite free speech cases *Arkansas Times LP v. Waldrip*, 37 F.4th 1386, 1394 (8th Cir. 2022) and *Rust v. Sullivan*, 500 U.S. 173 (1991). But Plaintiffs do not argue the PLA mandate restricts their free speech rights; Plaintiffs present only a free association challenge. The free association cases Defendants have cited—*Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 70 (2006) and *Christian Labor Ass'n v. City of Duluth*, No. 21-227, 2023 WL 3996240, at *10 (D. Minn. June 14, 2023)—are no more persuasive. (Opp'n to PI Mot. 16). In *Rumsfeld*, the Supreme Court rejected a free association challenge relating to the presence of military recruiters on law school campuses. *See Rumsfeld*, 547 U.S. at 69. The relationship between a union and an employer under a PLA is far more intrusive,

[31] In addition, the PLA Rule requires Plaintiffs' members to compel their employees to associate with unions as a condition of award of construction work, forcing them to aid and abet the infringement of employee rights under the Constitution.

requiring mutual agreement to various employment terms (*see* SOF ¶ 4).[32] In sum, the PLA Mandate violates Plaintiffs' free association rights under the First Amendment.

E. <u>The PLA Rule, EO, and OMB Memo Violate Section 8(d) of the NLRA.</u>

Congress has long prohibited the federal government from requiring employers to enter into any labor agreement or specific term thereof in Section 8(d) of the NLRA. *See H.K. Porter v. NLRB*, 397 U.S. 99, 102-109 (1970) (holding the federal government's National Labor Relations Board ("NLRB") does not have the power to compel employers to agree to any substantive contractual provision of a collective bargaining agreement). That is exactly what the PLA Rule unlawfully does as a condition of awarding federal contracts, thereby violating the NLRA.

Defendants have contended *Bldg. & Const. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./RI* ("*Boston Harbor*"), 507 U.S. 218 (1993) allows the government to require PLAs. (Opp'n to PI Mot. 16). But the Supreme Court only addressed the much narrower question whether federal labor law preempted state and local governments from choosing to impose PLAs on specific projects under their individual competitive bidding laws. *Id*.[33] The Court expressly declined to address the impact of Section 8(d) in that case, see 507 U.S. at 232, n.2; and *Boston Harbor* did not approve any across-the-board PLA mandates. *See* 507 U.S. at 227-29. Defendants have further cited *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) for the assertion

[32] Thus, while the District of Minnesota in *Christian Labor* applied *Rumsfeld* (and other inapposite Eighth Circuit precedent) to reject a free association challenge to a provision in a project labor agreement, it was wrong to do so. *See Christian Labor*, 2023 WL 3996240, at *10.

[33] Since *Boston Harbor* was decided, roughly half the states – including Florida - have declared PLAs on government contracts to be in violation of competitive bidding laws. (*See* ABC Comments at 20).

the NLRA does not preempt minimum standards impacting contract terms (Opp'n to PI Mot. 16), but that case dealt with "state laws of general application," *see Massachusetts*, 471 U.S. at 753, nothing like the PLA Mandate.

F. <u>The PLA Rule, EO, and the OMB Memo Fail to Comply with the RFA and SBA, in Violation of the APA</u>

Under the SBA, "[i]t is the policy of the United States" that small businesses "have the maximum practicable opportunity to participate" in federal contracts, and federal agencies must set percentage goals for awarding contracts to small businesses. 15 U.S.C. § 637(d), 644(g). Most ABC members are small businesses (ABC Comments at 36); and a PLA mandate will drastically reduce the participation of small businesses, most of which are not unionized (SBA Comments at 2-3).

Relatedly, the RFA, as amended by SBREFA, 5 U.S.C. §§ 601-611, requires agencies issuing rules under the APA to publish a final regulatory flexibility analysis ("FRFA") assessing the negative impact of a rule on small businesses, considering less burdensome alternatives, and responding to "any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule." 5 U.S.C. § 604(a). *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436-37 (M.D. Fla. 1998), and 55 F. Supp. 2d 1336 (M.D. Fla. 1999) (enjoining portion of regulations that did not comply with RFA). The SBA Office of Advocacy noted multiple concerns with the PLA Rule (SBA Comments at 3), which the FAR Council failed to address, again violating the Supreme Court's recent holding in *Ohio v. EPA*. Defendants also improperly dismissed alternatives to the PLA Rule in comments, including ABC's, with minimal analysis. 88 Fed. Reg. 88716-88717; *see also Southern Offshore*, 55 F. Supp. 2d at 1340 (RFA analysis of a few pages inadequate). Accordingly, the PLA

Mandate must be set aside for failing to comply with the RFA or SBA, in violation of the APA.

IV. The 2024 Rule Should Be Set Aside on a Nationwide Basis, or, at a Minimum, Expedited Nationwide Injunctive Relief Must Be Provided for Plaintiffs' Members.

Upon finding in favor of summary judgment, the appropriate remedy for the Court to apply is vacatur of the PLA Rule under Section 706 of the APA. *See Ctr. for Biological Diversity v. Haaland*, 2023 U.S. Dist. LEXIS 222818, at *8-10 (S.D. Fla. Dec. 11, 2023) ("Because the agency's actions were unlawful, the ordinary APA remedy of vacatur is appropriate."). But if the Court declines to vacate the PLA Mandate universally, the Court must, at minimum, provide injunctive relief to Plaintiffs' local and national memberships. *See Warth v. Seldin*, 422 U.S. 490, 511, 515 (1975) (granting remedy of the court to association members); see also *Georgia,* 46 F.4th 1283, 1298.

As discussed previously, the Eleventh Circuit in *Georgia* granted injunctive relief to ABC's nationwide membership, without setting aside the federal mandate as to non-parties nationwide. *Id*. at 1298 (enjoining the government "from enforcing the mandate against...members of [ABC]"). ABC would consent to the same preliminary injunctive remedy in the present case but urgently requests that the Court issue such an order without waiting to rule on the cross-motions for summary judgment.

In the event of a final ruling on the merits holding the PLA Rule is unlawful, the Court should vacate the Rule for all purposes, pursuant to Section 706 of the APA. *See Ctr. for Biological Diversity*, 2023 U.S. Dist. LEXIS 222818, at *7 (citing 11th Circuit authority); *see also Franciscan All., Inc. v. Becerra*, 47 F.4th 368, 374-75 (5th Cir. 2022)

("Vacatur is the only statutorily prescribed remedy for a successful APA challenge to a regulation.").

V. CONCLUSION

Plaintiffs request that the Court grant this Motion. In advance of the Court's ruling on the merits, Plaintiffs request that the Court grant Plaintiffs' pending motion for preliminary injunctive relief on an expedited basis.

Dated this 9th day of September, 2024.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2024, I electronically filed the foregoing with the Clerk of the Court by using the ECF system, which will send a notice electronically to Defendants' counsel of record.

/s/Kimberly J. Doud
Kimberly J. Doud

EXHIBIT "1"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§ § § §	**NO. 24-cv-318-WWB**
Plaintiffs,	§ §	
vs.	§ §	
WILLIAM F. CLARK, et al.	§ §	
Defendants.	§ § § § § § § §	

AFFIDAVIT

I, Ben Brubeck, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Vice President of Regulatory, Labor, and State Affairs of the Associated Builders and Contractors, Inc. ("ABC"). In April, 2024, I submitted an affidavit in support of the Motion for Preliminary Injunction filed by ABC and its affiliated Florida First Coast Chapter, on behalf of these associations representing more than 23,000 member contractors and related firms in Florida and throughout the country. See ECF No. 18-16 (Ex. 14 to PI Mot.). I am incorporating that affidavit by reference to avoid repetition, and I am submitting this new affidavit in support of Plaintiffs' Motion for Summary Judgment, specifically to supplement and update the information filed previously regarding the expanding harms caused by the challenged PLA Mandate. These include direct harms to ABC's local and nationwide membership—and to ABC as

an organization—as well as the injuries to competition, economy and efficiency in federal contracting, all in violation of the laws identified in Plaintiffs' Complaint and Motion(s).

2. As further set forth below, the irreparable harm to ABC's local and national members has continued unabated since my April affidavit, and has indeed increased, due to the imposition of unlawful PLAs on every known project costing $35 million or more (and sometimes below that threshold) awarded since the mandate went into effect. The PLA Rule has stifled competition from the majority of construction contractors whose employees have chosen not to be represented by labor unions (89% of the construction industry workforce nationally; 97% of the construction industry workforce in Florida), as well as contractors that have existing bargaining agreements with unions disfavored by the PLA Rule. Now more than ever, the PLA mandate is almost daily reducing economy and efficiency on federal construction projects and is irreparably injuring full and open competition by ABC member contractors.

3. As noted in my previous affidavit, the EO and FAR Rule announced creation of a website where exemptions would be posted. But no exemptions have been posted there as of this date—nine months since the PLA Rule took effect. *See* Project Labor Agreements (PLA) | Acquisition Gateway. And ABC is not aware of any federal agency granting an exception to the PLA Rule's PLA mandate policy, to date. This track record starkly contrasts with the PLA Rule's impact estimate claiming that as many as 50 percent of covered projects would be exempted from the PLA mandate.[1]

4. During the time period since the PLA Rule went into effect, ABC has identified 64 federal projects subject to PLA mandates resulting from the Rule, including

[1] See https://www.federalregister.gov/d/2023-27736/p-226.

projects in Jacksonville and the surrounding region.[2] Of this total, nine projects have been awarded, all with PLA requirements. These include projects identified by the otherwise qualified ABC members who previously submitted affidavits, who were disqualified from bidding on these projects due to their inability to enter into PLAs. In addition, the bid submission deadline for at least 30 projects has passed on projects identified as subject to the PLA mandate. As a direct result of the PLA Rule, few if any of the proposals submitted were from ABC members, even though they were qualified to bid and submitted bids on similar past projects, because of their inability to sign PLA agreements.

5. In addition, ABC is aware of dozens of future federal projects covered by the Rule that are in the pre-solicitation phase of procurement for fiscal year 2024, fiscal year 2025, and beyond. Absent injunctive relief, few if any ABC members will be able to bid under established principles of full and open competition on these projects due to the PLA mandate.

6. It is apparent from the foregoing public record, confirmed by ABC's own investigation including communications with multiple federal agency procurement officials, that the PLA Rule's exemption process is facially flawed. Front-line contracting officers are discouraged from recommending exemptions to senior procurement officials far up the procurement chain of command who must make all final exemption decisions under the new Rule. And in many cases, necessary market research is simply not being performed to evaluate whether union agreements are necessary or counter-productive in areas of the country, like Jacksonville, where there are very few union contractors or

[2] ABC identified the projects containing PLA mandates by searching the federal government's public procurement website, http://sam.gov., last visited for this purpose on September 8, 2024.

workers. Indeed, in Florida and roughly half of all the states, competitive bidding laws prohibit state and local government construction projects from being subjected to a government-mandated PLA.[3] And the public exemption website itself has served as a deterrent to granting any exemptions, since procurement officials do not want to be forced to defend their exemption decisions or complete the paperwork associated with the exemption process.

7. In short, the PLA exception process outlined in the OMB Memorandum and PLA Rule is flawed, or is not being utilized, and appears to be designed on its face to discourage PLA exception requests from being proposed or granted by federal procurement officials.

8. The published track record of the PLA Rule's across-the-board mandate of PLAs on covered projects also contradicts the FAR Council's claimed justifications for the Rule and demonstrates the lack of any factual basis supporting the PLA Rule. ABC has compared the present record of imposed mandates under the PLA Rule with the results of the federal government's policy from fiscal year 2009 to fiscal year 2023, "encouraging"—but not requiring—federal agencies to mandate PLAs. As reported in my previous affidavit, between fiscal years 2009 and 2023, just 12 federal contracts (valued at $1.26 billion) contained a PLA mandated by a federal agency out of 3,222 contracts over $25 million, with a total value of $238 billion. Nothing has changed with regard to the economy or efficiency on imposing PLAs on more than 99 percent of federal construction contracts for the first time, except that the new PLA Rule arbitrarily mandates unionization

[3] See ABC AR Comments at 18-21; ABC_FAR Council Federal Acquisition Regulation Use of Project Labor Agreements for Federal Construction Projects_101822.pdf

of all large federal construction projects. Notably, prior to the PLA mandate, there were no reports of strikes, project delays, cost overruns or other problems on federal construction projects due to any lack of PLA requirements.

9. ABC's investigation has further established that projects covered by the PLA Rule have received fewer bidders than would otherwise have bid, evidencing the impact of the PLA Rule on full and open competition. ABC is aware of at least one project previously identified by the member affidavits, on which six firms had been shortlisted as qualified to bid, but only one bid was actually submitted due to the new PLA mandate. Yet even this project has so far failed to secure a PLA exception from the USACE's senior procurement official, and the award process has been delayed as a result of the PLA Rule.

10. ABC's investigation has further confirmed that as a result of reduced competition on PLA projects the bid price proposals from the fewer bidders has been higher than expected on these projects. This is consistent with academic research into the cost of government-mandated PLAs establishing that such requirements increase the cost of construction 12 percent to 20 percent, as well as anecdotal evidence provided by ABC members and industry stakeholders regarding government-mandated PLAs.[4] The PLA Rule is needlessly increasing construction costs compared to projects bid with fair and open competition.

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[4] See studies listed throughout the ABC Comments on the proposed PLA Rule, which were not addressed by the Defendants: ABC_FAR Council Federal Acquisition Regulation Use of Project Labor Agreements for Federal Construction Projects_101822.pdf; *see also* https://buildamericalocal.com/learn-more/#gmpla-studies

11. State governments who partner with federal agencies to deliver projects to taxpayers subject to the Rule have publicly confirmed the negative consequences of the PLA mandate. On June 27, 2024, the executive director of the state of Louisiana's Coastal Protection and Restoration Authority (CPRA) provided written and oral testimony at a U.S. House of Representatives Oversight Subcommittee hearing on the Biden administration's PLA policies.[5] The testimony confirmed that the Rule's PLA mandates have reduced contractor competition and local workforce participation, caused needless procurement and construction delays, and threaten to increase costs on projects, putting local coastal communities at serious risk.

12. The executive director of the CPRA further testified that other states with similar cost-sharing partnerships with the USACE to build coastal projects and other civil infrastructure projects are also at risk to similar outcomes because of the Rule's PLA mandate policy. ABC has identified a number of similar federal projects with state cost sharing arrangements in active phases of procurement subject to the Rule's PLA mandate policy. These include two project solicitations procured by the USACE Jacksonville District (Central Everglades Planning Project (CEPP) Contract 11B, Everglades Agricultural Area (EAA) A-2 Reservoir Embankment and Structures, Palm Beach County, Florida and CERP, IRL-S, C-23/C-24 North Reservoir, S-426, Contract 4A Project, St. Lucie County, Florida).[6] USACE Jacksonville officials managing these project

[5] *See* Testimony by Glenn Ledet, Jr., (Jun. 27, 2024), Ledet-Testimony.pdf (house.gov) (last visited Sept. 5, 2024); *Cutting Competition in Contracting: The Administration's Pricey Project Labor Agreement Mandate*, YouTube, Cutting Competition in Contracting: The Administration's Pricey Project Labor Agreement Mandate (youtube.com) (last visited Sept. 5, 2024); (last visited Sept. 5, 2024).

[6] CERP, IRL-S, C-23/C-24 North Reservoir, S-426, Contract 4A Project, St. Lucie County, Florida, SAM.gov, SAM.gov (last visited Sept. 5, 2024).

procurements have expressed concerns about reduced competition from local experienced contractors and workers and needless added costs that will undermine state and federal taxpayer investments in crucial water infrastructure projects as a result of the Rule and PLA mandates.

13. Contrary to the PLA Rule's claim that contractors can simply "negotiate" with local unions to address obstacles to signing PLAs, numerous ABC member contractors have been unable to execute PLAs with local unions prior to their bid submissions. The North America's Building Trades Union (NABTU) has stated that PLAs with construction trade unions having jurisdiction on such projects must be approved by headquarters attorneys and must be consistent with a national PLA template.

14. As also previously explained in affidavits supporting the Preliminary Injunction Motion submitted by ABC member subcontractors — many of whom are small businesses — they continue to have no ability to provide feedback to general contractors during PLA negotiations concerning the terms and conditions of importance to the subcontractors within the PLA.

15. All of this is happening in the midst of a significant shortage of skilled workers in the construction industry, now estimated at 500,000 workers.[7] The shortage of skilled workers available to the federal government on projects covered by the PLA Rule will be exacerbated by the Rule's restrictive requirements, as more than 89 percent of the industry's workers are non-union and will be unable to perform the covered work.

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[7] *See* ABC Comments, at 4-5; see also https://www.abc.org/News-Media/News-Releases/abc-2024-construction-workforce-shortage-tops-half-a-million.

I declare under penalty of perjury that the foregoing is true and correct.

Ben Brubeck

9/9/24
Date

EXHIBIT “2”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§ § § §	**NO. __________**
Plaintiffs	§ §	
vs.	§ §	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§ § § § § §	
Defendants.	§ § §	

DECLARATION OF PHIL YANCE

I, Phil Yance, declare as follows:

1. I am a Senior Vice President of The Robins & Morton Group ("Robins & Morton"). Robins & Morton is a non-union general contractor headquartered in Birmingham, Alabama.

2. Robins & Morton pursues and has performed construction work in a majority of the lower 48 states of the United States. Robins & Morton is a member of Associated Builders and Contractors ("ABC"), and ABC's Florida First Coast Chapter, as well as the Alabama Chapter.

3. As Senior Vice President, I am responsible for Robins & Morton's construction work for the federal government. We have a strong history of working for the federal government. In recent years, we have performed several federal projects valued at more than $35M.

4. Robins & Morton currently holds several multiple award contracts with federal government agencies. Under these contracts, a limited group of contractors have been pre-selected for restricted competition for a select group of projects. We devoted considerable resources to winning the right to participate under these contracts and we have had good success winning project awards under programs such as these.

5. Robins & Morton has been pursuing several projects, in our multiple award contracts and otherwise, that will be requiring Project Labor Agreements (PLAs) because they are subject to the new Rules requiring PLAs on federal construction projects. These projects include: the B2080 Renovation of Galley, Emergency Department and Pharmacy, Naval Air Station, Jacksonville, Florida – N6945024R0057 ("JACKSONVILLE PROJECT"); the USDA-ARS Auburn Lab and Lab Annex, Auburn, Alabama – W9127824R0013 ("AUBURN PROJECT"); the Brownsville Gateway Modernization, Brownsville, Texas – 47PH0824R005 ("BROWNSVILLE PROJECT); and others.

6. Robins & Morton has invested many hours and many resources in pursuing JACKSONVILLE, AUBURN, BROWNSVILLE and other PROJECTS. Robins & Morton is particularly well suited for the JACKSONVILLE PROJECT and our investment in the pursuit of that project has been driven by a high expectation of winning the contract for construction.

7. I am informed that the new PLA Rules require all contractors and subcontractors to enter into a project-specific "pre-hire collective bargaining agreement" (i.e., PLA) with one or more construction trade unions as a condition of being awarded a covered project. The PLA must apply to all craft labor on the project, with no exceptions. The trade unions then become the exclusive bargaining representative of all workers on the project. The trade unions are thus empowered to negotiate all terms and conditions of employment for all labor on the project,

including worker classification, hiring hall procedures, wages, benefits, the ratio of apprentices to journeymen, work rules, disputes procedures and grievance procedures.

8. Because the terms and conditions of employment impact the cost of labor, and the cost of labor usually constitutes more than 50% of a pricing proposal to the government, contractors and subcontractors are, as a practical matter, required to negotiate a PLA with the trade unions prior to submission of bids or proposals. Otherwise, the cost and productivity of labor cannot be accurately known. Without this information, there can be no contractor and subcontractor confidence in the prices that comprise the bid or proposal to the government.

9. My understanding is that the new Rules do not require the trade unions to negotiate with all potential contractors and subcontractors submitting bids or proposals to the government. If a union does enter into negotiations for a particular project, there is nothing that requires the union to reach agreement prior to the date bids or proposals must be submitted. The contractors and subcontractors have a deadline for submission of their price, but the unions have no deadline.

10. In addition, I am informed that there is no requirement in the Rules that the unions offer the same terms and conditions to all contractors and subcontractors. They are at liberty to grant terms and conditions to union contractors and subcontractors with whom they have relationships that are different than the terms and conditions granted to non-union contractors and subcontractors.

11. I am informed that the new Rules allow an agency three options for when an executed PLA must be submitted to the government: (1) submission of the executed PLA with the bid or proposal, (2) submission of the executed PLA after bids/proposals are received but before award, or (3) submission of the executed PLA after award. Options 2 and 3 imply that contractors and subcontractors can submit accurate bids/proposals without knowing the terms and conditions

governing employment of labor. This assumption might possibly be true for union contractors and subcontractors who have established relationships with the unions, but it is false for non-union contractors and subcontractors (such as Robins & Morton and its non-union subcontractors) who have no experience with the unions. Under Option 3, if the contractors and trade unions do not reach agreement on a PLA, it appears the contract must be terminated for default. The new Rules allow the government to exempt a project from the PLA requirement before the date bids/proposals are received, but the government is not permitted to exempt a project after pricing is received or after its contractor and the trade unions reach impasse on PLA negotiations. Option 3 might be appropriate for union contractors and subcontractors with existing collective bargaining agreements with the unions, but it is inappropriate for non-union contractors and subcontractors (such as Robins & Morton and its non-union subcontractors) who have no such relationship.

12. I am informed that there are narrow exceptions to the PLA mandate. Most of them (i.e., short duration, lack of operational complexity, involving only one trade, involving specialized construction work, need for compelling urgency) will never apply to the kind of work we do and would never have applied to any work we have ever done in the past for the government. The only exception that might apply to the projects we are pursuing now is the market research exception. I am informed that the new Rules allow a project to be excepted from the PLA requirement when market research indicates a PLA would substantially reduce the number of potential offerors such that adequate competition at a fair and reasonable price would not be achieved.

13. On projects we have been pursuing, such as the JACKSONVILLE PROJECT, we have informed the government that the market for construction in the area does not support imposition of a PLA because there are very few unionized workers and because most non-union contractors and subcontractors will not bid on a project that is subject to a PLA. Notwithstanding

the information we have provided indicating that the PLA will have the immediate effect of drastically reducing competition and increasing costs, the government has proceeded to impose PLA mandates, without any rational basis and with harmful impact on the economy and efficiency of the government's construction procurements.

14. As a non-union contractor, Robins & Morton is irreparably harmed by the new Rules requiring project labor agreements ("PLAs") on federal construction projects. Unless a court issues an injunction against the unlawful PLA mandate, Robins & Morton will be subjected to severe and irreparable risks of harm that in effect deprive us of the ability to submit a competitive bid on the JACKSONVILLE PROJECT and other PLA-mandated projects.

15. The unfair and discriminatory burdens and risks imposed on us by the PLA mandate on the JACKSONVILLE PROJECT and other projects include the following:

A. We have no reliable database for the cost and productivity of union labor and labor that operates under union-driven terms and conditions. Cost databases are used to estimate construction costs and prepare pricing for bids and proposals. Labor is usually more than 50% of the cost of any construction project. Without this information, it is impossible to submit an accurate pricing proposal to the government.

B. Even if we did have a historical database of union labor cost and productivity, we would have no way of knowing with any accuracy the current cost of labor until a PLA is negotiated and signed. The final signed PLA would govern the wages, benefits, work assignments, work rules, productivity and other factors affecting labor cost, and therefore our price to the government. We do not wish to be forced to submit inaccurate pricing to the government.

C. We cannot assume we will be able to negotiate and finalize a PLA before bids/proposals and pricing are due to be submitted to the government. There is nothing in the new Rules that requires the incumbent trade unions to talk to us, or negotiate with us, prior to the date bids/proposals are due. The cost associated with pursuing and estimating a project is significant, and it would be foolish to make such an investment if there is no confidence that we could simultaneously negotiate and finalize labor terms prior to submission of pricing.

D. We have very little experience with unions, and no experience negotiating PLA terms. The incumbent unions have experience, and to our knowledge they are the only "labor organization" that qualifies for any given project. The incumbent unions have all the power in negotiations and no deadline for completion of negotiations. We must comply with all deadlines dictated by the government, including deadlines for submission of a fully signed PLA.

E. There is nothing in the new Rules that requires the trade unions to give us the same terms and conditions offered to the union contractors that the unions already have a relationship with. We cannot invest in a pursuit where our competition has an unfair advantage.

F. Preparation and submission of a bid or proposal on a federal contract is an expensive and time-consuming undertaking. We do not have the resources, and there is not enough time, to negotiate a PLA with the labor unions while simultaneously preparing a bid or proposal. If we cannot reach agreement on a PLA, the time, cost and energy expended in preparing a bid or proposal is lost.

G. The new Rules create an unfair advantage in favor of union contractors. They already have their collective bargaining agreements with the unions, with agreed-upon wage and benefit packages. They have data on union labor productivity. They can focus on their proposal and pricing, while we have to establish relations with the unions while simultaneously preparing our proposal and price. Under these circumstances, union contractors have an unfair advantage in submitting an accurate and lower bid than us. It would not be wise for us to make a large investment in estimating and preparing a bid or proposal when we are unlikely to win in competition with union contractors.

H. Most of the subcontractors Robins & Morton has a relationship with are non-union subcontractors. It is difficult to find subcontractors who are competent, financially strong and reliable. Our relationships with our subcontractors often go back many years, or decades. Our non-union subcontractors face the same challenges we do. If they decide not to pursue a project, we have to find new subcontractors with whom we do not have a history of business relations. Union contractors that we would compete with do not have this challenge and therefore have an unfair advantage.

I. It would be difficult or impossible for Robins & Morton and its non-union subcontractors to use their own craft labor employees to perform the work. We would have to hire union workers from union hiring halls. It is unrealistic to expect that our own employees would register with the union hiring halls en masse and be assigned back to us.

J. Most of the craft labor on a PLA project will have to be union labor. Even if non-union workers decide to be hired through union hiring halls, their wages, benefit, work rules and other conditions of employment will be the same as for union labor.

K. Our employees have freely chosen not to be represented by a union, and we and our employees should not be compelled to enter into a PLA with a non-representative union that infringes on our right of Freedom of Association.

16. The shift to union labor rules, and relations with unions, would be a severe hardship for Robins & Morton. Many of our regular non-union subcontractors feel the same way, and they have informed us they will not bid any projects that require a PLA.

17. If Robins & Morton did win a contract with a PLA, the impact would be destructive to the company and its relationship with its employees. Many of our employees would elect NOT to have a relationship with a union as its exclusive representative and would refuse to work on the PLA project. They would have to be replaced with other workers, and if we did not have other projects where they could be utilized, this would mean they would quit or would have to be laid off or terminated.

18. I understand that unions typically require contractors to obtain apprentices exclusively from union apprenticeship programs. Robins & Morton uses apprentices from non-union apprenticeship programs provided by ABC chapters. My firm does not want to stop working with our current apprentices. Plus, it would be costly for my firm to stop using our current apprentices, and switch to using entirely different apprentices, as we have already invested time in our current apprentices' training.

19. Working on projects with PLAs would also increase my firm's costs relating to employee benefit payments. I understand that unions require contractors to pay their workers' health and welfare benefits to union trust funds. However, Robins & Morton already has employee benefit plans. Our employees would not be able to vest in union benefits unless they leave Robins & Morton at the conclusion of the project and stay with the union. We do not want our employees

to leave Robins & Morton. To ensure that our employees do not leave, we would need to pay into union trust funds while still maintaining current employee benefit plans. This is a cost that union contractors do not have, and therefore, they will always have this unfair advantage when pursuing projects in competition with Robins & Morton.

20. It is my understanding that the new Rules allow room for negotiation between the contractors and the unions. But nothing in the new Rules constrains the unions in what they can demand. The burden is on the contractor/bidder, not the incumbent unions, to negotiate the PLA in order to get the work. This is an impossible burden on our bidding for work on any federal project subject to the new PLA mandate.

21. If Robins & Morton did obtain a contract on a PLA project, we would need to employ and train additional staff to negotiate with the unions and comply with the new administrative burdens and compliance risks imposed by the new Rules. This is an investment we do not wish to make because we are a non-union contractor. We believe that our non-union subcontractors feel the same way.

22. Robins & Morton is ready, willing and able to construct the JACKSONVILLE PROJECT and other federal projects that are being advertised for bids, but the PLA mandate makes that impracticable for us. We are hopeful that the PLA mandate will be lifted, so that we can compete fairly as a contractor for the federal government.

23. We are not aware of any federal projects where an agency has pursued and justified an exception from the PLA mandate. If the government did its duty to perform market research and exempt projects where competition at a fair price cannot be achieved, it would exempt JACKSONVILLE, AUBURN AND BROWNSVILLE. None of these locations has a significant union presence in the construction trades. There are trades in these locations where there is no

union, at all. There is a fairness in using competent local labor, but if workers are shipped in from other locations and displace competent local labor, the result is unfair to the workforce, would cost dramatically more and result in an unfair price to the government.

24. I declare under penalty of perjury under the laws of the United States of America that the statements in this Declaration are true and correct.

Executed on this 25th day of March, 2024 in Birmingham, Alabama.

Phil Yance