

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
GALVESTON DIVISION**

**THE STATE OF TEXAS,**

*Plaintiff,*

v.

**JOSEPH R. BIDEN**, in his official capacity as  
President of the United States, *et al.*,

*Defendants.*

Civil Action No.  
3:21-cv-309

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**BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AS *AMICUS  
CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

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## **CORPORATE DISCLOSURE STATEMENT**

The American Medical Association (“AMA”) is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the AMA.

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## **INTEREST OF *AMICUS CURIAE***

The American Medical Association (“AMA”) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA’s policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state. The AMA has an interest in providing evidence-based guidance on public health issues and working to reduce the spread of contagious illnesses.<sup>1</sup>

## **INTRODUCTION**

The United States is in an unprecedented and ongoing public health crisis. SARS-CoV-2, the causative agent of COVID-19, has wreaked havoc in communities across the country, taxed hospitals to the point of rationing care, upended the lives of countless families, and killed over

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<sup>1</sup> *Amicus* certifies that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund this brief, and no person other than *amicus*, its members, and their counsel contributed money intended to fund this brief.

762,000 Americans. Widespread vaccination is essential to ending the COVID-19 pandemic and preventing thousands more needless deaths.

Many COVID-19 outbreaks have occurred in workplaces, inducing an occupational health emergency. Needless to say, workers—including federal contractor employees—who contract the SARS-CoV-2 virus, or worse, develop COVID-19 symptoms, disrupt workplace efficiency and must stay home from workplaces during recovery. For nearly two years, the AMA has monitored the COVID-19 pandemic and advocated for evidence-based public health measures to end it. The AMA’s extensive review of the medical literature demonstrates that COVID-19 vaccines authorized or approved by the Food and Drug Administration are safe and effective, and the widespread use of those vaccines is the best way to keep COVID-19 from spreading within workplaces. Enjoining the Safer Federal Workforce Task Force’s Guidance for Federal Contractors and Subcontractors<sup>2</sup> would therefore severely and irreparably harm the public interest.

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<sup>2</sup> See Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* (Nov. 10, 2021), <https://bit.ly/3Cd6vFG>; Federal Acquisition Regulatory Council, *Memorandum to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021), <https://bit.ly/3qAIUha>.

## ARGUMENT

### I. **COVID-19 poses a grave danger to the health of federal contractor employees.**

COVID-19 presents a severe risk to public health in Texas and throughout the nation. Although most people infected with the virus will experience mild to moderate symptoms, individuals with COVID-19 can become seriously ill or die at any age. As of November 18, 2021, there have been over forty-seven million confirmed cases of COVID-19 in the United States,<sup>3</sup> leading to more than 3,250,000 hospitalizations.<sup>4</sup>

Even those who recover from COVID-19 may experience post-COVID conditions with debilitating symptoms lasting for several months after the acute phase of infection. A systematic review of forty-five studies including 9,751 participants found that 73% of infected individuals experienced at least one long-term symptom.<sup>5</sup> Over half of previously hospitalized patients continue to experience cardiopulmonary

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<sup>3</sup> *COVID Data Tracker*, Centers for Disease Control and Prevention (“CDC”) (Nov. 18, 2021), <https://bit.ly/3Du7Glz>.

<sup>4</sup> *COVID Data Tracker Weekly Review: This is Their Shot*, CDC (Nov. 5, 2021), <https://bit.ly/3EYAdAb>.

<sup>5</sup> Tahmina Nasserie et al., *Assessment of the Frequency and Variety of Persistent Symptoms: A Systematic Review*, JAMA Netw. Open (2021), <https://bit.ly/3qocFkk>.

symptoms and abnormalities six months later.<sup>6</sup> And over 762,000 people in the United States have died from COVID-19—more than twenty-one times the number of people in the United States who die from influenza in the average year.<sup>7</sup> As of November 18, 2021, over 71,000 people have died from COVID-19 in Texas alone.<sup>8</sup>

SARS-CoV-2 is highly transmissible. The original strain was more contagious than the flu, and the Delta variant of SARS-CoV-2, now the leading strain, is more than twice as contagious as the original.<sup>9</sup> Crucially, over 50% of the spread of the virus may be from individuals who have no symptoms at the time of transmission.<sup>10</sup>

Workplace transmission has been a major factor in the spread of COVID-19. COVID-19 outbreaks have occurred among workers—including federal contractor employees—in numerous industries,

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<sup>6</sup> M.P. Cassar et al., *Symptom Persistence Despite Improvement in Cardiopulmonary Health – Insights from longitudinal CMR, CPET and lung function testing post-COVID-19*, *EClinicalMedicine* (2021), <https://bit.ly/3H7AeDB>.

<sup>7</sup> *Disease Burden of Flu*, CDC (Oct. 4, 2021), <https://bit.ly/3ocAuZA>.

<sup>8</sup> *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CDC (Nov. 18, 2021), <https://bit.ly/3kui8SL>.

<sup>9</sup> *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/3plAmcy>; Apoorva Mandavilli, *C.D.C. Internal Report Calls Delta Variant as Contagious as Chickenpox*, *N.Y. Times* (Jul. 30, 2021), <https://nyti.ms/3wxXaHB>.

<sup>10</sup> *Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), <https://bit.ly/30inWYx>.

including service and sales, education, hospitality, construction, domestic work, meat-processing, transportation, prison, and of course healthcare industries.<sup>11</sup> Studies found widespread COVID-19 outbreaks in meat- and poultry-processing facilities and “identified high proportions of asymptomatic or presymptomatic infections.”<sup>12</sup>

Forty-five percent more people reported missing work for medical reasons during 2020 than the previous twenty-year average.<sup>13</sup> Another study found that adults who tested positive for SARS-CoV-2 were significantly more likely to report going to an office or school setting than adults who tested negative.<sup>14</sup> Protecting workers from COVID-19 is especially important given that “a large proportion of the United States workforce, across a variety of occupational sectors, are exposed to disease

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<sup>11</sup> *Update 64—COVID-19 Prevention at the Workplace*, World Health Organization (Jul. 28, 2021), <https://bit.ly/307J1V6>; *Investigating and Responding to COVID-19 Cases in Non-Healthcare Work Settings*, CDC (Oct. 25, 2021), <https://bit.ly/3qC74XN>.

<sup>12</sup> Michelle A. Waltenburg et al., *Coronavirus Disease among Workers in Food Processing, Food Manufacturing, and Agriculture Workplaces*, 27 *Emerging Infectious Diseases* 243 (2021), <https://bit.ly/3k3Lip>.

<sup>13</sup> Charisse Jones & Matt Wynn, *Coronavirus and the Workplace: The Virus Causes Record Numbers of Job Absences in 2020*, USA Today (Jan. 21, 2021), <https://bit.ly/3C39lgx>.

<sup>14</sup> Kiva A. Fisher et al., *Telework Before Illness Onset Among Symptomatic Adults Aged ≥18 Years With and Without COVID-19 in 11 Outpatient Health Care Facilities — United States, July 2020*, 69 *Morbidity & Mortality Weekly Rpt.* 1648 (Apr. 28, 2020), <https://bit.ly/3F5Ybt8>.

or infection at work more than once a month.”<sup>15</sup> Requiring federal contractor employees to be vaccinated is not just an efficiency-promoting practice; it is life-saving.

## **II. Vaccines provide a safe and effective way to help reduce transmission of COVID-19 in the workplace.**

COVID-19 vaccines are safe. Before FDA authorized/approved and CDC recommended use of the COVID-19 vaccines in the population, scientists conducted clinical trials. FDA, CDC, and their advisory committees conducted rigorous reviews of the data.<sup>16</sup> CDC and FDA continue to monitor the safety of COVID-19 vaccines through both passive and active safety surveillance systems.<sup>17</sup> A study of over six million people who received the Pfizer or Moderna vaccines found that serious side effects are very rare.<sup>18</sup> Another study concluded that there is no increased risk for mortality among recipients of any of the COVID-19

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<sup>15</sup> Marissa G. Baker et al., *Estimating the burden of United States workers exposed to infection or disease: A key factor in containing risk of COVID-19 infection*, PLoS ONE (2020), <https://bit.ly/3BWD0q8>.

<sup>16</sup> *Benefits of Getting a COVID-19 Vaccine*, CDC (Nov. 5, 2021), <https://bit.ly/3H6BsiF>.

<sup>17</sup> Nicola P. Klein et al., *Surveillance for Adverse Events After COVID-19 mRNA Vaccination*, 326 J. Am. Med. Ass’n 1390, (Sep. 3, 2021), <https://bit.ly/3F1XQYM>; *COVID-19 vaccine safety surveillance*, FDA (Jul. 12, 2021), <https://bit.ly/3wxPIB>.

<sup>18</sup> Klein et al., *supra* n. 17.

vaccines, and that vaccine recipients in fact had lower non-COVID-19 mortality risks than did unvaccinated people.<sup>19</sup>

COVID-19 vaccines are also effective. First, each of the three vaccines greatly reduces the likelihood of contracting infection. The Pfizer, Moderna, and J&J/Janssen vaccines are 91.3%, 90%, and 72% effective against infection, respectively.<sup>20</sup> Although the vaccines' efficacy wanes over time, initial data on Pfizer booster shots show that they may boost the vaccine efficacy to over 95%.<sup>21</sup> For comparison, the flu vaccination reduces the risk of flu illness by between forty and sixty percent.<sup>22</sup>

Second, each of the three vaccines is even more effective against serious illness and death. Studies have estimated the Pfizer, Moderna, and J&J/Janssen vaccines as 95.3–97%, 95%, and 86% effective against

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<sup>19</sup> Stanley Xu et al., *COVID-19 Vaccination and Non-COVID-19 Mortality Risk — Seven Integrated Health Care Organizations, United States, December 14, 2020–July 31, 2021*, 70 *Morbidity & Mortality Weekly Rpt.* 1520 (Oct. 29, 2021), <https://bit.ly/3D1ZRn4>.

<sup>20</sup> Kathy Katella, *Comparing the COVID-19 Vaccines: How Are They Different?*, Yale Med. (Nov. 3, 2021), <https://bit.ly/307jEU5>.

<sup>21</sup> *Pfizer and BioNTech Announce Phase 3 Trial Data Showing High Efficacy of a Booster Dose of Their COVID-19 Vaccine*, Pfizer (Oct. 21, 2021), <https://bit.ly/3EXQa9K>.

<sup>22</sup> *How Well Flu Vaccines Work: Questions & Answers*, CDC (last visited Nov. 9, 2021), <https://bit.ly/3HifLMP>.

severe disease, respectively.<sup>23</sup> The vaccines are likewise highly effective against hospital admissions, “even in the face of widespread circulation of the delta variant.”<sup>24</sup> According to one analysis, between March 11 and August 15, 2021, unvaccinated people accounted for 84.2% of patients hospitalized for COVID-19, including those infected with the Delta variant.<sup>25</sup> As of August 28, 2021, the age-adjusted rate of COVID-19 associated hospitalizations in unvaccinated adults was more than 18 times that of fully vaccinated adults.<sup>26</sup>

The initial rollout of COVID-19 vaccines in the United States “was associated with reductions in COVID-19 cases, emergency department visits, and hospital admissions among older adults.”<sup>27</sup> In August 2021, unvaccinated people had a 6.1 times greater risk of testing positive for

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<sup>23</sup> Katella, *supra* n. 20.

<sup>24</sup> Sara Y Tartof et al., *Effectiveness of mRNA BNT162b2 COVID-19 Vaccine Up to 6 Months*, 398 *Lancet* 1407, 1407 (Oct. 16, 2021).

<sup>25</sup> Mark W. Tenforde, *Association Between mRNA Vaccination and COVID-19 Hospitalization and Disease Severity*, *J. Am. Med. Ass’n* (Nov. 4, 2021), <https://bit.ly/3bZBHhb>.

<sup>26</sup> See *Rates of laboratory-confirmed COVID-19 hospitalizations by vaccination status*, CDC (last updated Aug. 28, 2021), <https://bit.ly/3oIwsZ4>.

<sup>27</sup> Lucy A. McNamara et al., *Estimating the Early Impact of the US COVID-19 Vaccination Programme on COVID-19 Cases, Emergency Department Visits, Hospital Admissions, and Deaths Among Adults Aged 65 Years and Older: An Ecological Analysis of National Surveillance Data*, *Lancet* (Nov. 3, 2021), <https://bit.ly/31NqTRq>.



COVID-19, and an 11.3 times greater risk of dying from COVID-19, than fully vaccinated people.<sup>28</sup>

Third, evidence suggests that those who are fully vaccinated are contagious for shorter periods than unvaccinated people.<sup>29</sup> Most importantly, “[r]egardless of viral loads in vaccinated and unvaccinated individuals, the fact remains clear that unvaccinated people pose a higher risk of transmission to others than vaccinated people, simply because they are much more likely to get COVID-19 in the first place.”<sup>30</sup>

### **III. The more federal contractor employees who get vaccinated, the safer the workplace becomes.**

The more federal contractor employees who get vaccinated, the closer we are to slowing the spread of the virus, creating a safer environment, and preventing employee illness due to COVID-19. As the AMA has explained, “[t]he only way to truly end this pandemic is to ensure *widespread* vaccination.”<sup>31</sup> Infectious diseases such as COVID-19 continue to circulate as long as the average infected individual is able to

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<sup>28</sup> *Rates of COVID-19 Cases and Deaths by Vaccination Status*, CDC (last visited Nov. 9, 2021), <https://bit.ly/3F3YMLV>.

<sup>29</sup> See COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402, 61,419 (Nov. 5, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> Press Release, Am. Med. Ass’n, *AMA, AHA, ANA urge vaccinations as U.S. reaches 750,000 COVID-19 deaths* (Nov. 4, 2021) (emphasis added), <https://bit.ly/3C07CIS>.

transmit the disease to one or more uninfected individuals within the community.<sup>32</sup> Widespread vaccination is the only practical way to push the effective reproduction rate of the SARS-CoV-2 virus below one, the rate at which endemic transmission begins to die out.

Widespread vaccination reduces the likelihood of infections among both vaccinated and unvaccinated people. “[S]tates with high vaccination rates (>70% of the population) are reporting lower numbers of vaccine breakthrough cases as well as hospitalizations and deaths from COVID-19.”<sup>33</sup> This is particularly important for people who cannot get vaccinated due to age or medical condition, as well as immunocompromised people, who remain particularly susceptible to infection even after vaccination.<sup>34</sup>

History has shown that vaccine requirements are critical to achieving the degree of vaccination necessary to curb or eradicate infectious disease. Countries or states that mandated smallpox vaccination saw 10 to 30 times fewer smallpox cases than those that

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<sup>32</sup> See generally Paul Fine et al., *“Herd Immunity”: A Rough Guide*, 52 *Clinical Infectious Diseases* 911 (2011).

<sup>33</sup> Carlos del Rio et al., *Confronting the Delta Variant of SARS-CoV-2, Summer 2021*, 326 *J. Am. Med. Ass’n* 1001, 1002 (2021), <https://bit.ly/3bVL5Cj>.

<sup>34</sup> *How Effective Are COVID-19 Vaccines in Immunocompromised People?*, *Am. Soc’y for Microbiology* (Aug. 12, 2021), <https://bit.ly/3F24HBh>.

declined to do so.<sup>35</sup> Before compulsory school vaccination laws were in place throughout the United States, states with strict vaccination requirements had incidence rates of measles less than half those of states that did not.<sup>36</sup> For example, in the four years before Texas enacted its compulsory school vaccination law in 1971, it accounted for between 31% and 53% of all diphtheria cases in the United States each year, between 25% and 79% of all polio cases, and an outsized percentage of tetanus and measles cases; by 1973, it had seen a “reduction in morbidity . . . unprecedented in Texas communicable disease history.”<sup>37</sup>

COVID-19 spreads in communities with fewer vaccinated individuals, even if they are within or adjacent to communities with a higher proportion of vaccinated individuals. The more federal contractor employees who are vaccinated, the better protected all employees—vaccinated and unvaccinated alike—will be.

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<sup>35</sup> Rajaie Batniji, *Historical Evidence to Inform COVID-19 Vaccine Mandates*, 397 *Lancet* 791 (2021) (citing Frank Fenner, et al., World Health Org., *Smallpox and Its Eradication* (1988)).

<sup>36</sup> Kevin M. Malone & Alan R. Hinman, *Vaccination Mandates: The Public Health Imperative and Individual Rights*, in *Law in Public Health Practice* 262 (1st ed., 2003), <https://bit.ly/3BUviyg>.

<sup>37</sup> See Lon Gee & R.F. Sowell, Jr., *A School Immunization Law Is Successful in Texas*, 90 *Pub. Health Rep.* 21, 23 (1975).

**IV. Widespread vaccination is the most effective way to protect federal contractor employees from COVID-19.**

The statistics on COVID-19 vaccine efficacy speak for themselves. No other measure has been shown to reduce the risk of infection, hospitalization, and death to the degree that vaccination does. Although misinformation about the efficacy of vaccines abounds, the science is clear: no arguments against the need for vaccination are medically valid, other than instances where an individual has a medical contraindication.

Natural immunity—the immunity against SARS-CoV-2 that develops following recovery from infection—is not an adequate substitute for vaccination.<sup>38</sup> Infection carries a significant risk of death or serious illness; vaccination does not. Moreover, vaccination better protects previously infected people against reinfection. Studies have shown that unvaccinated people are at least twice as likely to become reinfected as

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<sup>38</sup> See Catherine H. Bozio et al., *Laboratory-Confirmed COVID-19 Among Adults Hospitalized with COVID-19-Like Illness with Infection-Induced or mRNA Vaccine-Induced SARS-CoV-2 Immunity – Nine States, January–September 2021*, 70 *Morbidity & Mortality Weekly Rpt.* 1539 (Nov. 5, 2021), <https://bit.ly/3kvoBwR> (finding 5.5 times higher odds of laboratory-confirmed COVID-19 among previously infected patients than among fully vaccinated patients).

are vaccinated people.<sup>39</sup> There is no evidence that vaccination is harmful to people who were previously infected.

Other mitigation measures, such as mask wearing and social distancing, remain important. They do not, however, provide the same level of protection against COVID-19 as does vaccination. Although wearing a face mask can be highly effective at limiting the transmission of SARS-CoV-2, many people choose not to wear face masks, even when encouraged or legally required to do so. Noncontinuous face mask wearing has been shown to result in the spread of COVID-19 in the workplace.<sup>40</sup>

Immediate, widespread vaccination against COVID-19 not only promotes workplace efficiency and reduces worker absenteeism; but it also is the surest way to protect federal contractor employees and the public and to end this costly pandemic.

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<sup>39</sup> Alyson M. Cavanaugh et al., *Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021*, 70 *Morbidity & Mortality Weekly Rpt.* 1081 (2021); Meredith Wadman, *Having SARS-CoV-2 Once Confers Much Greater Immunity Than a Vaccine — but Vaccination Remains Vital*, 373 *Science* 1067 (Aug. 26, 2021), <https://bit.ly/2YB8I08>.

<sup>40</sup> Donatella Sarti et al., *COVID-19 in Workplaces: Secondary Transmission*, 65 *Annals Work Exposures & Health* 1145 (2021), <https://bit.ly/3Cj6oJ3>.

## CONCLUSION

For the reasons stated above and in Defendants' filings, the American Medical Association urges this Court to deny Plaintiff's motion for a temporary restraining order and preliminary injunction.

Respectfully submitted,

/s/ Rachel L. Fried

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 22, 2021, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

*/s/ Rachel L. Fried*

Date: November 22, 2021