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,

Plaintiffs

v.

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

CHRISTINE J. HARADA, FAR COUNCIL CHAIR, SENIOR ADVISOR TO THE DEPUTY DIRECTOR FOR MANAGEMENT, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET,

JOHN M. TENAGLIA, PRINCIPAL DIRECTOR, DEFENSE PRICING AND CONTRACTING, UNITED STATES DEPARTMENT OF DEFENSE,

KARLA S. JACKSON, A § CASE NO.

ADMINISTRATION, §
§
JEFFREY A. KOSES, SENIOR §
PROCUREMENT EXECUTIVE, §
GENERAL SERVICES §
ADMINISTRATION, §
§
SHALANDA YOUNG, DIRECTOR §
OF OFFICE OF MANAGEMENT §
AND BUDGET, §
§
In their official capacities, §
§

Defendants.

PLAINTIFFS' COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. Plaintiffs ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER ("ABC FFC"), and ASSOCIATED BUILDERS AND CONTRACTORS ("ABC") (collectively "Plaintiffs"), by and through their undersigned counsel, for their Complaint against WILLIAM F. CLARK, CHRISTINE J. HARADA, JOHN M. TENAGLIA, KARLA S. JACKSON, JEFFREY A. KOSES, and SHALANDA YOUNG (collectively "Defendants"), herein state as follows:

NATURE OF THE ACTION

2. Plaintiffs bring this action to have declared unlawful and set aside Executive Order 14063 (the "EO"), "Use of Project Labor Agreements for Federal Construction Projects," issued by President Joe Biden on Feb. 4, 2022, 87 Fed.

Reg. 7363 (Feb. 9, 2022); as implemented by the Final Rule having the same title, promulgated

further specified in the

Parties and Standing

7. Headquartered in Jacksonville, Florida, Plaintiff ABCFFC is comprised of 180 members in the construction industry, many of whom regularly perform construction contracts for the federal government exceeding $35 million dollars, or perform subcontracts to contractors who engage in such work. ABCFFC is a separately incorporated affiliate of the national construction industry trade association Plaintiff ABC, which represents more than 23,000 member contractors and related firms both in Florida and throughout the country.

8. Together, the Plaintiffs and their members share the belief that work in the construction industry should be awarded and performed on the basis of merit, without regard to labor affiliation. Relatedly, ABCFFC and ABC share the mission of protecting the right of their members to engage in free and open competition for construction contracts, including contracts with the federal government, regardless of labor affiliation.

9. ABC members won 54% of the $205.56 billion in total value of direct prime construction contracts exceeding $35 million awarded by federal agencies

Jacksonville, 508 U.S. 656, 666 (1993) (finding standing of group members to challenge barriers erected by the government making it more difficult for the group's members to compete in the process of bidding for government contracts).

13. The PLA Rule inevitably deters identifiable ABC and ABCFFC members from bidding on federal construction projects over $35M, though they are qualified and desire to seek awards of such projects, would otherwise do so, if not for the federal government's unlawful PLA requirement. This is so not only because many member contractors and subcontractors object to signing government-mandated PLAs and associating with unions without the consent of their employees, but also because it will be extremely burdensome for such contractors to submit accurate and competitive bids for applicab-0.004 e lso bef(u)8.3u

Robins & Morton (member of ABC and multiple chapters), Brasfield & Gorrie L.L.C. (member of ABC and ABCFFC); along with prime and subcontractor M.C. Dean, Inc. (member of ABC and multiple chapters); subcontractor American Electrical Contracting, Inc. (member of ABC and ABCFFC); and small business

16. Plaintiffs' members attest that since the PLA Rule has come into effect, federal agencies have imposed the PLA mandate across the board, without exemptions which the PLA Rule purports to recognize. Plaintiffs' members attest that multiple federal agencies have either failed to conduct any market research into the availability of union workers where the projects are being performed, else have ignored information from the contractors and others demonstrating that the PLA mandate will drastically reduce competition from non-union contractors who are qualified to perform the work.

17. ABC national staff have further been informed by numerous agency officials that the inherent structure of the EO, PLA Rule and OMB guidance pose insurmountable obstacles to exempting projects from the PLA mandate, even in markets that are known to contain few if any unionized workers. As fur(na)12.1

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PLA mandate has been announced on the $2B NAVFAC SE MACC program in the Jacksonville, Florida area, even though multiple contractors have informed the government agency that the condition is both unnecessary due to the absence of any significant union presence in the market area, and will injure competition by deterring non-union contractors and subcontractors from bidding for work they otherwise would be qualified to perform.

19. The PLA mandates are by no means confined to federal construction projects in Jacksonville. On numerous projects throughout the South and across the

which the Department of Defense U.S. Army Corps of Engineers ("USACE") issued a Solicitation for construction containing a PLA mandate. Similarly, USACE's pre-solicitation for the Missile Defense Agency Ground Test Facility Infrastructure at Redstone Arsenal in Alabama that requires offerors to submit a PLA. Another Alabama project identified by members of ABC and ABCFFC, announced as imposing the PLA mandate, is the USDA Lab Annex at Auburn University. Again, agency officials either did no market research or deliberately ignored conclusive evidence that imposing a PLA mandate on the project would adversely impact economy and efficiency on the project and drastically reduce competition in a market dominated bl3.5 (P)4.5 (L)8.1 (A m)4.3 (a)3.5etfLsasoor

22. Additional examples have been attested to by identified ABC members throughout the country, and the list of federal projects subject to unjustified government-mandated PLAs grows daily as a direct result of the unlawful PLA Rule.

23. The PLA Rule also harms merit shop members of ABC and ABCFFC who have signed CBAs with unions. Most construction industry CBAs are areawide, meaning that such agreements typically cover all work in a specific area set forth in the CBA. Therefore, unionized merit shop contractors, to comply with the PLA Rule, must either sign a PLA with a new union with which they have no relationship or negotiate a new and different agreement with their current union. Either way, unionized merit shop contractors are compelled by the PLA Rule to enter new agreements under which they will have reduced bargaining power. Therefore, even ABC and ABCFFC members who do have union agreements are being deprived of contracting opportunities and irreparably harmed if the PLA Rule is allowed to stay in effect.

24. ABC members have indicated they are ready, willing and able to bid on the projects being awarded by the federal government, as they have successfully done in the past; but they will be severely disadvantaged by PLA mandates or simply cannot engage in the futile act of bidding on such projects due to the wholly

unjustified PLA requirements, especially since submitting a responsive bid costs potential bidders tens of thousands of dollars to do so.

25. The PLA Rule makes such bids futile because union contractors cannot be *awarded* such contracts unless they agree to sign a PLA and agree that they and all of their subcontractors will be bound by its terms. ABC and ABCFFC members are thereby forced to associate with unions and to compel their employees to accept unwanted representation by the unions as a condition of performing the government's construction work. And as further discussed below, the mandated PLAs impose unjustified burdens on the ABC and ABCFFC members who want to perform such projects, discussed below, putting them at a severe disadvantage in the bidding process. Therefore, ABC and ABCFFC members who otherwise want to submit bids on projects covered by the PLA Rule are being irreparably harmed by the PLA Rule, so long as it is allowed to remain in effect.

26. As noted above, identified above are ABC and ABCFFC subcontractor members who have regularly participated on projects above $35M. The PLA Rule is causing such subcontractors to lose access to large federal construction projects, as the subcontractors work

publicly available information regarding the imposition of PLA mandates on many projects in this District and around the country impacting identified ABC and ABCFFC members.

30. For all the reasons alleged above, ABC and ABCFFC have associational standing to bring this action on behalf of their irreparably harmed members, and therefore do not have to establish direct standing. *Hunt*, 432 U.S. at 343. ABC and ABCFFC nevertheless each have direct standing to bring this action because the EO, PLA Rule, and OMB action are 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, jobsite safety, and advancement of free and open competition throughout the construction industry, in order to challenge the unlawful PLA Rule and EO, as well as to advise and assist members as to their (limited) options with regard to compliance with the PLA Rule. *See Plaintiffs v. Kemp,* 2023 U.S. Dist. LEXIS 144918, at *55-56 (N.D. Ga. Aug. 18, 2023) (plaintiff organization established organizational injury because it had to divert its resources).

31. The dispute here is also ripe for review as it raises pure questions of law that are fit for judicial review, and Plaintiffs are already 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). Indeed, the Eleventh Circuit has

concluded that a claim may be ripe even where some future contingent event could cause the plaintiff to not suffer an injury. *See Mulhall v. United Here Local 355*, 618 F.3d 1279, 1291 (11th Cir. 2010). In any event, Plaintiffs' members are being injured now and are entitled to injunctive relief.

32. Defendant William F. Clark is Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy at the General Services Administration. Defendant Clark is chair of the Civilian Agency Acquisition Council, which aids the Administrator of General Services by reviewing or developing all changes to the FAR. Defendant Clark signed the PLA Rule in the Federal Register. Defendant Clark is sued in his official capacity and the relief sought extends to all of his successors.

33. Defendants Christine J. Harada, John M. Tenaglia, Karla S. Jackson, and Jeffrey A. Koses are members of the FAR Council. The FAR Council is a federal agency charged with assisting in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government, in accordance with the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq*. As noted above, the FAR Council published the PLA Rule in the Federal Register. Defendants Harada, Tenaglia, Jackson, and Koses are sued in their official

circumstances relating to the enforcement of the challenged PLA mandate are taking place in this district, as set forth above.

Government-Mandated Project Labor Agreements Defined

38. As defined in the PLA Rule, a PLA is "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project."[5] As further stated in the PLA Rule: "Requiring a PLA means that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations."[6]

39. PLAs originated at a time when the overwhelming majority of

construction industry's workforce is now unionized, according to the government's

employees pursuing federal government contracts, all without any demonstrable increase in economy and efficiency in government contracting.[15]

45. In September 2022, ABC conducted a survey of its contractor members about government-mandated PLAs and the FAR Council's proposed rule.[16] 99% of respondents said they would be less likely to begin or continue bidding on federal contracts if the proposed rule is finalized and 97% said that government-mandated PLAs decrease economy and efficiency in government contracting.

46. 97% 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% of small businesses stated PLAs decrease hiring of minority, women, veteran and disadvantaged business enterprises."[17]

Federal Government PLA Policies Prior To The PLA Rule

47. Prior to the issuance of the PLA Rule, no President has ever claimed authority to impose a restrictive government-wide mandate requiring federal

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[15] AR, ABC Comments at 5, 15, 22. *See also Government-Mandated PLA Studies*, BUILD AMERICA LOCAL, https://buildamericalocal.com/learn-more/#gmpla-studies (last visited Mar. 8, 2024).

[16] *Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive*, ABC NEWSLINE, Sept. 28, 2022, 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

construction contractors to sign project labor agreements with labor unions as a

effectively discourage or exclude contractors from the pool of potential bidders or offerors. As the CICA states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition."[19]

49. Consistent with CICA, Congress has long prohibited the federal government from requiring employers to enter into any project 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 that the 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).

50. Since enactment of the CICA in 1984, no President has attempted to impose an across-the-board mandate of PLAs on federal contracts, until now.

51. President George H.W. Bush issued the first Executive Order dealing with PLAs, EO 12818 (Oct. 23, 1992), *prohibiting* government agencies from requiring the use of PLAs by any parties to federal construction projects.

52. President Clinton revoked the Bush Executive Order in 1993 and issued a Presidential Memorandum in 1997 to "encourage" the use of PLAs on a case-by-case basis.

53. In 2001, President George W. Bush issued EO 13202 and EO 13208.

[19] *Id.* at 18, citing 10 U.S.C. § 2305(a)(1)(A) and 41 U.S.C. § 253a(a)(1)(A). *See also* William S. Cohen,

The EOs enacted a new federal government policy of PLA neutrality, which prohibited government-mandated PLAs on federal and federally assisted construction projects, but made it clear that contractors were free to voluntarily enter into a PLA without government interference.

54. President Obama revoked the Bush EOs in 2009 and replaced them with EO 13502 which again encouraged

for the first time ever that federal agencies "shall" require contractors and subcontractors to negotiate or become parties to PLAs for federal construction contracts valued at $35 million or more. EO 14063, §§ 2-3.

57. The EO further requires such PLAs to bind all contractors and subcontractors on an applicable project. The EO purports to allow all contractors and subcontractors to compete for contracts and subcontracts regardless of whether they have previously negotiated collective bargaining agreements, but only if they agree to sign a PLA covering all their workers in the project as a condition of being awarded the work. The mandated PLAs must prohibit strikes, lockouts, and other comparable job disruptions; include labor dispute resolution procedures; provide for labor-management cooperation on relevant issues; and otherwise comply with applicable law. EO 14063, § 4.

Register its Notice of Proposed Rulemaking to implement the President's EO. *See* 87 Fed. Reg. 51044. On December 22, 2023, following public comment, including opposition filed by ABC on behalf of its chapters and members, the FAR Council published in the Federal Register a largely unchanged version of the original proposal as the final PLA Rule that is being challenged in this Complaint. 88 Fed. Reg. 88708 (Dec. 22, 2023).

60. As called for by the EO, but in violation of the Constitution and other applicable laws, the FAR Council's new PLA Rule requires federal contractors and subcontractors for the first time to enter into PLAs as a condition of being awarded work on federal construction projects valued at more than $35 million.

61. Section 22.505 of the PLA Rule makes clear that upon notification from the agency of intent to place an order covered by the EO, "[t]he Contractor shall...[n]egotiate or become a party to a project labor agreement with one or more labor organizations for the term of

the terms and conditions of a PLA, which effectively prevent contractors from preserving their nonunion status during the

out of 3,222

three) and the low bidder's offer was $6,247,000 (16.47%) less than the next lowest PLA bidder. In addition, firms who participated in both rounds of bidding submitted offers that were nearly 10% less than when the same firms submitted bids with a PLA. Without a PLA, a local firm from New Hampshire won the contract and performed it without incident to the satisfaction of the DOL.[24]

71. In response to numerous concerns in the AR about the impact of PLA mandates on non-union contractors, the Defendants improperly sought to minimize such concerns by stating that parties can simply negotiate for certain provisions in PLAs and by stating that PLAs may not necessarily include objectionable provisions. *E.g.*, 88 Fed. Reg. 88710, 88713-88716. Defendants contended that "there is no data to suggest...bad faith bargaining by unions." 88 Fed. Reg. 88712.

construction contract by the General Services Administration

contractors propose. *Id.*

75. In apparent violation of the CICA, the OMB Memorandum indicates that "[a] likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage" and further indicates that generally, "two or more qualified offers is sufficient to provide adequate price competition for negotiated contracts." Memorandum M-24-06, at 67.

COUNT ONE

The EO, the New PLA Rule, and the OMB Memorandum, Separately and Together, Are Unlawful Because They Exceed The Authority of the Executive Branch Under the Procurement Act

76. The previous paragraphs 1-75 are incorporated by reference as if set forth fully herein.

77. The EO, PLA Rule and OMB Memorandum are impermissible *ultra vires* actions by the President, that are being carried out by other executive officers, *i.e.*, the FAR Council and OMB here.

78. The FPASA, also known as the Procurement Act, is designed to provide the Federal Government with an economical and efficient system for procurement activities. *See* 40 U.S.C. E11S.008 0 Tc 0 Tw 1.248 1 6[3u0 T( )Tj /T

Georgia, 46 F.4th at 1294 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979)); *see also Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

79. This Circuit has further concluded that "[t]he President must stay within the confines of [FPASA], of course; but his actions must also be consistent with the policies and directives that Congress included in the statute," which "include the rule that agencies must 'obtain full and open competition' through most procurement procedures." *See Georgia*, 46 F.4th at 1294. "[I]mposing more criteria than necessary works against [FPASA's] repeated priority of achieving 'full and open competition' in the procurement process." *See id.* at 1297.

80. Analysis under the major questions doctrine further reveals that the President, FAR Council, and OMB lacked authority to issue the EO, PLA Rule, and OMB Guidance, 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)

81. As noted above, no president has previously claimed the authority under the FPASA to mandate PLAs on federal construction projects throughout the government. Such an unprecedented arrogation of authority to the Executive Branch violates the Constitution in a manner squarely prohibited by the U.S. Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *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 the FPASA); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (same).

82. Major questions appear in the federal contractor context where, as here, a government action impacts contracts and solicitations "across broad procurement categories" and "is no everyday exercise of federal power." *See Georgia*, 46 F.4th at 1295-96

83. In issuing the EO, the President has ignored the boundaries of the authority Congress delegated him in the FPASA; and invalidly seeks and exercises authority Congress explicitly refused to grant the President. Such action exceeds the President's statutory authority and is therefore contrary to law and invalid.

84. The President's unlawful EO has been enforced by his officers. The FAR Council, a federal agency operating within the Executive Branch, has implemented the President's unlawful EO by issuing the new Rule. Further, OMB has implemented the unlawful EO by issuing the OMB Memorandum. Therefore, the EO may be challenged by Plaintiffs. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (permitting a challenge to the constitutionality of an executive order based on the DOL's implementation of a rule enforcing the unconstitutional executive order); *see also Associated Builders and Contractors of*

Southeast Texas v. Rung, 2016 U.S. Dist. LEXIS 155232 (E.D. TX 2016) (enjoining Executive Order and FAR Council rule unlawfully imposing labor reporting requirements on federal government contractors).

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

86. In promulgating the PLA Rule, the FAR Council has ignored the boundaries of the authority Congress delegated it in the OFPP Act; and invalidly seeks and exercises authority Congress explicitly refused to grant Defendants. Such action exceeds the FAR Council's statutory authority and is therefore contrary to law and invalid.

COUNT TWO

The EO and PLA Rule Violate the Plain Language of the CICA

87. The previous paragraphs 1-75 are incorporated by reference as if set forth fully herein.

88. As noted above, Congress passed the CICA, 41 U.S.C. § 3301, to require that all federal agencies awarding government contracts "shall obtain full and open competition through the use of competitive procedures." Of particular

significance to the proposed rule, CICA expressly bars federal agencies from using restrictive bid specifications to "effectively exclude" contractors from the pool of potential bidders or offerors.[26] As the Act states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition." *Id.*; *see Georgia*, 46 F.4th at 1294, 1297.

89. Contrary to the CICA, it is clear that the EO, PLA Rule, and OMB Memorandum mandate the government-wide imposition of restrictive bid specifications – requiring that all prospective bidders agree to enter into PLAs as a condition of being awarded and performing the work being bid. This unauthorized restrictive bid specification unquestionably discourages and/or excludes a significant percentage of contractors from the pool of potential bidders or offerors, and defeats CICA's goal of achieving full and open competition.

90. The OMB Memorandum is further contrary to CICA, as it states "[a] likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage" and further indicates that generally, "two or more qualified offers is sufficient to provide adequate price competition for negotiated contracts." Memorandum M-24-06, at 6-7.

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COUNT THREE

The PLA Rule and OMB Guidance are Arbitrary and Capricious in Violation of the APA and/or Independently Violate the OFPP

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1913 (2020). An agency's action is arbitrary and capricious where it fails to consider important aspects of the problem and offers explanations for its new rule

collective bargaining agreements as a condition of being awarded work by the federal government.

96. OMB promulgated the OMB Memorandum 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) (finding OMB violated the APA where it issued binding guidance to the FAR Council without following the notice and comment requirements of the OFPP)

97. For these reasons as well, the PLA Rule must be held unlawful and set aside.

COUNT FOUR

The PLA Rule and EO Violate Plaintiffs' Free Association Rights Under the First Amendment

98. The previous paragraphs 1-75 are incorporated by reference as if set forth fully herein.

99. First Amendment protections apply to government contracts. More specifically, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests," such as "his constitutionally protected ... associations." *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Associated Builders & Contrs. of S.E. Tex. v. Rung*, 2016 U.S. Dist. LEXIS 155232, at *32 (E.D. Tex. Oct. 24, 2016) (*White v. Sch. Bd. of Hillsborough County*

Wrigley, 540 F. Supp. 3d 1220, 1222 (N.D. Ga. 2021).

100. Further, the government may not restrict First Amendment rights "as the price of maintaining eligibility to perform government contracts." *See Associated Builders & Contrs. of S.E. Tex.*, 2016 U.S. Dist. LEXIS 155232, at *32

101. The Supreme Court has concluded that 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 v. United Here Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010). Thus, compelled association with a union implicates the First Amendment's freedom not to associate. *See Mulhall*, 618 F.3d at 1287.

102. "[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).

103. The challenged PLA Rule infringes on Plaintiffs' freedom of association by requiring ABC and ABCFFC members to associate with unions as a prerequisite to bidding on and/or performing contracts that the PLA Rule covers. In addition, the PLA Rule requires ABC and ABCFFC members to compel their employees to associate with unions as a condition of award of construction work,

thereby forcing th

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rule on small businesses and to consider less burdensome alternatives. This analysis also requires the agency to respond 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)(3). The final regulatory analysis must "demonstrate a 'reasonable, good-faith effort' to fulfill [the Regulatory Flexibility Act's] requirements." *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 88-89 (D.C. Cir. 2001); *see also Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997) ("Congress, in enacting section 604, intended to compel administrative

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contracts to small businesses. 15 U.S.C. § 637(d), 644(g).

114. The majority of ABC members are small businesses, yet, the PLA Rule, as implemented by the OMB Memorandum, will drastically reduce the participation of small businesses on large-scale federal construction contracts. Specifically, the PLA rule imposes additional burdens on small businesses and disparately impacts small businesses, as most small contractors and subcontractors are not unionized. ABC members identifying as small businesses have indicated that the PLA Rule would deter them from bidding on large-scale federal construction contracts. ABC Comments. *See also* SBA Comments, at 2-3.

115. The PLA Rule also violates the Regulatory Flexibility Act by failing to properly respond to the comments filed by the Small Business Administration in response to the proposed rule as required under 5 U.S.C. § 604(a)(3).

116. The Small Business Administration's Office of Advocacy noted the following concerns with the PLA Rule in its Comments: that it would deter small businesses from bidding on contracts that the PLA Rule covers; that it raises compliance costs; that the PLA Rule underestimates the small business impact of the PLA Rule; that it requires small businesses to unionize even though small businesses cannot absorb such costs; that it conflicts with President Biden's goal of increasing the number of small business owners in the federal marketplace; and

have not been contacted by the FAR Counca 3.4 (AR 63.4 nc)4.3OM Ca 3.4 o

Dated March 28, 2024

Respectfully submitted,

/s/Kimberly J. Doud

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