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November 5, 2021

Via mail and email to:

Mr. John R. Scannell; Mr. Donald R. Fishback; Ms. Janet M. Coletti; Mr. William G. Gisel Jr.; Mr. Peter J. Gundermann; Mr. Kraig H. Kayser; Mr. R. Bradley Lawrence; Mr. Brian J. Lipke; and Ms. Brenda L. Reichelderfer
Moog, Inc,
East Aurora, NY 14052-0018

RE: Challenge to the Federal Contractor Vaccine Mandate

Dear Members of Moog's Board of Directors:

We have been retained to represent a group of Moog employees/shareholders (our "Clients") to oppose Moog's decision to comply with the Biden Administration's recent vaccine mandate for employees who work for federal government contractors and subcontractors (the "Contractor Vaccine Mandate"). Our Clients have asked us to write this letter to you in an effort to explain the legal arguments against the Contractor Vaccine Mandate, and hopefully to persuade you that it would be in Moog's best interest to join our Clients in litigation, instead of acquiescing to the federal government's deeply flawed mandate.

The procedure used to issue the Contractor Vaccine Mandate was illegal. The Contractor Vaccine Mandate was rushed through, by the Office of Management and Budget ("OMB"), in violation of the Federal Acquisition Regulator Council's (the "FAR Council") exclusive authority to create such "[g]overnment-wide procurement regulation[s]." *See* 41 U.S.C. § 1303(a)(1)-(2).

This rushed process also violated 41 U.S.C. § 1707(a)-(b), which requires that the federal government provide a notice and comment period before any procurement regulation takes effect. While there is an exception for "urgent and compelling circumstances" (*see id.* at § 1707(d)), any argument to this effect has been completely undermined by the federal government's announcement that it is delaying the effective date of the Contractor Vaccine Mandate until January 4, 2022. This announcement is nothing less than an admission by the federal government that there are no "urgent and compelling circumstances" for the Contractor Vaccine Mandate.

Nineteen states, in four separate lawsuits, have argued that the Contractor Vaccine Mandate should be invalidated for these procedural failings (and upon numerous other independent grounds).[1]

These procedural problems are not simply failures to properly dot the i's and cross the t's, but instead betray that the Contractor Vaccine Mandate is primarily driven by a political goal to encourage universal vaccination, and not by true concern about protecting the federal government's supply chain.

If a notice and comment period was held, then the federal government would have had to confront the large amount of evidence that is quickly amassing, which shows: (i) the protection offered by the vaccine is incomplete to variants; (ii) the protection offered by the vaccine wanes in as little as six months; (iii) that natural immunity provides more complete protection to COVID-19 than the vaccine because natural immunity teaches the body to respond to the entire COVID viral structure, unlike the vaccines which only teach the body to target the specific spike protein of the original variant of COVID; and (iv) that natural immunity persists longer than vaccine immunity, potentially for a lifetime.[2] A court is unlikely to excuse the calculated avoidance of a notice and comment period that allowed the federal government to avoid confronting this scientific evidence, particularly after the federal government extended the deadline for compliance with the Contractor Vaccine Mandate in a manner that would have easily allowed for such a notice and comment period to have been held.

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[1] Lawsuit have been brought by (i) Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia; (ii) Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming; (iii) Florida; and (iv) Texas.

[2] A compilation of more than 100 studies evidencing these facts is available at: https://brownstone.org/articles/79-research-studies-affirm-naturally-acquired-immunity-to-covid-19-documented-linked-and-quoted/

Indeed, many Moog workers have developed natural immunity over the course of the last 18 months of the pandemic. For these workers, significant evidence suggest may be no benefit whatsoever to vaccination. At the same time, scientific research is showing that those with natural immunity are much more likely to have adverse reactions to vaccination, above and beyond the extensively documented adverse impacts that have occurred after vaccination.[3]

In sum, by agreeing to the Contractor Vaccine Mandate, Moog may very well be needlessly demanding that its naturally immune employees expose themselves to the potentially serious side effects of the vaccine for no benefit whatsoever. Obviously, requiring valuable and critical employees to expose themselves to any health risk in the absence of a tangible benefit does not make sense from a business perspective, and could invite additional litigation.

Moreover, the problems with the Contractor Vaccine Mandate go well beyond its procedural shortcomings. In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905), the Supreme Court upheld a Massachusetts vaccine mandate because "[a]ccording to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." While many COVID-19 regulations have relied on this ruling for authority during the pandemic, here *Jacobson* highlights the problems with the Contractor Vaccine Mandate.

First, the Contractor Vaccine Mandate is being issued by the federal government, which, unlike state governments, does not have any general police power that could be said to embrace mandating vaccines. The 19 states which have sued against the Contractor Vaccine Mandate have noted this issue in their lawsuits. *See* footnote 1, *supra*.

Second, the Contractor Vaccine Mandate cannot be said to be reasonable because it does not account for natural immunity, contrary to the scientific evidence that such natural immunity is superior, or at least equivalent, to vaccine immunity. And it was particularly unreasonable for the federal government to take calculated steps to avoid notice and comment, so that it did not even need to confront evidence as to the effectiveness of natural immunity.

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[3] *See, e.g.* , Menni, et al., *Vaccine side-effects and SARS-CoV-2 infection after vaccination in users of the COVID Symptom Study app in the UK: a prospective observational study*, available at: https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00224-3/fulltext (finding that vaccine "side-effects were [160% to 290%] more common … among individuals with previous SARS-CoV-2 infection than among those without known past infection.").

Third, the Contractor Vaccine Mandate does not flow naturally from any existing legislative enactment, given that Congress has been conspicuously silent on any such COVID-19 vaccine mandates. The Contractor Vaccine Mandate is nothing less than a brazen attempt to utilize procurement law to enact public health policy.

Indeed, if the federal government attempts to argue (honestly) that the Contractor Vaccine Mandate is part of public health initiative to maximize the vaccination rate, it will be doing nothing less than admitting it is attempting to use procurement policy to illegally and/or unconstitutionally make public health policy, without the consent of Congress. *See* 40 U.S.C. § 121(a) (providing that procurement "policies must be consistent with" the purpose of the Procurement Act); 40 U.S.C. § 101(1) (providing that the limited "purpose of [the Procurement Act] is to provide the Federal Government with an economical and efficient system for … [p]rocuring and supplying property and nonpersonal services, and performing related functions").

Accordingly, there is simply no way to characterize the Contractor Vaccine Mandate as being consistent with the intent of any statute it claims to rely on for its authority. Thus, Contractor Vaccine Mandate should be found to be impermissible law-making by the executive branch, and therefore, void under numerous doctrines of statutory construction and constitutional separation of powers principles. *See, e.g., King v. Burwell*, 576 U.S. 473, 474 (2015) (holding that if "Congress wished to assign" a question of "deep economic and political significance [as the Contractor Vaccine Mandate clearly is] … to an agency, it surely would have done so expressly.")

Additionally, it is far from a strong argument that federal government has any legitimate procurement interest in the Contractor Vaccine Mandate given (i) the high survival rate for working age adults and (ii) given the extensive amount of natural immunity amongst unvaccinated workers. When this argument is further examined in the context of the fact that contractors are likely to lose more employees as a result of individuals resigning in opposition to this mandate than they would lose as a consequence of COVID-19 infections, it quickly becomes apparent that the federal government is actually undermining the strength of its supply chain, not protecting it, with this Contractor Vaccine Mandate.

Finally, a court cannot ignore that this regulation presents employees with a Hobson's Choice regarding their constitutionally protected rights. Employees must sacrifice their constitutional rights of bodily autonomy and medical privacy—by both getting vaccinated against their wishes and disclosing their vaccination status—in order to keep their job. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 929 (1992) (citing *Griswold v.*

Connecticut, 381 U.S. 479, 485 [1965]) ("The Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest."); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 304–05 (1990) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 [1934]) ("Freedom from unwanted medical attention is unquestionably among those principles so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 129 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body.") (CARDOZO, J.).

Because such deprivations of fundamental rights are at issue, the federal government is required to demonstrate that the Contractor Vaccine Mandate is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Cruzan*, 497 U.S. at 303 (citing *Zablocki v. Redhail,* 434 U.S. 374, 388 [1978]); *see also Planned Parenthood of Se. Pennsylvania*, 505 U.S. at 929, *supra*.

Accordingly, the federal government must make the argument that the Contractor Vaccine Mandate is "closely tailored" to its interest in the continuity of its supply chain. The Contractor Vaccine Mandate cannot be said to be closely tailored to the federal government's supply chain interests because it ignores equally effective means of protecting its supply chain, such as providing an exemption for natural immunity or a test-out option.[4]

All the above demonstrates the multiplicity of problems with the Contractor Vaccine Mandate, each of which provides an independent argument for nullifying this regulation.

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[4] Conversely, the OSHA mandate on employers with more than 100 employees requires employors to ensure each of their workers is fully vaccinated ***or*** tests for COVID-19 on at least a weekly basis. While still ignoring naturally immunity, the OSHA mandate is at least more closely tailored than the Contractor Vaccine Mandate in this respect. *See* https://www.osha.gov/sites/default/files/covid-19-healthcare-ets-reg-text.pdf

In light of the extensive legal bases to challenge the Contractor Vaccine Mandate, our Clients are requesting that Moog have its legal team review this letter and that Moog agree to join our Clients in a lawsuit against the Contractor Vaccine Mandate.

Such a course of action would show that Moog is committed to the rights of its employees, and moreover, would be in the best interest of Moog's shareholders.

Just at Moog's Buffalo facilities, there are hundreds of unvaccinated employees. Many of these employees have natural immunity and many are religiously/morally opposed to being forced to receive these vaccines against their will. Losing hundreds of employees would cripple Moog's ability to fulfill its contracts, including its federal government contracts. In other words, by acceding to the federal government's illegal and unconstitutional Contractor Vaccine Mandate, Moog is likely jeopardizing its business operations just as much as if it were to lose federal contracts for failing to comply with this Mandate.

If Moog does not agree to participate in such a lawsuit, our Clients reserve the right to bring their own lawsuit against the federal government to challenge the Contractor Vaccine Mandate, together with shareholder lawsuits against Moog directors and officers for this patently bad business decision that threatens to destroy significant shareholder value by causing hundreds of valuable employees to needlessly leave Moog, massively disrupting Moog's operations and compromising its profitability in the process.

Please contact us by close of business on Wednesday, November 10, 2021 and let us know whether Moog is willing to stand with their employees and join this lawsuit.

Thank you for your prompt attention to this important matter.

Sincerely,

/s/ Ralph C. Lorigo
Ralph C. Lorigo, Esq.

/s/ Todd J. Aldinger
Todd J. Aldinger Esq.