

EXECUTIVE ORDER NO.

2021-38

WHEREAS, the State of South Carolina has made significant and sustained progress in addressing the 2019 Novel Coronavirus (“COVID-19”), and the State must continue to take appropriate and narrowly tailored actions to confront the public health and other impacts associated with COVID-19; however, the State must simultaneously guard against unwarranted, unprecedented, and unlawful efforts by the federal government to expand federal authority and intrude upon the sovereign interests of the State and the recognized rights and liberties of South Carolinians; and

WHEREAS, on May 22, 2021, the undersigned issued Executive Order No. 2021-25, declaring the last State of Emergency in connection with COVID-19, which expired by its terms on or about June 6, 2021; and

WHEREAS, although COVID-19 continues to impact the State of South Carolina, the State has noted and documented substantial improvements in the key indicators, metrics, and data elements used to assess the measure of impact from COVID-19, which are due in large part to the availability of authorized COVID-19 vaccines, as well as the continued diligence, resilience, and persistence of South Carolinians in making responsible choices to protect themselves and their communities; and

WHEREAS, throughout the State of South Carolina’s response to COVID-19, the undersigned has consistently noted that government mandates of any kind are disfavored and should be utilized only as a matter of last resort and in the most extraordinary of circumstances and has underscored that any government action must be limited, both in time and in scope, and narrowly tailored to address specific threats and emergency circumstances; and

WHEREAS, the undersigned has repeatedly emphasized that the proper role of government ordinarily should be to educate, inform, communicate to encourage certain conduct and that government, at any level, should take care to avoid coercing or compelling private action and should resist any temptation to impose unnecessary mandates on individuals that burden or fail to account for recognized rights and liberty interests; and

WHEREAS, consistent with the foregoing, in the context of vaccines, the undersigned has encouraged, and will continue to encourage, eligible individuals who wish to receive a COVID-19 vaccine to do so, but the undersigned has repeatedly noted that the State of South Carolina would not and should not mandate that individuals receive such vaccines; and

WHEREAS, since December 2020, the South Carolina Department of Environmental Control (“DHEC”) and its public and private partners have administered over 5,200,000 doses of vaccines for COVID-19, which remain available to the public at no cost, and as of the date of this Order, over 55% of eligible South Carolinians are fully vaccinated; and

WHEREAS, as a result of the aforementioned efforts, DHEC continues to document consistent downward or declining trends associated with the average rate of cases of COVID-19 per 100,000 individuals, the percentage of positive tests for COVID-19, and the number of new hospital admissions and deaths associated with or related to COVID-19; and

WHEREAS, for the foregoing reasons, it has been the policy of the undersigned’s Administration to communicate that medical experts have regarded the COVID-19 vaccines as safe and effective at mitigating the risk of serious infection, hospitalization, and death and to encourage eligible individuals who wish to receive a COVID-19 vaccine to do so but to oppose coercing or requiring such action; and

WHEREAS, governmental entities should not compel proof, certification, documentation, or disclosure of an individual’s COVID-19 vaccination status, whether by mandating what has been characterized as a “vaccine passport” or otherwise, for purposes of conditioning receipt of services or assistance or restricting employment opportunities or access to any building, structure, facility, or other physical or geographic location based on an individual’s COVID-19 vaccination status; and

WHEREAS, notwithstanding the aforementioned progress in addressing COVID-19, President Joseph R. Biden, Jr. and his Administration (collectively, “Biden Administration”) recently announced plans for the Executive Branch of the federal government to mandate, unilaterally and without legislative authorization, onerous and unprecedented vaccination policies, which would purportedly apply in a multitude of contexts and to various categories of individuals and businesses, including federal employees, federal contractors, healthcare providers, and businesses with 100 or more employees; and

WHEREAS, on September 9, 2021, President Biden issued Executive Order No. 14042, titled *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, which purported to provide the Safer Federal Workforce Task Force, the Office of Management and Budget, and the Federal Acquisition Regulatory Council broad authority to impose vaccine mandates on federal contractors; and

WHEREAS, the Safer Federal Workforce Task Force has since issued multiple sets of guidance regarding Executive Order No. 14042, without publishing the same in the Federal Register for review and public comment; and

WHEREAS, on September 28, 2021, the Office of Management and Budget, pursuant to Executive Order 14042, published *Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042*, without including any research or data in support of its claims and without providing any opportunity for notice and comment; and

WHEREAS, on September 30, 2021, the Federal Acquisition and Regulatory Council issued Class Deviation 252.233-7999, which purports to require federal contractors to follow all guidance from the Safer Federal Workforce Task Force and any amendments to the same; and

WHEREAS, on November 4, 2021, the Occupational Safety and Health Administration (“OSHA”) issued an emergency temporary standard (“ETS”) purporting to require covered businesses or entities that employ 100 or more employees to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to elect either to get vaccinated or to undergo regular COVID-19 testing and wear a face covering at work; and

WHEREAS, the Biden Administration’s recently announced, issued, and anticipated federal vaccine mandates are premised on dubious or non-existent legal grounds and pose a significant threat to the State of South Carolina’s continued economic prosperity and workforce and risk jeopardizing public health by increasing vaccine skepticism and hesitancy; and

WHEREAS, the United States Constitution does not authorize or empower the federal government to mandate vaccinations on an individual or nationwide basis in the manner announced by the Biden Administration, and for the reasons set forth herein, the State of South Carolina will not impose such a requirement on the people of this State using the police power that is reserved to the States in accordance with the United States Constitution and under the system of federalism established thereby; and

WHEREAS, both the United States Constitution and the South Carolina Constitution, as well as the judicial precedent interpreting the same, recognize that the sovereign police power and authority to regulate and provide for the health, safety, and welfare of the people—to include, in certain limited circumstances, any authority to compel vaccinations subject to proper exemptions—rests with the States and was not delegated to the federal government; and

WHEREAS, while the undersigned will continue to encourage individuals who wish to receive a COVID-19 vaccine to do so, some have raised objections, reservations, and concerns based on their specific medical situation or condition and on account of sincerely held religious beliefs, observances, and practices; and

WHEREAS, the rights of individuals to exercise, practice, and observe their sincerely held religious beliefs without interference are guaranteed by, *inter alia*, the First Amendment to the United States Constitution and article I, section 2 of the South Carolina Constitution and protected by the Religious Freedom Restoration Act (“RFRA”), codified as amended at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4, as well as the South Carolina Religious Freedom Act (“RFA”), codified in sections 1-32-10 through -60 of the South Carolina Code of Laws, which provides, in relevant part, that “[t]he State may not substantially burden a person’s exercise of religion, even if

the burden results from a rule of general applicability,” unless the burden furthers a compelling state interest and is applied in the least restrictive means of furthering that interest; and

WHEREAS, both the undersigned and the Attorney General, on behalf of the State of South Carolina, have already joined as plaintiffs in a federal lawsuit challenging the constitutionality and legality of Executive Order No. 14042 and related actions by federal agencies, departments, and officials, which is currently captioned as *State of Georgia, et al. v. Joseph R. Biden, et al.*, Civil Action No. 1:21-cv-00163-RSB-BKE (S.D. Ga.); and

WHEREAS, the State of South Carolina is also actively preparing to join with other States in challenging the ETS issued by OSHA earlier today to ensure that the Biden Administration’s unlawful, unwarranted, and unprecedented efforts to utilize and expand federal authority do not intrude or encroach upon the sovereign interests of the State of South Carolina and infringe upon the recognized rights and liberty interests of its people and businesses; and

WHEREAS, as the Biden Administration continues to issue unprecedented and unwarranted vaccine mandates, additional legal challenges will be necessary to restrain, enjoin, or otherwise stop this egregious federal overreach, and it is imperative that the State of South Carolina and its agencies, departments, and officials cooperate and assist with the undersigned and the Attorney General in supporting current and future litigation challenging the Biden Administration’s vaccine mandates; and

WHEREAS, because it is the stated policy of the undersigned’s Administration to encourage voluntary vaccination against COVID-19 while recognizing that federal vaccine mandates represent an unwarranted and unprecedented intrusion upon the sovereign interests of the State of South Carolina and the private rights of individuals to govern their own affairs and to make personal healthcare decisions, in addition to assisting with current and future challenges to the Biden Administration’s vaccine mandates, state agencies, departments, and officials should also continue to set an example by encouraging, but not requiring, COVID-19 vaccinations for its employees and contractors; and

WHEREAS, in furtherance of the foregoing principles, policies, initiatives, and activities, the undersigned has determined that it is necessary and appropriate to take additional proactive action to support ongoing and anticipated legal challenges to the Biden Administration’s vaccine mandates and to ensure that the Biden Administration’s actions do not unlawfully and adversely impact the State of South Carolina; and

WHEREAS, the South Carolina Constitution expressly provides that the Governor of the State of South Carolina is vested with “[t]he supreme executive authority of this State” and that he “shall take care that the laws be faithfully executed,” S.C. Const. art. IV, §§ 1, 15; and

WHEREAS, in recognition of the aforementioned authority, article IV, section 17 of the South Carolina Constitution states that “[a]ll State officers, agencies, and institutions within the Executive Branch shall, when required by the Governor, give him information in writing upon any subject relating to the duties and functions of their respective offices, agencies, and institutions, including itemized accounts of receipts and disbursements”; and

WHEREAS, section 1-1-840 of the South Carolina Code of Laws, as amended, similarly authorizes the Governor to “call upon any department or institution at any time for such special reports as may be deemed in the interest of the public welfare”; and

WHEREAS, section 1-3-10 of the South Carolina Code of Laws, as amended, also requires that “[t]he departments, bureaus, divisions, officers, boards, commissions, institutions and other agencies or undertakings of the State, upon request, shall immediately furnish to the Governor, in such form as he may require, any information desired by him in relation to their respective affairs or activities”; and

WHEREAS, it is axiomatic that the undersigned’s Executive Orders shall have the force and effect of law, *see* S.C. Code Ann. § 1-23-100; *Amisub of S.C., Inc. v. S.C. Dep’t of Health & Env’t Control*, 407 S.C. 583, 600, 757 S.E.2d 408, 417 (2014); *see also Com. of Va. v. Cannon*, 228 F.2d 313, 315 (4th Cir. 1955) (noting that courts “must look to the proclamations of the Governors to determine what the policy of the state was [and] that these have the effect of statutory enactments”); and

WHEREAS, for the aforementioned and other reasons, and in recognition and furtherance of the undersigned’s authority and responsibility to “take care that the laws be faithfully executed” and to provide for and ensure the health, safety, security, and welfare of the people of the State of South Carolina, the undersigned has determined that it is necessary and appropriate for the State of South Carolina to take additional proactive action to challenge and oppose current and future efforts by the Biden Administration to impose unwarranted, unprecedented, and unlawful vaccine mandates and that the agencies, departments, and officials of the State shall cooperate and assist with ongoing and anticipated legal challenges to ensure that the Biden Administration’s actions do not unlawfully and adversely impact the State of South Carolina.

NOW, THEREFORE, by virtue of the authority vested in me as Governor of the State of South Carolina and pursuant to the Constitution and Laws of this State and the powers conferred upon me therein, I hereby order and direct as follows:

Section 1. Directive to Cooperate and Assist with Litigation Challenging the Biden Administration’s Vaccine Mandates

A. I hereby authorize and direct agencies, departments, officials, and employees of the State of South Carolina, as further defined herein, to cooperate with and assist, to the maximum extent possible, the undersigned, the Office of the Governor (“Office”), and the Attorney General in furtherance of ongoing and anticipated litigation initiated by or involving the State of South Carolina to challenge, as necessary and appropriate, any current or future COVID-19 vaccination requirement or mandate announced, issued, promulgated, initiated, or enforced by the Biden Administration or any federal agency, department, or official that purports to apply to individuals, private employers, or state or local government agencies, departments, or officials in the State of South Carolina.

B. In accordance with article IV, section 17 of the South Carolina Constitution and sections 1-1-840 and 1-3-10 of the South Carolina Code of Laws, I hereby deem and determine it is in the interest of the public welfare for the State of South Carolina to ensure that the South

Carolina Constitution and the South Carolina Code of Laws are duly executed and enforced rather than encroached upon or subverted through federal overreach and to remain vigilant against and prepared to challenge any current or future unlawful or *ultra vires* actions by the Biden Administration, or any federal agencies, departments, or officials, that threaten, restrict, commandeer, or encroach upon the sovereign interests of the State of South Carolina or infringe upon the recognized rights and liberty interests of its people and businesses.

C. Pursuant to the cited authorities and other applicable law, I hereby authorize and direct that all agencies, departments, officials, and employees of the State of South Carolina, as further defined herein, shall immediately notify the undersigned, via the Office's Chief Legal Counsel or his designee, and the Attorney General, or his designee, of any notice or communication from the Biden Administration, or any federal agency, department, or official, that purports to require that any state official or employee submit to any COVID-19 vaccination mandate or that purports to require that any state official or employee enforce any COVID-19 vaccination mandate under color of state law. Any state agency, department, official, or employee that receives such a notice or communication from the Biden Administration, or any federal agency, department, or official, shall immediately furnish a copy to the undersigned, via the Office's Chief Legal Counsel or his designee, and the Attorney General, or his designee, to facilitate review and evaluation of the same in connection with any available, necessary, and appropriate legal challenge.

D. This Section shall apply to any agency, department, or official within the undersigned's Cabinet or any other agency, department, or official within the Executive Branch, as defined by section 1-30-10(A) of the South Carolina Code of Laws, as amended, including any boards or commissions that are part of, comprised within, or under the jurisdiction of such agency or department, as well as any and all other departments, bureaus, divisions, officers, boards, commissions, institutions, and other agencies or undertakings of the State, to the maximum extent provided by law. In accordance with article I, section 8 of the South Carolina Constitution, this Section shall not apply to agencies, departments, officials, or employees of the Legislative or Judicial Branches of the State of South Carolina, which shall be governed by their respective orders, rules, or regulations.

Section 2. Prohibition on Cabinet Agency Vaccine Mandates

A. I hereby prohibit any agency or department within the undersigned's Cabinet, as further defined herein, through its respective director or secretary, from adopting or enforcing any order, ordinance, policy, regulation, rule, or similar measure that requires or purports to require, under color of state law, that an individual receive a COVID-19 vaccine or that an individual provide, as a condition of employment, obtaining any government service, or entering any building, structure, facility, or other physical or geographic location, any certification or documentation regarding the individual's vaccination status with respect to any COVID-19 vaccine.

B. I hereby prohibit any agency or department within the undersigned's Cabinet, as further defined herein, through its respective director or secretary, from compelling or attempting to compel, under color of state law, any individual to receive any COVID-19 vaccine pursuant to any current or future mandate announced, issued, promulgated, initiated, or enforced by the Biden Administration, or any federal agency, department, or official, where such individual objects to

receiving a COVID-19 vaccine due to or on account of any sincerely held religious belief or medical objection.

C. I hereby prohibit any agency or department within the undersigned's Cabinet, as further defined herein, through its respective director or secretary, from imposing or attempting to impose, under color of state law, a penalty on any individual, business, or entity for failure to comply with any current or future COVID-19 vaccine mandate announced, issued, promulgated, initiated, or enforced by the Biden Administration, or any federal agency, department, or official, that has or would have the purpose or effect of compelling an individual to receive a COVID-19 vaccine or compelling a business or entity to require that one or more of its employees receive a COVID-19 vaccine or to condition current or future employment on an individual's vaccination status. To the extent any state agency, department, or official is required to impose such a penalty by virtue of or under the color of federal law, the state agency, department, or official shall immediately notify the undersigned, via the Office's Chief Legal Counsel or his designee, and the Attorney General, or his designee, to facilitate review and evaluation of the same in connection with any available, necessary, and appropriate legal challenge and shall promptly take action to advise any affected individual, business, or entity that the State of South Carolina does not approve of, support, condone, or otherwise endorse the imposition of any such penalty.

D. This Section shall apply to any agency or department, through its respective director or secretary, within the undersigned's Cabinet, as set forth in sections 1-30-10(B)(1)(i) and 30-4-65(B) of the South Carolina Code of Laws, including any boards or commissions that are part of, comprised within, or under the jurisdiction of such agency or department, unless otherwise provided by law. In furtherance of the aforementioned principles, considerations, and initiatives, it is advised and recommended that state agencies, departments, and officials not in the undersigned's Cabinet or otherwise subject to the undersigned's direct authority should likewise act in manner consistent with this Order to the maximum extent possible. In accordance with article I, section 8 of the South Carolina Constitution, this Section shall not apply to agencies, departments, officials, or employees of the Legislative or Judicial Branches of the State of South Carolina, which shall be governed by their respective orders, rules, or regulations.

E. This Section shall not be interpreted, applied, implemented, or construed in a manner so as to apply to healthcare-related activities or settings, in which documentation or certification regarding an individual's vaccination status is medically necessary and appropriate or otherwise addressed or required by existing law, or to limit the ability of an individual to access their own vaccination-related records or to request that copies of any such records be provided or released to a third party.

Section 3. General Provisions

A. This Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of South Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any other person.

B. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this Order is for any reason held to be unconstitutional or invalid, such holding shall not

affect the constitutionality or validity of the remaining portions of this Order, as the undersigned would have issued this Order, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

C. This Order shall be implemented consistent with and to the maximum extent provided by applicable law and shall be subject to the availability of appropriations. This Order shall not be interpreted, applied, implemented, or construed in a manner so as to impair, impede, or otherwise affect the authority granted by law to an executive agency or department, or the officials or head thereof, including the undersigned.

D. I hereby expressly authorize the Office to provide or issue any necessary and appropriate additional or supplemental guidance, rules, regulations, or restrictions regarding the application of this Order or to otherwise to provide clarification regarding the same, through appropriate means, without the need for further Orders.

E. This Order is effective immediately and shall remain in effect unless and until modified, amended, or rescinded by subsequent Order.

**GIVEN UNDER MY HAND AND THE
GREAT SEAL OF THE STATE OF
SOUTH CAROLINA, THIS 4th DAY OF
NOVEMBER, 2021.**

HENRY MCMASTER
Governor

ATTEST:

MARK HAMMOND
Secretary of State