

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Supreme Court Cause No. DA 24-0194

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QLARANT INTEGRITY SOLUTIONS, LLC,

Petitioner/Appellee,

v.

NICHOLAS GUTHNECK,

Respondent/Appellant.

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Appeal from the First Judicial District Court, Lewis and Clark County  
Cause No. ADV-2023-483  
The Honorable Mike Menahan, Presiding

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**APPELLANT NICHOLAS GUTHNECK'S OPENING BRIEF**

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COMES NOW the Appellant, Nicholas Guthneck (“Guthneck”), and hereby submits his Opening Brief to the Supreme Court of the State of Montana.

### **ISSUE ON APPEAL**

Did the District Court err in granting Qlarant Integrity Solutions, LLC’s (“Qlarant”) Petition for Judicial Review dismissing Nicholas Guthneck’s *Complaint of Discrimination* alleging violation of Montana Code Annotated § 49-2-312, holding both that the Hearing Officer and Montana Human Rights Commission had jurisdiction to determine whether federal law preempted Montana Code Annotated § 49-2-312, and that the Hearing Officer correctly determined that federal law preempted Montana Code Annotated § 49-2-312?

### **STATEMENT OF THE CASE**

This case arises out of Guthneck’s *Complaint of Discrimination* filed with the Montana Human Rights Bureau, alleging that Qlarant’s termination of his employment for Guthneck’s failure to disclose his vaccination status violated Montana Code Annotated § 49-2-312. (Appendix 2, *Complaint of Discrimination*). On November 4, 2021, Guthneck filed his *Complaint of Discrimination* before the Montana Human Rights Bureau. (Appendix 2). After a finding of reasonable cause to believe a discriminatory violation of Montana Code Annotated § 49-2-312 was issued by the Montana Human Rights Investigator, this case was assigned to

the Montana Department of Labor and Industry Office of Administrative Hearing, OAH Case No. 1736-2022.

On December 29, 2022, Qlarant filed its *Motion to Dismiss* this case for failure to state a claim. On February 24, 2023, and after the matter was fully briefed, the Hearing Officer issued her *Order on Respondent's Motion to Dismiss*, dismissing Guthneck's Complaint of Discrimination on the grounds that Montana Code Annotated § 49-2-312 was preempted by Executive Order 14042 ("EO 14042"). (Appendix 3).

Guthneck appealed the Hearing Officer's *Order on Respondent's Motion to Dismiss* to the Montana Human Rights Commission ("Commission"). After briefing and oral argument, the Commission issued its *Remand Order* (Appendix 4) vacating and rejecting the Hearing Officer's conclusion and holding that the question of whether Montana Code Annotated § 49-2-312 was preempted by EO 14042 presented a constitutional question that could not be decided by an administrative official such as the Office of Administrative Hearings, as it lacked authority to make such a determination.

Thereafter, Qlarant filed its *Petition for Judicial Review* in Montana First Judicial District Court. Following briefing by the parties, the District Court issued its *Order – Petition for Judicial Review* (Appendix 1), granting Qlarant's *Petition*, remanding the case back to the Commission with instructions to adopt the Hearing

Officer's *Order on Respondent's Motion to Dismiss* and dismiss Guthneck's *Complaint of Discrimination*. Guthneck timely filed his *Notice of Appeal*.

### **STATEMENT OF FACTS**

On September 21, 2020, Guthneck was hired as a Health Fraud Investigator with Qlarant. (Appendix 2, ¶ 1). His first day of employment with Qlarant was October 12, 2020. (*Id*). Guthneck completed his 90-day probationary period and received positive performance evaluations throughout his employment with Qlarant. (*Id*). While Guthneck was employed with Qlarant, he worked remotely from his residence. (*Id*).

House Bill 702 was passed by the 2021 Montana Legislature and became effective when signed by Governor Gianforte on May 7, 2021.<sup>1</sup> House Bill 702 prohibits discrimination based upon vaccination status or having an immunity passport, and the prohibitions were published and codified at Montana Code Annotated § 49-2-312 (2021). Montana Code Annotated § 49-2-312 specifically prohibits discrimination in employment based upon a person's vaccination status or whether the person has an immunity passport. Mont. Code Ann. § 49-2-312(1)(a), (b).

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<sup>1</sup> <https://erd.dli.mt.gov/human-rights/human-rights-laws/employment-discrimination/hb-702> (Answer to "What is House Bill 702) (last accessed May 30, 2024).



On September 9, 2021, President Biden signed EO 14042, requiring the Safer Federal Workforce Task Force (“Task Force”) to issue guidance regarding adequate COVID-19 safeguards. *Missouri (Mo.) v. Biden*, 576 F. Supp. 3d 622, 627 (E.D. Mo. Dec. 20, 2021). Thereafter, on September 24, 2021, the Task Force issued its Guidance implementing EO 14042, requiring – among other things – that federal contractors (i.e., covered contractors) require covered contractor employees to be fully vaccinated no later than December 8, 2021 and requiring the federal contractors to acquire proof of the same. *Mo.*, 576 F. Supp. 3d at 627-628.

On October 6, 2021, Qlarant’s CEO sent out a companywide email detailing Qlarant’s mandatory COVID vaccination policy. (Appendix 2, ¶ 2). Qlarant’s mandatory vaccination policy required all employees of Qlarant to submit proof of being vaccinated for COVID by November 24, 2021 or face termination. (*Id.*).

On October 22, 2021, Guthneck emailed Qlarant’s HR Representative Lauren Dulin informing Qlarant of Montana House Bill 702, and stating that Qlarant’s mandatory COVID vaccination policy was in violation of Montana House Bill 702. (Appendix 2, ¶ 3). On October 25, 2021, Dulin emailed a response to Guthneck, arguing that because Qlarant performed services on federally funded contracts, Montana law was not valid and that Guthneck was subject to Qlarant’s mandatory COVID vaccination policy. (*Id.*, ¶ 4).

On November 3, 2021, Guthneck emailed Dulin informing her that he was

undecided about sharing his vaccination status with Qlarant and provided her with information regarding Montana AG Knudsen and nine other state attorneys general filing a lawsuit against the Biden administration for imposing an illegal vaccine mandate on federal contractors and federally contracted employees. (Id., ¶ 5).

On November 4, 2021, President Biden extended the deadline for federal covered contract employees to be fully vaccinated to January 4, 2022.<sup>2</sup>

Thereafter, on November 4, 2021, Guthneck was contacted via telephone by Qlarant supervisory personnel, wherein they requested Guthneck inform them of his decision concerning getting vaccinated and providing his vaccination status to Qlarant. (Appendix 2, ¶ 6). Guthneck declined to share his vaccination status with Qlarant's supervisory personnel, citing Montana House Bill 702 and his privacy concerns. (Id.) Qlarant responded by terminating Guthneck's employment, with Qlarant's supervisory personnel informing Guthneck that he would receive his pay and benefits from Qlarant through November 24, 2021. (Id.) During the discussion, Guthneck asked Qlarant's supervisory personnel about the new January 4, 2022 deadline set by President Biden (as discussed above); however, Qlarant's

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<sup>2</sup> "White House November 4, 2021 Fact Sheet", <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> (last accessed May 30, 2024).

supervisory personnel's response to Guthneck's inquiry was that it was not obligated to wait until January 4, 2022. (Id.)

On November 10, 2021 – six days after Qlarant informed Guthneck he was terminated but fourteen days prior to Qlarant's cessation of paying Guthneck's wages and benefits – the Task Force updated its Guidance, changing the date that covered contractor employees were required to be fully vaccinated by to January 18, 2022.<sup>3</sup> *Mo.*, 576 F. Supp. 3d at 628. Then, on December 7, 2021, a nationwide injunction was issued, prohibiting the federal government and its agencies from enforcing EO 14402 in any state or territory of the United States. *Georgia v. Biden*, 574 F. Supp. 3d 1337 (S.D. Ga. December 7, 2021). Next, on December 20, 2021, an injunction was issued prohibiting the federal government and its agencies from enforcing EO 14402 for federal contractors in all covered contracts in ten states, including Montana. *Mo.*, 576 F. Supp. 3d at 635.

The nationwide bar to enforcement remained in place until October 18, 2022, when the bar was narrowed to apply only to the plaintiffs in *Georgia v. Biden*. However, despite the narrowing of the nationwide bar, the federal government instructed its agencies not to take any steps to require federal covered

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<sup>3</sup> [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 5) (last accessed May 30, 2024).

contractors to come into compliance with the previous Task Force Guidance or to enforce any contract clauses implementing EO 14042.<sup>4</sup>

### **STANDARD OF REVIEW**

A district court may reverse an agency decision if substantial rights of the party seeking judicial review have been prejudiced because the administrative decision is in violation of constitutional or statutory provisions or affected by other error of law. Mont. Code Ann. § 2-4-701. Questions of law are reviewed de novo for correctness. *North Star Dev., LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶ 11, 408 Mont. 498, 510 P.3d 1232. This Court uses the same standards when reviewing a district court's order affirming or reversing the Human Rights Commission's decision. *Denke v. Shoemaker*, 2008 MT 418, ¶ 39, 347 Mont. 322, 198 P.3d 284.

### **SUMMARY OF THE ARGUMENT**

The District Court erred in granting Qlarant's *Petition* and dismissing Guthneck's *Complaint of Discrimination* in several distinct ways. First, the Commission correctly concluded the Hearing Officer lacked authority to determine that EO 14042 preempted Montana Code Annotated § 49-2-312 and dismiss Guthneck's *Complaint of Discrimination* on those grounds. Furthermore, the

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<sup>4</sup> <https://www.saferfederalworkforce.gov/contractors/>

record before the Commission and the District Court does not establish that EO 14042 applies to Guthneck's employment situation with Qlarant, and as the Commission had not made a final decision on these factual issues the District Court's adopting of the Hearing Officer's contrary findings is premature. Furthermore, even if EO 14042 applies to Guthneck's employment situation with Qlarant, Qlarant could have continued to employ Guthneck and comply with both EO 14042 and Montana Code Annotated § 49-2-312. Lastly, EO 14042 has been repeatedly found to constitute an invalid exercise of power. As only valid federal law or executive orders can preempt state law, the District Court's *Order* adopting the Hearing Officer's finding that EO 14042 preempts Montana Code Annotated § 49-2-312 was in error.

## **ARGUMENT**

### **I. The District Court erred in granting Qlarant's *Petition for Judicial Review* adopting the Hearing Officer's *Order* and dismissing Nicholas Guthneck's *Complaint of Discrimination*.**

The District Court erred in granting Qlarant's Petition for Judicial Review dismissing Nicholas Guthneck's Complaint of Discrimination, as the Hearing Officer and Commission lacked authority to determine the constitutional question of whether Montana Code Annotated § 49-2-312 was preempted by EO 14042, the record before the District Court did not support finding EO 14042 applied to Guthneck's employment with Qlarant, Qlarant's continued employment of

Guthneck would not have violated EO 14042, and EO 14042 cannot preempt Montana Code Annotated § 49-2-312 because it is an invalid executive order.

A. The District Court erred in concluding that the Hearing Officer and the Commission had authority to determine the constitutional question of whether Montana Code Annotated § 49-2-312 was preempted by EO 14042 and reversing the Commission's *Remand Order*.

The District Court erred in reversing the Commission's *Remand Order*, as the Commission correctly rejected the Hearing Officer's decision that EO 14042 preempted Montana Code Annotated § 49-2-312. It is well settled that questions of federal preemption of state law are constitutional questions. It is similarly well settled that constitutional questions are properly decided by a judicial – and not an administrative – body.

The doctrine of federal preemption of state law finds its foundation in the Supremacy Clause of the United States Constitution. *Chicago and North Western Transportation Company v. Kalo Brick and Tile Company*, 450 U.S. 311, 317 (1981); *Hanley v. Safeway Stores*, 254 Mont. 379, 382, 838 P.2d 408, 410 (1992). As such, questions of preemption necessarily require a determination of a constitutional question. *Kalo*, 450 U.S. at 317. In determining whether federal law preempts state law, a court must undertake a two-step analysis of “first ascertaining the construction of the two statutes and then determining **the constitutional question** whether they are in conflict.” *Id.* (emphasis added). As such, the Commission correctly concluded that the preemption question – whether EO

14042 preempted Montana Code Annotated § 49-2-312 – was a constitutional question, and the District Court erred in rejecting and reversing the Commission’s decision.

Similarly, the Commission correctly concluded that this preemption question must be decided by a judicial body and that the Office of Administrative Hearings lacked the authority to make a determination concerning whether EO 14042 preempted Montana Code Annotated § 49-2-312. It is well-settled law that constitutional questions are properly decided by a judicial body and not an administrative official, under the constitutional principle of separation of powers. Art. III, Section 1, 1972 Mont. Const.; *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983).

In holding that determinations of federal preemption are simply questions of statutory interpretation, the District Court completely disregards the second step of the two-step analysis set forth in *Kalo*, which requires the judicial body to determine the constitutional question of whether the federal law/executive order is in conflict with the state law. 450 U.S. at 317. The error of the District Court’s decision is perhaps best demonstrated by Judge Donald Molloy’s 2022 decision in *Montana Medical Association, et al. v. Knudsen*, a case discussing the application of Montana Code Annotated § 49-2-312, the same statute at issue in this matter. 591 F. Supp. 3d 905 (D. Mont. 2022).

In *Montana Medical Association*, several private physician offices, the Montana Medical Association, as well as several other individuals, sued the Austin Knudsen in his role as Attorney General of the State of Montana, and requested injunction of Montana Code Annotated § 49-2-312 on the basis of federal preemption. 591 F. Supp. 3d at 908, 911. In arguing against the plaintiffs’ request for an injunction, the defendants responded that the plaintiffs’ alleged harm was too speculative and not irreparable, and that if the Montana Code Annotated § 49-2-312 was preempted by federal law, that preemption argument could be raised by the plaintiffs as an affirmative defense to any action by the State of Montana pursuant to Montana Code Annotated § 49-2-312, and that this affirmative defense could be raised before the Montana Human Rights Commission throughout the administrative process before subjecting the plaintiffs to liability. *Montana Medical Association*, 591 F. Supp. 3d at 915. Judge Molloy rejected the defendants’ argument, recognizing that a federal preemption defense would fail if raised before the Commission, as federal preemption of a state statute is a constitutional question, and such questions “must only be decided by a judicial body, not an administrative body...” *Id.* at 916.

As the question of whether Montana Code Annotated § 49-2-312 was preempted by EO 14042 is a constitutional question, and the Hearing Officer and the Commission lacked the authority to determine this constitutional question, the



Commission correctly rejected and vacated the Hearing Officer's decision and remanded this case. As such, the District Court erred in reversing the Commission's *Remand Order*. Therefore, Guthneck respectfully requests that this Court reverse the District Court's *Order – Petition for Judicial Review* and remand this case back to the Office of Administrative Hearings for a hearing on the merits, as set forth in the Commission's *Remand Order*.

B. The District Court erred in granting the Petition for Judicial Review dismissing Guthneck's *Complaint of Discrimination*, as the well-pled allegations of Guthneck's *Complaint of Discrimination* do not establish that Guthneck was a "covered contractor employee" or that Qlarant was a "covered contractor."

In the present matter, Qlarant would only be entitled to dismissal for failure to state a claim if all three of the following were true: EO 14042 applied to the present situation; Qlarant could not be in compliance with Montana Code Annotated § 49-2-312 without violating EO 14042 during all pertinent times; and EO 14042 actually preempted Montana Code Annotated § 49-2-312. As demonstrated below, the facts before the District Court, and the Hearing Officer before that, neither establish that Guthneck was a "covered contractor employee" or that Qlarant was a "covered contractor" as defined by EO 14042. As such, sufficient facts do not exist to establish that EO 14042 applies in this situation; therefore, the District Court's *Order – Petition for Judicial Review* upholding the

Hearing Officer's *Order* finding Guthneck to be a "covered contractor employee" and Qlarant a "covered contractor" is in error.

When considering a motion to dismiss a complaint for an alleged failure to state a claim upon which relief may be granted, all well-pled allegations in the complaint are to be considered as true. *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997) (citations omitted). Additionally, in considering the motion to dismiss, the complaint must be construed in the light most favorable to the plaintiff, and all allegations of fact contained in the complaint are taken as true. *Id.* A complaint should only be dismissed if it is determined that the plaintiff "is not entitled to relief under any set of facts which could be proven in support of the claim. *Id.* Furthermore, in analyzing a motion to dismiss for an alleged failure to state a claim upon which relief may be granted, the court is to only look within the four corners of the complaint, not relying upon any other pleadings of the parties. *Stufft v. Stufft*, 276 Mont. 310, 313, 916 P.2d 104, 106 (1996).

Pursuant to EO 14042 and the Task Force Guidance implementing the same, "covered contractors" were to ensure that all "covered contractor employees" were fully vaccinated for COVID-19 by a date certain, unless the employee was legally entitled to an accommodation.<sup>5</sup> Both "covered contractor" and "covered contractor

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<sup>5</sup> [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 5)

employee” are specifically defined, and importantly, not all employees of a “covered contractor” are necessarily a “covered contractor employee.”<sup>6</sup> A “covered contractor” is defined as “a prime contractor or subcontractor at any tier who is party to a covered contract,” while a “covered contractor employee” is defined as “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.”<sup>7</sup>

A review of Guthneck’s *Complaint of Discrimination* demonstrates that he did not allege that he was a “covered contractor employee” subject to EO 14042 and its mandates, or that Qlarant was a “covered contractor.” (Appendix 2, generally). Neither word is set forth anywhere within Guthneck’s *Complaint*. Furthermore, Guthneck did not allege in his *Complaint* that he worked on or in connection with a covered contract, or at a covered contractor workplace.

On the contrary, Guthneck simply alleges that he was hired by Qlarant as a Health Fraud Investigator, and that he worked remotely from his residence throughout his employment with Qlarant. Importantly, working remotely from

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6 [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 3-4)

7 [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 3)

one's residence is not a "covered contractor workplace" pursuant to the Task Force Guidance.<sup>8</sup>

No allegations exist anywhere within Guthneck's *Complaint of Discrimination* that would establish Guthneck was a "covered contractor employee" or that Qlarant was a "covered contractor." Guthneck's *Complaint of Discrimination* does not allege that he was an employee working on or in connection with a covered contract or at a covered contractor workplace. Instead, as discussed above, Guthneck specifically alleges that he worked from his residence, which is acknowledged not to be a "covered contractor workplace." In fact, the only place Guthneck's *Complaint* references "federally funded contracts" is in relation to Qlarant's HR Representative's statement that Qlarant "performed services on federally funded contracts." (Appendix 2, ¶ 4). However, this is not a statement of Guthneck's alleging that Qlarant was a "covered contractor" or that he was a "covered contractor employee", but instead is a recitation of hearsay by Qlarant's agent, and was not meant by Guthneck to be relied upon in support of his *Complaint of Discrimination*. He is simply relaying Qlarant's purported justification.

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<sup>8</sup> [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 4)

The District Court fails to make any factual findings concerning whether Qlarant was a “covered contractor” or Guthneck a “covered contractor employee”, instead appearing to simply adopt the Hearing Officer’s factual findings and her analysis of preemption. In doing so, it makes the same mistake the Hearing Officer did and erroneously relies upon Guthneck’s recitation of Qlarant’s agent to find that the well-pled allegations of the *Complaint* establish that Qlarant was a “covered contractor” and Guthneck was a “covered contractor employee.”

However, a review of Guthneck’s *Complaint of Discrimination* reveals the error of such an attempt. The statement at issue reads: “On October 25, 2021, [Guthneck] received an email response from Ms. Dulin [Qlarant Human Resources]. She informed [Guthneck] that because Qlarant performed services on federally funded contracts, Montana law was not valid, and [Guthneck] was still subject to Qlarant’s mandatory COVID vaccination policy.” (Appendix 2, ¶4).

As demonstrated by the above-quoted language, Guthneck is not making an allegation that Qlarant performed services on federally funded contracts or that he was subject to the vaccination policy. Similarly, he is not alleging that, pursuant to EO 14042, Qlarant was a “covered contractor” or that Guthneck was a “covered contractor employee.” Instead, he is simply reciting the emailed statement made by Qlarant. Essentially, the statement Guthneck recited is an allegation of Qlarant, not of Guthneck.

As is demonstrated by his *Complaint of Discrimination*, Guthneck has pled that he was employed by Qlarant, that Qlarant requested he provide it information about his vaccination status, that he refused to inform Qlarant of his vaccination status, and that Qlarant terminated his employment because he refused to inform Qlarant of his vaccination status. (Appendix 2, ¶¶ 1, 2, 6, and 7). As such, Guthneck set forth allegations, which if true, constitute illegal discrimination in violation of Montana Code Annotated § 49-2-312.

Conversely, Guthneck never alleged in his *Complaint of Discrimination* that he was a “covered contractor employee”, that Qlarant was a “covered contractor”, or that he or Qlarant were subject to EO 14042 and its vaccine mandate. As such, Qlarant did not have any “well-pleaded allegations” to support its argument that Qlarant and Guthneck were subject to EO 14042, which in turn means Qlarant does not have substantial evidence in the record to support its preemption argument. Therefore, Qlarant’s *Petition for Judicial Review* should have been denied, and the District Court’s *Order* granting the Petition for Judicial Review dismissing Guthneck’s *Complaint of Discrimination* was in error. Given the above, this Court should reverse the District Court’s *Order – Petition for Judicial Review* and remand this case to the Commission for further proceedings on the merits.

- C. The District Court's *Order* determining that preemption applied to bar Guthneck's claims was improper, premature and in error, as the Commission did not make any ruling on whether Qlarant was a "covered contractor" or Guthneck a "covered contractor employee" as defined by EO 14042.

The District Court's adopting of the Hearing Officer's finding that EO 14042 preempts Montana Code Annotated § 49-2-312 is in error, as the Commission did not resolve the underlying factual issues – namely, (1) whether Qlarant was a "covered contractor" as defined by EO 14042, (2) whether Guthneck was a "covered contractor employee" as defined by EO 14042, and (3) whether EO 14042 applied to Guthneck's employment situation.

As discussed previously, EO 14042 only applies to covered contractors and covered contractor employees. While the Hearing Officer determined that Qlarant was a covered contractor, Guthneck a covered contractor employee, and that EO 14042 applied to Guthneck's employment situation, these determinations were neither affirmed nor rejected by the Commission. In fact, these determinations were not addressed at all, with the Commission instead rejecting the Hearing Officer's conclusion based on the holding in *Jarussi*.

In adopting the Hearing Officer's findings, this District Court essentially ruled on the above-discussed factual issues without a final agency decision on these issues. The District Court's ruling is both improper and premature. Mont. Code Ann. §§ 2-4-702, 704; *see also Singal Peak Energy, LLC v. Mont. Env'tl. Info. Ctr.*, 2020 Mont. LEXIS 1853, \*6-8 (2020).

Without the Commission's findings and conclusions on these matters, it was premature and improper for the District Court to both rule on the preemption issue and to dismiss Guthneck's *Complaint of Discrimination*. As the Montana Supreme Court stated in *Signal Peak*, "courts should avoid constitutional issues whenever it is possible to decide a case without reaching constitutional considerations." *Id.*, (citing *In re G.M.*, 2008 MT 200, ¶ 25, 186 P.3d 229). In this case, if it is determined that EO 14042 does not apply to Guthneck's employment situation, a ruling on the constitutional issue of preemption is unnecessary.

Therefore, Guthneck respectfully requests this Court reverse the District Court's *Order – Petition for Judicial Review* and remand this case to the Commission for further proceedings on the merits.

D. The District Court erred in reversing the Commission's *Remand Order* thereby adopting the Hearing Officer's *Order* dismissing Guthneck's *Complaint of Discrimination*, as EO 14042 did not require Qlarant to terminate Guthneck's employment, and Qlarant could have complied with both EO 14042 and Montana Code Annotated § 49-2-312.

As demonstrated above, Guthneck's *Complaint of Discrimination* establishes a violation of Montana Code Annotated § 49-2-312 without providing Qlarant any factual support for its claim that it is a "covered contractor", Guthneck is a "covered contractor employee" or that EO 14042 applies to this situation. However, even assuming *arguendo* that Qlarant was a "covered contractor" and Guthneck a "covered contractor employee", throughout all time periods relevant to



Guthneck's *Complaint of Discrimination*, Qlarant was not obligated by EO 14042 to terminate Guthneck's employment.

In adopting the Hearing Officer's *Order* and her analysis, the District Court also adopts the Hearing Officer's erroneous finding that at the time of Qlarant's termination of Guthneck's employment, Qlarant was required by EO 14042 to both have knowledge of Guthneck's vaccination status, and to terminate Guthneck because it did not have knowledge of his vaccination status. On the contrary, the timeline concerning EO 14042 and the implementation of its vaccine mandates demonstrates that Qlarant was not required to have record of Guthneck's vaccination status at the time of his termination, nor was it required to terminate Guthneck due to his failure to disclose his vaccination status. As such, Qlarant could have continued to employ Guthneck and remain in compliance with both EO 14042 and Montana Code Annotated § 49-2-312.

On September 9, 2021, the President signed EO 14042, requiring the Task Force to issue Guidance regarding adequate COVID-19 safeguards.<sup>9</sup> *Mo*, 576 F. Supp. 3d 622, 627 (E.D. Mo. Dec. 20, 2021). Thereafter, on September 24, 2021, the Task Force issued Guidance implementing EO 14402, requiring that covered contractors require covered contractor employees to be fully vaccinated no later

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<sup>9</sup> [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) (pg. 1) (last accessed May 30, 2024).

than December 8, 2021 and requiring the federal contractors to acquire proof of the same.<sup>10</sup> *Mo.*, 576 F. Supp. 3d at 627-628.

On October 6, 2021, Qlarant's CEO sent out a companywide email detailing Qlarant's mandatory COVID-19 vaccination policy, which required all employees of Qlarant to submit proof of being vaccinated by November 24, 2021 or face termination. (Appendix 2, ¶ 2). On October 22, 2021, Guthneck emailed Qlarant HR, explaining House Bill 702 and informing HR that Qlarant's mandatory vaccination policy violated Montana law. (Appendix 2, ¶ 3). Qlarant HR emailed Guthneck back on October 25, 2021, stating Qlarant's belief that House Bill 702 was not valid, and that Guthneck was subject to Qlarant's mandatory vaccination policy. (Appendix 2, ¶ 4).

On November 4, 2021, the Task Force updated its guidance, extending the deadline for covered contractor employees to be fully vaccinated to January 4, 2022.<sup>11</sup> Thereafter, on November 4, 2021, Qlarant terminated Guthneck's employment because he would not disclose his vaccination status to Qlarant. (Appendix 2, ¶ 6). Then, on November 10, 2021, the Task Force updated its

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<sup>10</sup> [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) (pg. 5) (last accessed May 30, 2024).

<sup>11</sup> "White House November 4, 2021 Fact Sheet", <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/> (last accessed May 30, 2024).

Guidance, changing the date that covered contractor employees were required to be fully vaccinated by to January 18, 2022.<sup>12</sup> *Mo.*, 576 F. Supp. 3d 628.

However, on December 7, 2021, a nationwide injunction was issued, prohibiting the federal government and its agencies from enforcing EO 14402 in any state or territory of the United States. *Georgia v. Biden*, 574 F. Supp. 3d 1337 (S.D. Ga. December 7, 2021). Similarly, on December 20, 2021, an injunction was issued prohibiting the federal government and its agencies from enforcing EO 14402 for federal contractors in all covered contracts in ten states, including Montana. *Mo.*, 576 F. Supp. 3d at 635.

The nationwide bar to enforcement remained in place until October 18, 2022 when the bar was narrowed to apply only to the plaintiffs in *Georgia v. Biden*. Notably, despite the narrowing of the nationwide bar, the federal government instructed its agencies not to take any steps to require federal covered contractors to come into compliance with the previous Task Force Guidance or to enforce any contract clauses implementing EO 14042.<sup>13</sup>

As confirmed by the foregoing timeline, at no time pertinent to Guthneck's employment with Qlarant or his *Complaint of Discrimination* was Qlarant required

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12 [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 5) (last accessed May 30, 2024).

13 <https://www.saferfederalworkforce.gov/contractors/>

by EO 14042 to either ensure that Guthneck was vaccinated, or to otherwise have knowledge of his vaccination status. Furthermore, at no time was Qlarant required by EO 14042 to terminate Guthneck's employment because he would not provide his vaccination status or otherwise prove he was fully vaccinated. In fact, at all times pertinent to Guthneck's *Complaint of Discrimination*, Qlarant could have continued to employ Guthneck despite his decision not to disclose his vaccination status, and as such could have remained in compliance with both EO 14042 and Montana Code Annotated § 49-2-312.

The District Court erroneously adopts the Hearing Officer's finding that at the time of Guthneck's termination, Qlarant was required by EO 14042 to have knowledge of Guthneck's vaccination status to ensure he was fully vaccinated, and that it was required to terminate his employment because he would not disclose his vaccination status. This constitutes error for several reasons. First, on November 4, 2021 – when Qlarant informed Guthneck it would be terminating his employment effective November 24, 2021 – pursuant to EO 14042, covered contractors were to ensure that all covered contractor employees were fully vaccinated by January 4, 2022.<sup>14</sup>

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<sup>14</sup> [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) (pg. 5) (last accessed May 30, 2024).

Therefore, assuming both that Qlarant was a covered contractor and Guthneck was a covered contractor employee, Qlarant would have needed to know that Guthneck had received his second shot of a two-dose vaccine series or his first shot of a one-dose series by December 21, 2021.<sup>15</sup> Qlarant's lack of knowledge of Guthneck's vaccination status prior to either November 4 or November 24, 2021 could not be found to be in violation of EO 14042. As such, despite its protestations to the contrary, Qlarant *was not required* to terminate Guthneck, or be in violation of EO 14042.

Furthermore, on November 10, 2021 – 14 days prior to Guthneck's effective date of termination – the Task Force Guidance was updated, extending the date by which covered contractors were to ensure all covered contractor employees were fully vaccinated to January 18, 2022.<sup>16</sup> Therefore, the date by which Qlarant would have needed to know that Guthneck had received his second shot of a two-dose vaccine series or his first shot of a one-dose series was extended to January 4, 2022. Again, Qlarant's lack of knowledge of Guthneck's vaccination status prior to November 4 or November 24, 2021 could not be found to be in violation of EO

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15 [https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) (pg. 4, 5) (last accessed May 30, 2024).

16 [https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors\\_Safer%20Federal%20Workforce%20Task%20Force\\_20211110.pdf](https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf) (pg. 5) (last accessed May 30, 2024).

14042; therefore, Qlarant was not in a position where it would have had to terminate Guthneck or be in violation of EO 14042.

Perhaps most importantly, prior to the January 18, 2022 deadline for covered contractors to ensure all covered contractor employees were fully vaccinated, injunctions were issued – both nationwide and Montana-specific – prohibiting the enforcement of EO 14042. *Georgia v. Biden*, 574 F. Supp. 3d 1337; *Mo*, 576 F. Supp. 3d 622. These injunctions, coupled with the federal government’s decision to forego any enforcement of EO 14042,<sup>17</sup> mean that throughout all times pertinent to Guthneck’s *Complaint of Discrimination* Qlarant was never put in a position where it would have to choose between terminating Guthneck or being in violation of EO 14042. Put another way, **never, at any time pertinent to Guthneck’s *Complaint***, would Qlarant’s compliance with Montana Code Annotated § 49-2-312 have caused it to violate EO 14042.<sup>18</sup> Qlarant could have continued to employ Guthneck, despite his decision not to disclose his vaccination status and thereby remained in compliance with the protections of Montana Code Annotated § 49-2-312, while still being in compliance with the dictates of EO 14042.

As set forth above, nothing within EO 14042 required Qlarant to terminate Guthneck as a result of his decision not to disclose his vaccination status. Despite

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<sup>17</sup> <https://www.saferfederalworkforce.gov/contractors/>

<sup>18</sup> Montana House Bill 702 has been codified as Montana Code Annotated § 49-2-312.

this Qlarant chose to violate Montana Code Annotated § 49-2-312 and terminate Guthneck on November 4, 2021. As such, the Hearing Officer erred in applying the law and dismissing Guthneck’s *Complaint of Discrimination*. The District Court compounded the error by adopting the Hearing Officer’s *Order* dismissing Guthneck’s *Complaint of Discrimination*. Therefore, Guthneck respectfully requests this Court reverse the District Court’s *Order* and remand this case back to the Commission for a hearing on the merits.

E. The District Court erred in adopting the Hearing Officer’s finding that EO 14042 preempted Montana Code Annotated § 49-2-312, as EO 14042 is not a valid exercise of power.

Again, assuming *arguendo* that Guthneck’s employment situation would have been subject to EO 14042, it still would not have preempted Montana Code Annotated § 49-2-312, as only **valid** federal exercises of power preempt state law.

Pursuant to the Supremacy Clause, a state law may be preempted only by a valid federal law or executive order. U.S. Const., Art. VI, cl. 2; *see also Printz v. U.S.*, 521 U.S. 898, 924-925 (1997) (noting that the validity of a federal law is a prerequisite for application of the Supremacy Clause).

Furthermore, executive orders, in and of themselves, do not preempt state law. *In re NSA Telcoms. Records Litig.*, 633 F. Supp. 2d 892, 908 (N.D. Cal. 2007). It is only “when executive orders are necessary as a means of carrying out federal laws do they preempt state law.” *Id.* (citation omitted).

Lastly, it is “well settled that state statutes are presumed to be valid unless Congress clearly intended these statutes to be superseded by federal law.”

*Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Industry*, 187 Mont. 22, 41, 608 P.2d 1047, 1057 (Mont. 1979) (citations omitted).

In issuing EO 14042, the President relied upon the authority granted to him under the Federal Property and Administrative Services Act (known as “FPASA” and/or “the Procurement Act”). EO 14042. However, nearly every court which has analyzed whether EO 14042 exceeded the authority granted to the President, whether by the Procurement Act or the Constitution, has held either that EO 14042 exceeded the authority granted to the President or that it likely exceeded the authority. *E.g., Mo. v. Biden*, 576 F. Supp. 3d 622, 633, 635 (concluding plaintiff states “are likely to succeed on the issue of whether the [vaccine] mandate exceeds the scope of power granted to the President by FPASA” and enjoining the enforcement of the mandate as to ten states, including Montana); *Brnovich v. Biden*, 562 F. Supp. 3d 123, 157 (D. Ariz. 2022) (holding “[t]he Contractor Mandate thus exceeds the President’s authority under the Procurement Act.”); *Commonwealth of Kentucky v. Biden*, 571 F. Supp. 3d 715, 719, 726-727 (E.D. Ky. 2021) (finding the President exceeded his authority under the Procurement Act in issuing the contractor vaccine mandate); *Ky. v. Biden*, 23 F.4th 585 (6th Cir. 2022) (denying stay of injunction issued in *Commonwealth of Kentucky v. Biden*, with



court concluding “that the federal government is unlikely to prevail on its argument that the [Procurement] Act authorizes imposition of the contractor mandate); *Louisiana v. Biden*, 575 F. Supp. 3d 680, 692-693 (W.D. La. 2021) (holding “that EO 14042 conflicts with the Tenth Amendment” and enjoining its enforcement as to the plaintiff states) (affirmed by *Louisiana v. Biden*, 55 F.4<sup>th</sup> 1017 (5th Cir. 2022)); *Ga. v. President of the United States*, 46 F.4th 1283, 1297, 1301 (11th Cir. 2022) (stating “the President likely exceeded his authority under the Procurement Act when directing executive agencies to enforce such a mandate”, holding “plaintiffs thus are likely to succeed on their claim that the President exceeded his authority by issuing the contractor vaccine mandate”, and upholding the preliminary injunction of EO 14042 as to the plaintiff states); *Florida v. Nelson*, 576 F. Supp. 3d 1017, 1038 (M.D. Fla. 2021) (holding “Executive Order 14042 likely exceed the structure and purpose of FPASA and falls outside Congress’s contemplated grant of authority under FPASA); *compare with Mayes v. Biden*, 67 F. 4th 921, 942 (9th Cir. 2023) (vacated as moot by *Mayes v. Biden*, 89 F.4th 1186 (9th Cir. 2023)).

As was held in all but one of the cases cited above, President Biden exceeded the authority granted to him in issuing EO 14042 and the contractor vaccine mandate. Given that the President exceeded his authority in issuing EO 14042, EO 14042 is not a valid exercise of power and cannot preempt Montana

Code Annotated § 49-2-312. U.S. Const., Art. VI, cl. 2; *Printz*, 521 U.S. at 924-925; *In re NSA Telcoms. Records Litig.*, 633 F. Supp. 2d at 908. Therefore, the District Court erred in determining that EO 14042 preempted Montana Code Annotated § 49-2-312 and barred Guthneck's claims. As such, this Court should reverse the District Court's *Order* and remand this case to the Commission for a hearing on the merits.

### **CONCLUSION**

The District Court's *Order – Petition for Judicial Review* should be reversed on several different grounds. First, the Commission was correct in finding that the Hearing Officer lacked authority to determine the constitutional question of whether EO 14042 preempted Montana Code Annotated § 49-2-312. Second, the record is devoid of factual allegations that Qlarant is a "covered contractor", that Guthneck is a "covered contractor employee", and that EO 14042 applies to Guthneck's situation, and the Commission did not make any final determinations concerning these factual allegations. Third, at no time pertinent to Guthneck's *Complaint of Discrimination* was Qlarant required by EO 14042 to terminate Guthneck's employment in violation of Montana Code Annotated § 49-2-312. Lastly, EO 14042 cannot preempt Montana Code Annotated § 49-2-312 and bar Guthneck's claims set forth in his *Complaint of Discrimination* as EO 14042 is not a valid exercise of power. For these reasons, Guthneck respectfully requests this

Court reverse the District Court's *Order – Petition for Judicial Review* and remand this case back to the Commission for a hearing on the merits.

Respectfully submitted this 31<sup>st</sup> day of May, 2024.

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By: /s/ Torrance L. Coburn

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text of fourteen (14) points; is double-spaced; and the word count calculated by Word is 6,490, excluding the cover page, table of contents, table of authorities, certificate of compliance, certificate of mailing and appendix.

Dated this 31<sup>st</sup> day of May, 2024.

TIPP COBURN LOCKWOOD PC

By: /s/ Torrance L. Coburn

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## **CERTIFICATE OF SERVICE**

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