MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)
2005 N. Central Ave
Phoenix, AZ 85004-1592
Phone: (602) 542-8540
Joseph.Kanefield@azag.gov
Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
James.Rogers@azag.gov
Attorneys for Plaintiffs Mark Brnovich and the State of Arizona

WILENCHIK & BARTNESS PC

Jack Wilenchik
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, AZ 85004
Phone (602) 606-2816
JackW@wb-law.com

Attorney for Plaintiff John Doe

NAPIER, BAILLIE, WILSON, BACON & TALLONE, P.C.

Michael Napier (No. 002603)
Eric R. Wilson (No. 030053)
Cassidy L. Bacon (No. 031361)
2525 E. Arizona Biltmore Cir, Ste C-135
Phoenix, Arizona 85016
Phone: 602.248.9107
mike@napierlawfirm.com

Attorneys for Plaintiff PLEA and United Phoenix Firefighters Association Local 493

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mark Brnovich, *et al.*,

Plaintiffs,

v.

Joseph R. Biden, *et al.*

Defendants.

No. 2:21-cv-01568-MTL

PLAINTIFFS' REPLY IN SUPPORT OF THIRD MOTION FOR A PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 3
I. Plaintiffs have Article III standing 3
II. The Contractor Mandate Is Reviewable 4
A. Non-Statutory Cause of Action 4
B. The Contractor Mandate Is Reviewable Under the APA 5
1. The OMB Notices Are Reviewable Under the APA 5
2. The FAR Council Guidance Is Reviewable Under The APA 6
III. Plaintiffs Are Likely To Succeed On the Merits 7
A. The Contractor Mandate Exceeds the President's Authority Under the Procurement Act. 7
1. The Claimed Justification for the Contractor Mandate is Pretextual 9
B. Only FAR Council May Issue Government-Wide Procurement Regulations. 11
C. The FAQ Is A Procurement Policy and Regulation Subject To Section 1707 11
1. The FAR Deviation Clause Is A Procurement Policy and Regulation 12
D. Defendants Have Failed To Invoke The Urgent And Compelling Circumstances Exception to 41 U.S.C. § 1707. 13
IV. The Contractor Clause Is Unconstitutional. 14
CONCLUSION 14

TABLE OF AUTHORITIES

CASES

AFGE v. Carmen,
669 F.2d 815 (D.C. Cir. 1981) 9

AFL-CIO v. Kahn,
618 F.2d 784 (D.C. Cir. 1979) 8

Alabama Ass'n of Realtors v. HHS,
141 S. Ct. 2485 (2021) 2, 9

BST Holdings, L.L.C. v. OSHA,
17 F.4th 604 (5th Cir. 2021) 2, 3, 4, 9, 10

Chamber of Com. v. SEC,
443 F.3d 890 (D.C. Cir. 2006); 13

Chamber of Commerce of US v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 2, 5

Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.,
452 F.3d 798 (D.C. Cir. 2006) 7

Exhaustless v. FAA,
931 F.3d 1209 (D.C. Cir. 2019) 7

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 2

Florida v. Becerra,
8:21-cv-839, 2021 WL 2514138 (M.D. Fla. June 18, 2021) 13

Franklin v. Massachusetts,
505 U.S. 788 (1992) 5

Galassini v. Town of Fountain Hills,
2013 WL 5445483, (D. Ariz. Sept. 30, 2013) 3

Georgia v. Biden,
No. 21-cv-00163 (S.D. Ga. Dec. 7, 2021) 1, 3

Hawaii v. Trump,
878 F.3d 662 (9th Cir. 2017) 5

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 4

Kentucky. v. Biden,
--- F.Supp.3d ---, 2021 WL 5587446 (E.D. Ky., Nov. 30, 2021) 1, 2, 3

Liberty Mut. Ins. Co v. Friedman,
639 F.2d 164 (4th Cir. 1981) 7

Louisiana v. Becerra,
--- F.Supp.3d ---, 2021 WL 5609846, (W.D. La. Nov. 30, 2021) 3

Meland v. Weber,
2 F.4th 838 (9th Cir. 2021) 3

Missouri v. Biden,
4:21-cv-01329, 2021 WL 5564501 (Nov. 29, 2021) 10

National Res. Def. Council v. Nat'l Highway Traffic Safety Admin.,
894 F.3d 95 (2d Cir. 2018).. 13

Natural Res. Def. Council v. Wheeler,
955 F.3d 68 (D.C. Cir. 2020)... 7

NFIB v. Sebelius,
567 U.S. 519 (2012) 14

Oregon Nat. Desert Ass'n v. U.S. Forest Serv.,
465 F.3d 977 (9th Cir. 2006) 7

Public Citizen v. U.S. Trade Representative,
5 F.3d 549 (D.C. Cir. 1993)... 6

Regeneron Pharms., Inc. v. HHS,
510 F. Supp. 3d 29 (S.D.N.Y. Dec. 30, 2020) 13

Sierra Club v. Trump,
963 F.3d 874 (9th Cir. 2020) 5

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014) 3

Texas v. EEOC,
933 F.3d 433 (5th Cir. 2019) 6, 14

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
578 U.S. 590 (2016) 6

UAW-Labor Employment and Training Corp. v. Chao,
325 F.3d 360 (D.C. Cir. 2003) 8

United States v. Bozarov,
974 F.2d 1037 (9th Cir. 1992) 5

Zucht v. King,
260 U.S. 174 (1922) 4

STATUTES

40 U.S.C. § 101 10

40 U.S.C. § 121 9

41 U.S.C. § 1303 11

41 U.S.C. § 1707(a) 12

41 U.S.C.A. § 1707(a) 11

5 U.S.C. § 701(b)(1) 5

REGULATIONS

48 C.F.R. § 1.501-1 14

48 C.F.R. § 1.501-2(b), (c) 14

86 Fed. Reg. 50985 (Sept. 9, 2021) 12, 13

86 Fed. Reg. 63418 (Nov. 16, 2021) 11, 13

OTHER AUTHORITIES

The Coronavirus Aid, Relief, and Economic Security Act, PL 116-136, Mar. 27, 2020, 134 Stat. 281 9

The Families First Coronavirus Response Act, PL 116-127, March 18, 2020, 134 Stat. 178 9

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INTRODUCTION

The Contractor Mandate is unprecedented, unlawful, unconstitutional, and deeply harmful to Plaintiffs. It has also now been enjoined nationwide. *Georgia v. Biden*, No. 21-cv-00163 (S.D. Ga. Dec. 7, 2021); *see also Kentucky. v. Biden,* --- F.Supp.3d ---, 2021 WL 5587446 (E.D. Ky., Nov. 30, 2021) (enjoining Contractor Mandate in Kentucky, Ohio, and Tennessee). That nationwide injunction might be extinguished at an instant, however. Absent relief from this Court (or any binding commitment of forbearance from Defendants), Defendants could obtain a stay pending appeal at 9 am and start threatening contractors with enforcement at 9:02 and demanding that they fire unvaccinated workers immediately (even those that relied on the preliminary injunction in good faith). Unvaccinated members of Plaintiffs PLEA and United Phoenix Firefighters Association Local 493 (the "First Responder Plaintiffs") would face a bleak holiday season, forced into the bitter dilemma of choosing between the jab or their jobs. This Court should remove that Sword of Damocles.

In response to Plaintiffs' suit, the government rushed out belated notice that all but conceded the initial illegality of the Contractor Mandate. While outwardly proclaiming that there was "nothing to see here," their frantic attempts at damage control—releasing 13th-hour notice mere minutes before a hearing in this Court—betray their private assessment that the Contractor Mandate's legality is tenuous (at best).

In their Response, Federal Defendants (hereinafter "Defendants") offer little new. They repeat their contention that the State Plaintiffs lack standing, which is both wrong and irrelevant. Since they do not contest the standing of First Responder Plaintiffs, their standing arguments are but wasted ink and paper. *See*, *e.g.*, *NRDC v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008) ("Only one of the Plaintiffs must have standing to permit our review.").

In any event, the State of Arizona has multiple agencies and subdivisions that are federal contractors with multiple current contractual modifications directly subject to the Contractor Mandate and faces the loss of over a billion dollars. Furthermore, Defendants have made clear they intend to impose the mandate on *all* future contracts, ensuring that the State will be subject to—and injured by—the Contractor Mandate..

On the merits, Defendants simply assert the unfettered power to use the Procurement Act to achieve nearly any objective that strikes Defendants' fancy. But Congress has not written "a [statutory] blank check for the President to fill in at his will." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996). Defendants nevertheless ask this Court to interpret language in the Procurement Act to grant the executive nearly unlimited authority over questions of deep political and economic significance. That is precisely *backwards*. Courts must interpret statutes *not* to grant extraordinary authority to executive agencies *without* a clear statement from Congress. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). The major questions doctrine demands the Procurement Act be read in a "common sense" fashion to avoid tenuous "delgat[ions]" of "policy decisions[s]" of "economic and political magnitude." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). If the Procurement Act allows a vaccine mandate, it would also allow the federal government the power to demand that contractor employees consume no more than 16 ounces of sugary drinks in a sitting, spend less than 10 minutes per day outdoors without sunscreen, or abstain from all meat consumption. *See Kentucky*, 2021 WL 5587446, at 13.

Even if Defendants could conceivably impose a mandate of such breathtaking scope, they would still have to connect it to economy and efficiency. They have failed to do so. There is no evidence the Contractor Mandate will achieve economy and efficiency in procurement, and certainly no evidence that vaccinating everyone remotely *connected* to federal contractor employees will do so. On the other hand, there is plenty of evidence the Contractor Mandate will cripple economic efficiency. Federal contractors will be forced to fire employees en masse in a tight labor market. What is actually "self-evident" here is the Contractor Mandate is a pretextual attempt to force vaccination by any means necessary. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604 (5th Cir. 2021) ("*BST*").

And assuming the Contractor Mandate might have otherwise been valid—and it would not—it fails to satisfy the applicable notice-and-comment requirements. Defendants make the perplexing argument that the SFWTF FAQ is not subject to notice-and-comment because it is not "controlling," yet the FAR Deviation Clause that Defendants have been forcing into

1 thousands of federal contracts says exactly the opposite.

2 The Court should follow other courts that have enjoined this and similar mandates and
3 enjoin Defendants' lawless attempt to make health policy by federal contracting subterfuge.

4 **ARGUMENT**

5 **I. Plaintiffs have Article III standing**

6 Defendants notably do not appear to contest First Responder Plaintiffs' standing—
7 which is "self-evident" in light of them being directly subject to the requirement. *Sierra Club v.*
8 *EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Their uncontested standing renders further standing
9 analysis academic. *Supra* at 1.

10 In any event, State Plaintiffs' "standing to sue is obvious." *BST*, 17 F.4th at 610.
11 Defendants' same arguments against standing have recently been rejected by the Fifth Circuit
12 and multiple federal district courts in the context of state challenges to the Contractor Mandate
13 or similar mandates. *See*, *e.g.*, *id.*; *Georgia*, No. 21-cv-00163 at 13-–16; *Kentucky*, 2021 WL
14 5587446, at *3–5 ("multiple reasons" states had standing in Contractor Mandate challenge);
15 *Louisiana v. Becerra*, --- F.Supp.3d ---, 2021 WL 5609846, at *4–6 (W.D. La. Nov. 30, 2021)
16 (states had "proven standing through the normal inquiry" in CMS mandate challenge, and also
17 "as a result of special solicitude"). This Court should adopt the same reasoning of those courts.

18 Furthermore, Defendants do not even address the State Plaintiffs' entitlement to
19 "special solicitude." (Doc. 72 at 13.) And in demonstrating injury-in-fact, a plaintiff need only
20 allege a "credible threat" of injury. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014).
21 A credible threat can exist where an individual is "strongly encouraged" to undergo or abstain
22 from certain conduct. *Galassini v. Town of Fountain Hills*, 2013 WL 5445483, at *11 (D. Ariz.
23 Sept. 30, 2013); *Meland v. Weber*, 2 F.4th 838, 846 (9th Cir. 2021). This is exactly what
24 Defendants have been doing to Plaintiffs here. State Plaintiffs also have both sovereign[1] and

25 [1] Because the Contractor Mandate seeks to force the State Plaintiffs to violate state law, (Doc
26 70-03 at 15), Arizona can easily show sovereign injury. "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305,
27 2324 n.17 (2018); *Maryland v. King*, 567 U.S. 1301, 1303 (2012). Federal action that infringes on a State's "sovereign interests and public policies" also causes irreparable harm. *Kansas v. United*
28 *States*, 249 F.3d 1213, 1227– 28 (10th Cir. 2001). Similarly, the Contractor Mandate injures the State's sovereign interest supplanting the State's police power. *See, e.g.*, *BST*, 17 F.4th at 618.

proprietary[2] injury as well.

II. The Contractor Mandate Is Reviewable

A. Non-Statutory Cause of Action

Defendants concede that a plaintiff may assert a non-statutory cause of action against the President and other federal actors "to enjoin *ultra vires* official conduct." (Doc. 108 at 16.) They go on to claim that no such action lies here, however, because the Contractor Mandate is merely "an executive order regarding the terms and conditions on which the federal government will enter into contracts." *Id.* Not so. The Contract Mandate is not just some routine procurement order not issued in conformity with the proper bureaucratic niceties. It is an unprecedented and unconstitutional power-grab. By its own terms, the Contractor Mandate purports to preempt state law (Doc 70-3 at 15) and thus force States to violate their own laws in a domain where power is entirely reserved to the States. "The safety and the health of the people of [a state] ... are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take[.]" *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905); *accord Zucht v. King,* 260 U.S. 174, 176 (1922); *see also BST*, 17 F.4th at 617 ("to mandate that a person receive a vaccine or undergo testing falls squarely within the States' police power").

Courts have held there to be a valid non-statutory cause of action against 1) an

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[2] Hundreds of millions of dollars are at stake. Accordingly, Arizona has "alleged a concrete threatened injury in the form of millions of dollars of losses," which gives it standing. *Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015); *see also San Francisco v. Trump*, 897 F.3d 1225, 1236 (9th Cir. 2018) (likely loss of funds promised under federal law is sufficient to demonstrate standing). Defendants have explicitly stated they will not enter into federal contracts after November 14, 2021 with parties that refuse the Contractor Mandate. (*See* Doc 70-01 at 2; Doc 70-03, at 11). Nor do Defendants even attempt to refute Plaintiffs' evidence about Defendants "maximum pressure" campaign and intent to blacklist contractors. (*See* Doc 48-2; Doc 62.). Moreover, the State will also suffer indirect financial harms. While the precise cost is unknowable, Defendants cannot and do not seriously dispute that Arizona will spend *some* amount of money in public assistance for Arizonans forced to leave their jobs rather than receive a medical treatment to which they are opposed. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) ("predictable effect of Government action"). Indeed, Defendant GSA has already acknowledged federal contractors may "experience[] loss of workforce due to employee concerns about the new [vaccine] policy" and that there may be "degradation in service performance, since personnel may need to be suspended until vaccinated." (Doc. 48-2 ¶ 3.) "The causal chain is easy to see[.]" *State v. Biden*, 10 F.4th 538, 548 (5th Cir. 2021).

"Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike," *Reich*, 74 F.3d at 1324; 2) travel bans, *Hawaii v. Trump*, 878 F.3d 662, 672 (9th Cir. 2017), *reversed on other grounds*, 138 S. Ct. 2392 (2018); 3) claims against the Secretary of Commerce for acting "in excess of his delegated authority under the [Export Administration Act]," even though the statute precluded judicial review, *United States v. Bozarov*, 974 F.2d 1037, 1045 (9th Cir. 1992); and 4) the President's construction of a border wall, *Sierra Club v. Trump*, 963 F.3d 874, 891–93 (9th Cir. 2020), *vacated*, 2021 WL 2742775 (U.S. 2021). Defendants' unprecedented vaccine mandate affecting twenty percent of all workers is equally susceptible to judicial review.[3]

B. The Contractor Mandate Is Reviewable Under the APA

1. The OMB Notices Are Reviewable Under the APA.

Defendants contend that because the OMB Director was "acting pursuant to a[] … delegation of the President's authority," the OMB Rule is exempted from section 1707. (Doc. 108 at 12.) That purported impunity is not the law. Courts may review the actions of federal officials and agencies even where they were taken in accordance with executive orders. *Reich*, 74 F.3d at 1328. Indeed, in *Gomez v. Trump*, the defendants offered the same argument—namely, that when the president relies on agencies to carry out his executive order, agency implementation of the executive order was categorically unreviewable. 485 F. Supp. 3d 145, 177 (D.C. Cir. 2020). To no avail: that position "suffer[ed] from a fundamental … misunderstanding of the law." *Id.* Defendants' identical contention that they acted "at the behest of the President" here is equally meritless since "courts have power to compel [them] to disobey illegal Presidential commands." *Reich*, 74 F.3d at 1328.

The government cites no binding authority for the proposition that agency action is unreviewable under the APA because it involves a presidential delegation. Unlike, for example, Congress, *see* 5 U.S.C. § 701(b)(1), the President's APA exemption is not based on the text of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01(1992) ("[T]extual silence is not enough to subject the President to the provisions of the APA."). Indeed, "*Franklin* is limited

[3] Defendants claim that Plaintiffs' only avenue for relief would be the CDA. Plaintiffs already refuted these arguments, and Defendants have failed to offer any argument against that refutation. The CDA has no applicability here and affords no relief. (*See* Doc. 58 at 11–12.)

to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." *See Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). That is not the case here, since Defendants were required to implement the executive order for it to have legal effect. This is why many district courts have disagreed with the government's argument. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1156–57 (D. Minn. 2010); *Indigenous Envt'l Network v. U.S. Dep't of State*, No. cv-17-29, 2017 WL 5632435, at *6 (D. Mont. Nov. 22, 2017); *Protect Our Cmtys. Found. v. Chu*, No. 12-cv-3062, 2014 WL 1289444, at *6 (S.D. Cal. Mar. 27, 2014). This Court should too.

2. The FAR Council Guidance Is Reviewable Under The APA

The government also argues the FAR Deviation Clause is unreviewable because, in its view, it is not final agency action. (Doc. 108 at 8–9.) But there is a strong presumption in favor of judicial review of administrative action. *Texas*, 809 F.3d at 163. And the FAR Deviation Clause is reviewable final agency action because it (1) marks the "'consummation' of the agency's decisionmaking process" and (2) either determines "rights or obligations" or causes "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

The FAR Council guidance marks the consummation of the agency's decisionmaking process because Defendants are including the contract clause in countless contracts throughout the country and requiring vaccination by January 4. The government does not dispute this. Instead, the government argues that it "is not the FAR Council's final word on" COVID-19 vaccine mandates. (Doc 108 at 19.) But the fact that an agency may "revise" its decision "is a common characteristic of agency action and does not make an otherwise definitive decision nonfinal." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016).

The FAR Deviation Clause also determines rights and obligations and causes legal consequences because it is being "applied by the [government] in a way that indicates it is binding." *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019). The government disagrees, claiming that the guidance has no independent effect unless an agency chooses to "incorporate the suggested clause into a procurement contract." (Doc. 108 at 19.) That may be true, but Defendants are doing that in droves. They do not suggest otherwise. And the FAQ—which the FAR Deviation Clause makes binding on contractors—expressly address the scope of the

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guidance's contact clause, suggesting it is the unitary, definitive contract clause being used across the government. (*See* Doc. 70-3 at 15). More fundamentally, Defendants' arguments cannot survive an encounter with even an ounce of common sense: When people are coerced by official government action into injecting foreign substances into their body, that is the sort of "legal consequence" reviewable under the APA. That action will never get any more final.

Even "an interim agency resolution counts as final agency action despite the potential for a different permanent decision, as long as the interim decision is not itself subject to further consideration by the agency." *NRDC v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020). In considering whether agency action is "final," the Ninth Circuit "focus[s] on the practical and legal effects of the agency action: The finality element must be interpreted in a pragmatic and flexible manner." *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (cleaned up). The FAR Council Directive constitutes final agency action, because it does not "genuinely [leave] [an] agency and its decisionmakers free to exercise discretion." *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006). But if agencies could avoid judicial review by cloaking their actions as "non-final" or "interim," they could avoid judicial review of their actions for an indefinite amount of time. *See Wheeler*, 955 F.3d at 79 (citing *Exhaustless v. FAA*, 931 F.3d 1209 (D.C. Cir. 2019), in which the FAA promulgated "interim" regulations that remained in effect for over a decade). The FAR Council Directive represents the FAR Council's final position on this issue. *See Wheeler*, 955 F.3d at 79–80 (holding that when an agency's decision "represents the final agency *position on this issue*," it is a "final agency decision" for purposes of judicial review under the APA).

III. Plaintiffs Are Likely To Succeed On the Merits

A. The Contractor Mandate Exceeds the President's Authority Under the Procurement Act.

Defendants identify no statute giving the President authority to regulate the personal health decisions of millions of Americans. Generic authority to promote "econom[y] and efficien[cy]" is not enough. Even the government's cases recognize that procurement actions must lie "reasonably within the contemplation of" the Procurement Act. *Liberty Mut. Ins. Co v. Friedman*, 639 F.2d 164, 171–72 (4th Cir. 1981). It strains credulity to think that Congress authorized the Executive Branch to impose a vaccination mandate on millions of Americans

when it streamlined the government's procurement system in the wake of World War II.

Defendants' conclusory assertion that vaccination promotes efficiency and economy wholly ignores the significant disruptions to federal contracting that will result from the Contractor Mandate. And while Defendants rely on the explanations set out for the first time in the Second OMB Notice to attempt to demonstrate a nexus between the Executive Order and the requirements of the Procurement Act, (see, Doc. 108 at 13–15), the Second OMB Notice's explanations are not entitled to any deference because they are manufactured *post hoc* rationalizations issued in response to mounting litigation brought by the States.

Nevertheless, no explanation or analysis could bring the President's Executive Order within the purposes of the Procurement Act. Defendants rely heavily on *UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) and *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), for their wide-ranging view of the President's authority under the Procurement Act, but their reliance is misplaced. First, Defendants ignore the D.C. Circuit's emphasis in *Kahn* that its holding did not "write a blank check for the President to fill in at his will." 618 F.2d at 793. In *Kahn*, the court emphasized that "[t]he procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power." *Id.* And Defendants' reliance on *UAW* is inapposite—that case considered whether the President could require contractors to *post notices* informing employees of their rights, not whether the President could *compel vaccination* of millions of Americans. 325 F.3d at 362.

Similarly, in *Kahn* the D.C. Circuit held that Congress' delegation of authority to the President demonstrated Congress wanted the President to "play a direct and active part in supervising the Government's *management functions*." *Kahn* 618 F.2d at 788 (emphasis added). In analogizing the Contractor Mandate to *Kahn* and *Chao*, Defendants ignore the manifest differences between mandatory injections into a person's body and workplace wage-setting, anti-discrimination policies, and requirements to notify employees of their rights.

Mandatory vaccination can hardly be said to be a central tenet of business management. Indeed, if the OSH Act does not authorize OSHA to require vaccination for workplace *safety*, it is hard to imagine that the Contractor Mandate falls within the ambit of the Procurement

1 Act and the President's supervision over workplace *management*. *See BST*, 17 F.4th at 617–18.

2 Moreover, Defendants' proposed interpretation of the "nexus" requirement would
3 render the President's Procurement Act power virtually unrestricted—and Defendants
4 tellingly offer no limiting principle. This limitless scope "counsel[s] against the Government's
5 interpretation." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see also BST*, 17 F.4th at 617–18.
6 Defendants' citation to *AFGE v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) is similarly
7 inapposite—whether the President has authority to phase out free parking is decidedly
8 different from requiring millions of people be injected against their will.

9 Defendants argue they need not find any textual support for their overreach because
10 Defendants are "acting as a market participant." (Doc. 108 at 2.) But even when exercising its
11 power to enter into contracts, the Executive Branch must comply with the statutory limits on
12 that power, and hence rules of statutory construction like the major questions doctrine and
13 constitutional avoidance. Under those doctrines, where—as here—the Government cannot
14 point to "exceedingly clear language," *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (citation
15 omitted), authorizing its actions, Defendants have no authority to enact the edict at issue.
16 Furthermore, even when contracting in the marketplace, "governmental discretion is always
17 constrained by the Constitution." *Kinney v. Weaver*, 367 F.3d 337, 357 (5th Cir. 2004); *see also*.
18 *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (Unconstitutional Conditions doctrine
19 applies to government contracts); (Doc. 34 at 8-9, 25-28; Doc. 58 at 19-20; Doc. 72 at 12-13.)

20 Defendants do not even claim they can point to "exceedingly clear" statutory language
21 authorizing the President to impose deeply consequential, federalism-disrupting public health
22 policies via the Procurement Act. At most, they point to 40 U.S.C. § 121, which authorizes the
23 President to issue "policies and directives" "not inconsistent" with the Procurement Act. If
24 Congress wanted a contractor mandate, it could have included one in the multiple COVID-
25 19 laws, thousands of pages in length, enacted over the last two years. *See, e.g.*, The Families
26 First Coronavirus Response Act, PL 116-127, March 18, 2020, 134 Stat. 178; The Coronavirus
27 Aid, Relief, and Economic Security Act, PL 116-136, Mar. 27, 2020, 134 Stat. 281. It did not.

1. The Claimed Justification for the Contractor Mandate is Pretextual

28 Defendants also cannot satisfy the nexus test. Defendants ask this Court to accept their

1 assurance that the nexus here "requires no extended explanation," (Doc. 108 at 14), but *they*
2 must connect the dots between the staggeringly overbroad mandate and specific threats to
3 federal contracting. Instead of attempting to do so, they point only to COVID-19's impact on
4 the country as a whole. (*E.g.*, *id.* at 2, 13–14.) Because the Contractor Mandate is tailored to
5 combat COVID-19 generally rather than address COVID-19's impact on the ability of federal
6 contractors to complete their work, it "is both overinclusive . . .*and* underinclusive," *BST*, 17
7 F.4th at 612 (emphasis in original); *see also Missouri v. Biden*, 2021 WL 5564501 (Nov. 29, 2021).
8 Under the Mandate's terms, contractors must "affirmatively determine" that their
9 covered contract employees have "no interactions" with "non-covered contractor employees"
10 in "common areas such as lobbies, security clearance areas, elevators, stairwells, meeting
11 rooms, kitchens, dining areas, and parking garages." (Doc. 70-3 at 9.) If that determination
12 cannot be made, each otherwise non-covered contractor employee falls under the sweeping
13 scope of the Contractor Mandate. High-traffic common areas traversed by thousands of
14 employees with no direct relationship to a federal contract would bring them all under the
15 grasp of the Contractor Mandate, even though their health has no particular connection to an
16 "economical and efficient system for . . . contracting." 40 U.S.C. § 101. And Defendants have
17 never explained why requiring vaccination for employees that work alone, at home, or
18 outdoors will promote efficiency or economy. This over-inclusivity[4] shows the Contractor
19 Mandate does not have a reasonably close nexus to economy and efficiency.
20 Finally, Defendants ignore the employee terminations, reassignments, and departures
21 that will inevitably follow the Contractor Mandate and make federal contracting *less* efficient.
22 Even if the Mandate might reduce the number of work hours lost from COVID-19 illness
23 (and Defendants insist we must just take their word for that), it will almost certainly result in
24 more work hours being lost from employees that can no longer work on the project. *See* Doc.
25 70 ¶ 96–102 and Doc. 72 at 3.) OMB itself cited, but ignored, some of the same data that
26
27 [4] It is also underinclusive. It applies only to new contracts, renewals, or modifications, (Doc.
28 108 at 10), yet there is no "economy and efficiency" reason to believe new contracts are more likely to lead to COVID-19. The Contractor Mandate also does not apply to "grants," "most contracts for procurement of goods," or contracts below $250,000. (Doc 108 at 3.)

Plaintiffs have been citing. For example, it cited a news article that stated 5% "of unvaccinated adults said they have left a job due to a vaccine mandate" and "[m]ore than a third of unvaccinated workers said they would quit rather than comply with a vaccine or testing mandate … a share that jumps to 72% if no testing option is offered."[5]

The public health analysis in the Second OMB Notice, and its issuance as part of President Biden's "new plan to require more Americans to be vaccinated," (*see* Doc. 70 ¶ 63) underscores that the government seeks to regulate public health, not improve the efficiency of contracting, rendering its actions pretextual. The *Louisiana* court found that the nearly identical timing in the adoption of the CMS mandate made it "obvious" the rationale for the CMS mandate was pretextual. (*See* Doc. 102-1 at 27.) So too here. Stopping the spread of COVID-19 is an admirable goal—one Plaintiffs share—but pretending that the government is not doing so, but instead merely improving the efficiency of its contracts, is pretextual. There is no nexus, no emergency, and no reason to allow the Mandate to go into effect.

B. Only FAR Council May Issue Government-Wide Procurement Regulations

As with the other challenged actions, the Second OMB Notice usurps the FAR Council's exclusive authority to issue government-wide procurement regulations. *See* 41 U.S.C. § 1303. The government argues that the Second OMB Notice is not within the scope of § 1303(a)(2)'s exclusivity provision, (Doc. 108 at 12), apparently because it believes the Second OMB Notice is not a "regulation[] relating to procurement issued by an executive agency." 41 U.S.C. § 1303(a)(2). That manifestly *is* what it is. It does not implement the executive order within OMB; it mandates implementation government-wide and thus violates Section 1303.

C. The FAQ Is A Procurement Policy and Regulation Subject To Section 1707

Every "procurement policy, regulation, procedure, or form" that "relates to the expenditure of appropriated funds" and "has a significant cost or administrative impact on contractors or offerors" *must* be published for notice and comment. 41 U.S.C.A. § 1707(a). The SFWTF FAQs qualify as both a procurement "policy" and "regulation," (*see* Doc. 34 at 19). Defendants have never argued otherwise. Because the FAQs were never published for

[5] 86 Fed. Reg. 63418 at 63,422 n.14 (Nov. 16, 2021) (citing Nate Rattner, "Some 5% of unvaccinated adults quit their jobs over Covid vaccine mandates, survey shows," CNBC, Oct. 25, 2021, https://tinyurl.com/y3yawxey), compare with (Doc. 70 ¶ 98 and Doc. 72 at 3 n.7.)

notice and comment, they "may not take effect," 41 U.S.C. § 1707(a), and because they are integral to the Contractor Mandate, (*see* Doc. 72 at 13–15), the entire mandate also fails.[6]

Defendants' baffling rejoinder to all of this is simply to contend the FAQs are not "controlling" and have no "legal force" unless "approved by the OMB Director." (Doc. 108 at 18 n.9). The FAR Deviation Clause—the clause Defendants are inserting into thousands of contracts around the country and that imposes the Contractor Mandate—specifically *requires* Contractors to "comply with all guidance, **including guidance conveyed through Frequently Asked Questions**, as amended during the performance of this contract." (Doc. 70-1 at 6, § 52.223-99(c) (emphasis added).) Because it has been forcibly inserted into contracts that are independently enforceable under contract law, they have obvious "legal force."

Defendants are apparently taking the bizarre position that their own contract clauses are not "controlling" and have no "legal force" unless first approved by the OMB Director. That is not—and never has been—the law. Nor does the actual FAR Deviation Clause make any distinction between SFWTF guidance and FAQs that have been approved by the Director of OMB and those that have been issued only by the SFWTF.[7]

1. The FAR Deviation Clause Is A Procurement Policy and Regulation

Defendants similarly, and also erroneously, suggest that the FAR Deviation Clause is not a procurement "regulation" because, they claim, it is nonbinding and does not direct "agenc[ies] to take any specific action." (Doc. 108 at 19). Defendants' analysis, however, demonstrates a fundamental misunderstanding of Section 1707. Section 1707 applies not just to regulations, but to *any* procurement "policy, regulation, procedure, or form." And EO 14042 directed the FAR Council to "by October 8, 2021, take initial steps to implement appropriate policy direction to acquisition offices for use of the [vaccine mandate] clause by recommending that agencies" implement vaccine mandate clauses as FAR deviations. 86 Fed. Reg. 50985, 50986 (Sept. 9, 2021). The EO further commanded agencies to "take steps" to

[6] Similarly, the Acting OMB Director failed to consider whether the FAQs promote economy and efficiency, even though the FAQs are purportedly binding.

[7] For the same reason, Defendants' argument the SFWTF is not an agency also fails. Their argument hinges on the contention the SFWTF is merely an "advisory body" that cannot issue legally binding guidance on its own. (Doc. 108 at 8.) The vaccine mandate clauses Defendants have been forcing into every federal contract since October 14, 2021 say otherwise.

"ensure" that contracts "entered into on or after October 15, 2021" "include the [vaccine mandate] clause." *Id.* State agencies and local governments in Arizona have been inundated with demands from federal agencies that they modify existing contracts, or enter into new contracts, containing the FAR Deviation Clause that the President told FAR to create. Federal agencies simply have no choice but to insist upon inclusion of that clause.

D. Defendants Have Failed To Invoke The Urgent And Compelling Circumstances Exception to 41 U.S.C. § 1707.

Defendants' new position that urgent and compelling circumstances justified departing from the notice-and-comment requirements is belied by the fact that Defendants did not claim these emergency circumstances existed when they promulgated the First OMB Notice in September, which is substantively the same as the Second OMB Notice. Defendants have not identified a change in circumstances supporting the new invocation of subsection (d). The purported emergency is plainly pretextual since Defendants only invoked it after this lawsuit (and others) challenged Defendants' failure to post the OMB Rule for notice and comment.

Finally, Defendants cannot credibly claim "urgent and compelling circumstances" justify this procedural violation while simultaneously delaying the implementation of the Contractor Mandate. The government relies on the COVID-19 pandemic, including the Delta variant, which surfaced in the United States in May. 86 Fed. Reg. at 63,423. But this does not qualify as urgent and compelling circumstances, especially given the government's delay. *See NRDC v. NHTSA*, 894 F.3d 95, 114 (2d Cir. 2018); *accord Chamber of Com. v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006); *Florida v. Becerra*, 8:21-cv-839, 2021 WL 2514138, at *45 (M.D. Fla. June 18, 2021); *Regeneron Pharms., Inc. v. HHS*, 510 F. Supp. 3d 29, 48-49 (S.D.N.Y. 2020).

This is especially so given that—at least according to the government—the challenged actions are not public health measures but purport to be measures to improve economy and efficiency in federal contracting. Thus, the government need not just show that COVID-19 in general is an urgent and compelling circumstance; it must show that COVID-19's effect on procurement *efficiency* is an urgent and compelling circumstance. They have not done so.

And because the FAR Deviation Clause is a "significant revision" as defined by the FAR, it is subject to additional procedures under the FAR, which require that it undergo

notice-and-comment rulemaking. 48 C.F.R. §§1.501-1; 1.501-2(b), (c). Defendants entirely ignore this separate notice-and-comment requirement, conceding their violation.

Agency action that has the force and effect of law is subject to the requisite procedural requirements of the statute that authorizes such action. *See Texas v. EEOC*, 933 F.3d 433, 441–42 (5th Cir. 2019) (explaining that agency action treated as binding is reviewable as final agency action). The FAR Deviation Clause authorizes and directs agencies' compliance with the Executive Order. Together, the FAR Deviation Clause and SFWTF Guidance and FAQ are being used by agencies to seek amendments to contracts. The guidance issued with the FAR Deviation Clause gives pre-approval to the Deviation Clause and imposes the SFWTF's requirements, including the information contained in the SFWTF FAQ. Defendants were required to go through notice and comment procedure, and they failed to do so.

IV. The Contractor Clause Is Unconstitutional.

Defendants point out that "Plaintiffs fail to identify a single case subjecting a federal procurement policy or contract to the Spending Clause's requirement[s]." (Doc. 108 at 16.) That is true. But Plaintiffs *do* identify authority demonstrating the requirements of the Spending Clause, (Doc. 72 at 11), and Defendants neither dispute that government contracts are an exercise of the Spending Clause nor cite authority recognizing a federal-contract exception. (Neither do they ask the Court to create such an exception.). What is more, Defendants do not even argue that their conduct would comply with the Spending Clause.

Nor do Defendants fare any better in their arguments against the anti-commandeering doctrine. (Doc. 108 at 16.) The Contractor Mandate is similar to *NFIB v. Sebelius,* where the Supreme Court struck down a federal government scheme of "economic dragooning that leaves the States with no real option but to acquiesce." 567 U.S. 519, 582 (2012). Plaintiffs have cited *NFIB* multiple times in this case. (*See* Doc. 58 at 1, 4, 14, 20-21; Doc 72 at 6, 13.) Defendants have never attempted to distinguish it. They have not because they cannot. The Contractor Mandate violates the Tenth Amendment and the anti-commandeering doctrine.

CONCLUSION

Plaintiffs thus respectfully request a nationwide PI enjoining the vaccine mandates.

RESPECTFULLY SUBMITTED this 8th day of December, 2021.

MARK BRNOVICH
ATTORNEY GENERAL

By: /s/ *James K. Rogers*
Joseph A. Kanefield (No. 15838)
Brunn W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)

Attorneys for Plaintiffs Mark Brnovich and the State of Arizona

WILENCHIK & BARTNESS PC

By: /s/ *Jack Wilenchik* (with permission)
Jack Wilenchik (No. 029353)

Attorney for Plaintiff John Doe

NAPIER, BAILLIE, WILSON, BACON & TALLONE, P.C.

By: /s/ *Michael Napier* (with permission)
Michael Napier (No. 002603)
Eric R. Wilson (No. 030053)
Cassidy L. Bacon (No. 031361)

Attorneys for Plaintiffs PLEA and United Phoenix Firefighters Association Local 493

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants, who have appeared, are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
Attorney for Plaintiff Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona