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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

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Mark Brnovich, et al.,

No. CV-21-01568-PHX-MTL

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Plaintiffs,

**ORDER**

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v.

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Joseph R Biden, et al.,

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Defendants.

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Plaintiffs the State of Arizona and Arizona Attorney General Mark Brnovich (collectively, the “State”); Al Reble, an employee of the U.S. Marshals Service, a component of the Department of Justice; the Phoenix Law Enforcement Association (“PLEA”); and United Phoenix Firefighters Association Local 493 (“Local 493”), seek to enjoin Defendants, the United States; various federal officials and entities; and the City of Phoenix, from enforcing two federal vaccination policies: one relating to federal contractors and subcontractors (the “Contractor Mandate”), and one relating to federal employees (the “Employee Mandate”).

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For the reasons that follow, the Court will grant Plaintiffs’ Motion for Preliminary Injunction (Doc. 72) in part, deny it in part, and enter an injunction against the federal Defendants.

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1       **I.       BACKGROUND**

2               **A.       Factual Background**

3                       **1.       Contractor Mandate**

4               On January 20, 2021, President Joseph Biden’s first day in office, he issued  
5 Executive Order (“EO”) 13991, Protecting the Federal Workforce and Requiring Mask-  
6 Wearing, which established the Safer Federal Workforce Task Force (“SFWTF”) and  
7 charged it with “provid[ing] ongoing guidance to heads of agencies on the operation of the  
8 Federal Government, the safety of its employees, and the continuity of Government  
9 functions during the COVID-19 pandemic.” 86 Fed. Reg. 7,045, 7,046. EO 13991  
10 provided that the SFWTF would be headed by three co-chairs: (1) the Director of the Office  
11 of Personnel Management (“OPM”) (Defendant Ahuja); (2) the Administrator of the  
12 General Services Administration (“GSA”) (Defendant Carnahan); and (3) the COVID-19  
13 Response Coordinator (Defendant Zients). *Id.*

14               Nine months later, on September 9, 2021, President Biden announced “a new plan  
15 to require more Americans to be vaccinated.” *See* President Joseph Biden, Remarks on  
16 Fighting the COVID-19 Pandemic (Sept. 9, 2021), [https://www.whitehouse.gov/briefing-](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/)  
17 [room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/)  
18 [19-pandemic-3/](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/). This plan would include several “new vaccination requirements.” *Id.*  
19 First, it would “require all employers with 100 or more employees, that together employ  
20 over 80 million workers, to ensure their workforces are fully vaccinated or show a negative  
21 test at least once a week.” *Id.* Second, it would “require vaccinations” of “those who work  
22 in hospitals, home healthcare facilities, or other medical facilities—a total of 17 million  
23 healthcare workers.” *Id.* Third, President Biden stated that “I will sign an executive order  
24 that will now require all executive branch federal employees to be vaccinated — all. And  
25 I’ve signed another executive order that will require federal contractors to do the same.”  
26 *Id.* And finally, the President announced that he would “require all of nearly 300,000  
27 educators in the federal paid program, Head Start program,” to be vaccinated. *Id.* The  
28 instant action challenges two of these vaccination requirements: those relating to federal

1 employees (the “Employee Mandate”) and federal contractor employees (the “Contractor  
2 Mandate”).

3 The same day he announced his new vaccination plan, President Biden signed EO  
4 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg.  
5 50,985 (Sept. 14, 2021). Therein, President Biden stated that the order was promulgated  
6 pursuant to “the authority vested in me as President by the Constitution and the laws of the  
7 United States of America, including the Federal Property and Administrative Services  
8 Act.” *Id.* at 50,985. The order was intended to “promote[] economy and efficiency in  
9 Federal procurement by ensuring that the parties that contract with the Federal Government  
10 provide adequate COVID-19 safeguards to their workers performing on or in connection  
11 with a Federal Government contract or contract-like instrument.” *Id.* Compliance with  
12 these safeguards, the order reasoned, “will decrease worker absence, reduce labor costs,  
13 and improve the efficiency of contractors and subcontractors at sites where they are  
14 performing work for the Federal Government.” *Id.*

15 The order directed executive agencies subject to the Federal Property and  
16 Administrative Services Act (the “Procurement Act”), 40 U.S.C. § 101 et seq., to include,  
17 in qualifying federal contracts and contract-like instruments, a clause requiring contractors  
18 and subcontractors to comply with guidance that would subsequently be issued by the  
19 SFWTF.<sup>1</sup> *Id.* The order further directed the Federal Acquisition Regulation (“FAR”)   
20 Council to make corresponding amendments to the FAR and, in the interim, to issue  
21 guidance to federal agencies on how to use their existing authority to include the new clause

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23 <sup>1</sup> The EO required the clause to be included in new contracts, new solicitations for a  
24 contract, extensions or renewals of an existing contract, and exercises of an option on an  
25 existing contract, if the contract falls into one of the following categories: a procurement  
26 contract for services, construction, or a leasehold interest in real property; a contract for  
27 concessions, including any concessions contract excluded by Department of Labor  
28 regulations at 29 C.F.R. § 4.133(b); or a contract entered into with the federal government  
in connection with federal property or lands and related to offering services for federal  
employees, their dependents, or the general public. 86 Fed. Reg. at 50,986–87. The EO  
does not extend to grants or to most contracts for the procurement of goods (as opposed to  
services). *Id.* Nor does it extend to contracts “whose value is equal to or less than the  
simplified acquisition threshold,” which is essentially \$250,000. *Id.* at 50,986; *see also* 48  
C.F.R. § 2.101.

1 in covered contracts. *Id.* at 50,986. Such guidance was to be issued by October 8, 2021 and  
2 was to include a sample clause that agencies might incorporate into their contracts and  
3 solicitations. *Id.*

4 The order instructed the SFWTF to issue its guidance by September 24, 2021 and  
5 provided that prior to the guidance’s issuance, the Director of the Office of Management  
6 and Budget (“OMB”) “shall, as an exercise of the delegation of my authority under the  
7 Federal Property and Administrative Services Act, *see* 3 U.S.C. 301, determine whether  
8 such Guidance will promote economy and efficiency in Federal contracting if adhered to  
9 by Government contractors and subcontractors.” *Id.* at 50,985–86.

10 Consistent with the President’s direction, the SFWTF issued its initial guidance for  
11 federal contractor and subcontractor work locations on September 24, 2021. Safer Federal  
12 Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors  
13 and Subcontractors (Sept. 24, 2021), [https://www.saferfederalworkforce.gov/downloads/  
14 Draft%20contractor%20guidance%20doc\\_20210922.pdf](https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf). The guidance states, in part:

15 Covered contractors must ensure that all covered contractor  
16 employees are fully vaccinated for COVID-19, unless the  
17 employee is legally entitled to an accommodation. Covered  
18 contractor employees must be fully vaccinated no later than  
19 December 8, 2021. After that date, all covered contractor  
20 employees must be fully vaccinated by the first day of the  
period of performance on a newly awarded covered contract,  
and by the first day of the period of performance on an  
exercised option or extended or renewed contract when the  
clause has been incorporated into the covered contract.

21 *Id.* at 5. The guidance defines the term “covered contractor employee” to mean “any full-  
22 time or part-time employee of a covered contractor working on or in connection with a  
23 covered contract or working at a covered contractor workplace[,] . . . includ[ing]  
24 employees of covered contractors who are not themselves working on or in connection  
25 with a covered contract.” *Id.* at 3–4. This means that even employees of contractors and  
26 subcontractors who are not themselves working on federal contracts are subject to the  
27 Contractor Mandate. The guidance further provides that the vaccine mandate applies to  
28 contractor employees who have already been infected with COVID-19, to workplace

1 locations that are outdoors, and to contractor employees who are working remotely full  
2 time. *Id.* at 10–11. The guidance also clarifies that “[p]eople are considered fully  
3 vaccinated for COVID-19 two weeks after they have received the second dose in a two-  
4 dose series, or two weeks after they have received a single-dose vaccine.”<sup>2</sup> *Id.* at 4. And,  
5 finally, the guidance states that it is promulgated pursuant to federal law and thus  
6 supersedes any contrary state or local law or ordinance. *Id.* at 13.

7 On September 28, 2021, Shalanda Young, Acting Director of OMB, published a  
8 notice in the Federal Register that she had “determined that compliance by Federal  
9 contractors and subcontractors with the COVID-19 workplace safety protocols detailed in  
10 [the SFWTF guidance] will improve economy and efficiency by reducing absenteeism and  
11 decreasing labor costs for contractors and subcontractors working on or in connection with  
12 a Federal Government contract.” Determination of the Promotion of Economy and  
13 Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg.  
14 53,691, 53,692 (Sept. 28, 2021). The notice did not provide analysis or evidence supporting  
15 Acting Director Young’s determination and was not subject to public comment. Nor did  
16 the notice claim that urgent and compelling circumstances merited forgoing the notice-and-  
17 comment procedures set forth in the Office of Federal Procurement Policy Act (the  
18 “Procurement Policy Act”), 41 U.S.C. § 1707(d).

19 The next day, September 29, 2021, the FAR Council initiated the rulemaking  
20 process to amend the FAR. *See* Open FAR Cases Report 2 (Nov. 1, 2021),  
21 <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (Case No. 2021-021,  
22 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors). EO 14042  
23 directed the FAR Council to issue *interim* guidance assisting agencies in exercising their  
24 authority to deviate from the FAR by incorporating vaccination clauses into qualifying  
25 contracts. *See* 86 Fed. Reg. at 50,986. Consistent with that directive, on September 30,  
26 2021, the FAR Council issued a memorandum “provid[ing] agencies . . . with initial

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28 <sup>2</sup> Thus, the initial guidance *de facto* required that contractor employees receive their final  
vaccination dose no later than November 24, 2021 to meet the December 8, 2021 deadline  
to be fully vaccinated.

1 direction” for implementing the SFWTF guidance and for “meeting the applicability  
2 requirements and deadlines set forth in” EO 14042. *See* Memorandum from Lesley A. Field  
3 et al., 1–2 (Sept. 30, 2021), [https://www.whitehouse.gov/wp-content/uploads/2021/09/  
4 FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf)  
5 (“FAR Memorandum”). The memorandum includes a sample vaccination clause that reads,  
6 in part: “The Contractor shall comply with all guidance, including guidance conveyed  
7 through Frequently Asked Questions, as amended during the performance of this contract,  
8 for contractor or subcontractor workplace locations published by the Safer Federal  
9 Workforce Task Force.” *Id.* at 5. The memorandum also encourages agencies “to make  
10 their deviations effective until the FAR is amended or the deviation is otherwise rescinded  
11 by the agency.” *Id.* at 3.

12 In November, the SFWTF issued revised contractor guidance and Acting OMB  
13 Director Young issued a revised determination that the guidance would promote economy  
14 and efficiency in federal contracting. Acting Director Young’s revised determination was  
15 published the Federal Register on November 16, 2021. Determination of the Acting OMB  
16 Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal  
17 Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418. Among  
18 other things, the revised determination includes the full text of the revised SFWTF  
19 contractor guidance. The revised guidance changes the deadline for federal contractor  
20 employees to be fully vaccinated from December 8, 2021 to January 18, 2022.<sup>3</sup> The revised  
21 guidance also omits the FAQs section from the initial guidance document and instead  
22 provided a link to a contractor FAQ page on the SFWTF website (“Contractor FAQs”).  
23 *See* Federal Contractors, FAQs, Safer Federal Workforce,  
24 <https://www.saferfederalworkforce.gov/faq/contractors/> (last visited Jan. 25, 2022). The  
25 revised determination also includes a section stating, in far more detail than the initial  
26 determination, the manner in which the guidance is expected to promote economy and

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28 <sup>3</sup> That deadline nominally remains in place. But given the injunctions that have been  
entered in other cases challenging the Contractor Mandate, *see infra* Section I.B., the  
mandate is not currently being enforced.

1 efficiency in federal procurement. Further, the revised determination disclaims the  
2 applicability of the notice-and-comment procedures set forth in the Procurement Policy  
3 Act, 41 U.S.C. § 1707(d), and provides that even if that statute is applicable, “urgent and  
4 compelling circumstances” justify departing from the requirements of § 1707 in this case.  
5 86 Fed. Reg. at 63,423.

## 6 **2. Employee Mandate**

7 The same day President Biden issued EO 14042, he also signed EO 14043,  
8 Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. 86 Fed. Reg.  
9 50,989 (Sept. 14, 2021). EO 14043 stated President Biden’s determination “that to promote  
10 the health and safety of the Federal workforce and the efficiency of the civil service, it is  
11 necessary to require COVID-19 vaccination for all Federal employees.” *Id.* at 50,989.  
12 Pursuant to that determination, the order directed each federal agency to “implement, to  
13 the extent consistent with applicable law, a program to require COVID-19 vaccination for  
14 all of its Federal employees, with exceptions only as required by law.” *Id.* at 50,990. The  
15 order further directed the SFWTF to “issue guidance within 7 days of this order on agency  
16 implementation of this requirement for all agencies covered by this order.” *Id.*

17 On September 16, 2021, the SFWTF updated the “Frequently Asked Questions”  
18 page on its website in order to carry out the President’s directive (“Employee FAQs”). *See*  
19 Vaccinations, FAQs, Safer Federal Workforce, [https://www.saferfederalworkforce.gov/  
20 faq/vaccinations/](https://www.saferfederalworkforce.gov/faq/vaccinations/) (last visited Jan. 25, 2022). The Employee FAQs initially provided a  
21 deadline of November 22, 2021 for all federal employees to be fully vaccinated. *Id.* The  
22 FAQs, like the contractor guidance, also provide that federal employees will be considered  
23 fully vaccinated two weeks after they received the final dose of an approved vaccine. *Id.*  
24 The FAQs further provide that the vaccine mandate applies to federal employees who have  
25 already been infected with COVID-19 and to those that are working remotely full time. *Id.*  
26 To date, Defendants have neither issued a formal guidance document nor published a notice  
27 in the Federal Register with respect to the Employee Mandate.

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1           **B. Procedural Background**

2           On September 14, 2021, the State initiated this action. (Doc. 1.) The State's initial  
3 Complaint contained only a single claim for relief, based on the Constitution's Equal  
4 Protection Clause.<sup>4</sup> (Doc. 1 at 13–14 ¶¶ 39–45.) After the scope of the federal vaccine  
5 mandates became clear, however, the State filed a much broader Amended Complaint,  
6 containing eleven claims for relief. (Doc. 14 at 43–51 ¶¶ 114–64.) The Amended  
7 Complaint was joined by Plaintiff Reble, then proceeding under the pseudonym John Doe,  
8 who also filed a Motion to Proceed Pseudonymously. (Doc. 16.) With the Amended  
9 Complaint, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary  
10 Injunction. (Doc. 34.) The motion was briefed on an expedited schedule (Docs. 34, 44, 52,  
11 58) and, on November 10, 2021, the Court held oral argument.

12           At oral argument, Defendants' counsel notified the Court that, earlier that day, the  
13 SFWTF had issued revised contractor guidance and Acting OMB Director Young had  
14 issued a revised determination that the guidance would promote economy and efficiency  
15 in federal contracting. (Doc. 69 at 48–49.) At the conclusion of oral argument, in light of  
16 Defendants' revised guidance and determination, and certain deficiencies in Plaintiffs'  
17 Amended Complaint, the Court denied the Motion for Temporary Restraining Order and  
18 Preliminary Injunction without prejudice and granted Plaintiffs leave to file a second  
19 amended complaint. (Doc. 64.)

20           Plaintiffs filed the Second Amended Complaint (Doc. 70) and the instant Motion  
21 for Preliminary Injunction (Doc. 72) on November 19, 2021. The Second Amended  
22 Complaint was joined by Plaintiffs PLEA and Local 493, who asserted claims against  
23 Defendant the City of Phoenix, a federal contractor, for implementing the federal  
24 Defendants' Contractor Mandate.<sup>5</sup>

25           With their Second Amended Complaint, Plaintiffs filed a Motion to Bifurcate  
26 Claims and Consolidate Trial on the Merits. (Doc. 73.) In that motion, Plaintiffs seek to

27 <sup>4</sup> Plaintiffs elected not to include this claim in their Third Amended Complaint. (Doc. 134.)

28 <sup>5</sup> On November 18, 2021, the City, citing the Contractor Mandate, notified its employees  
that they would be required to receive the COVID-19 vaccine by January 18, 2022 or face  
discipline, up to and including termination.



1 bifurcate Counts I–VIII (the “Vaccine Counts”) and Counts IX–XIII (the “Immigration  
2 Counts”) and consolidate adjudication of the Motion for Preliminary Injunction with a trial  
3 on the merits of the Vaccine Counts.<sup>6</sup> Plaintiffs’ motion is unopposed; the parties agree  
4 that this case presents “almost exclusively legal issues,” and that “discovery and trial  
5 procedures are unnecessary.” (Doc. 127 at 2.) The Court agrees. Bifurcation and  
6 consolidation will serve the interest of judicial economy and convenience, will expedite  
7 proceedings, and will not prejudice any party. *See* Fed. R. Civ. P. 42(b) (bifurcation may  
8 be ordered “[f]or convenience, to avoid prejudice, or to expedite and economize”); Fed. R.  
9 Civ. P. 65(a)(2) (“Before or after beginning the hearing on a motion for a preliminary  
10 injunction, the court may advance the trial on the merits and consolidate it with the  
11 hearing.”). Accordingly, the Court will grant Plaintiffs’ motion.

12 Before the instant Motion for Preliminary Injunction was fully briefed, decisions  
13 were handed down in four parallel cases involving states’ challenges to the Contractor  
14 Mandate: *Kentucky v. Biden*, No. 3:21-cv-00055, — F. Supp. 3d —, 2021 WL 5587446  
15 (E.D. Ky. Nov. 30, 2021), *Georgia v. Biden*, No. 1:21-cv-00163, — F. Supp. 3d —, 2021  
16 WL 5779939 (S.D. Ga. Dec. 7, 2021), *Missouri v. Biden*, No. 4:21-cv-1300, — F. Supp.  
17 3d —, 2021 WL 5998204 (E.D. Mo. Dec. 20, 2021), and *Florida v. Nelson*, No. 8:21-cv-  
18 02524 (M.D. Fla. Dec. 22, 2021). In *Kentucky*, the district court granted plaintiffs’ motion  
19 for a preliminary injunction and enjoined enforcement of the Contractor Mandate in  
20 Kentucky, Ohio, and Tennessee. 2021 WL 5587446, at \*14. In *Missouri*, the court likewise  
21 granted plaintiffs’ request for an injunction, and enjoined enforcement of the Contractor  
22 Mandate in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North  
23 Dakota, South Dakota, and Wyoming. Slip op. at 13. In *Florida*, the court again agreed  
24 with Plaintiffs, and enjoined enforcement of the Contractor Mandate in Florida. Slip op. at  
25 38. In *Georgia*, the court again granted plaintiffs’ motion for a preliminary injunction, but  
26 issued a nationwide injunction barring enforcement of the Contractor Mandate “in any state  
27 or territory of the United States of America.” 2021 WL 5779939, at \*12.

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<sup>6</sup> Plaintiffs presently seek injunctive relief only on the Vaccine Counts.

1           Shortly after the *Georgia* court issued the nationwide injunction, Defendants moved  
2 to stay this action while the injunction was pending. (Doc. 117.) *See Texas v. Biden*, No.  
3 3:21-cv-309-JVB (S.D. Tex. Dec. 10, 2021) (granting similar motion to stay). The Court  
4 held a Status Conference with the parties on December 14, 2021, to discuss Defendants’  
5 Motion to Stay, the scope of Plaintiffs’ Second Amended Complaint, Plaintiffs’ Motion to  
6 Bifurcate Claims and Consolidate Trial on the Merits, and Plaintiff Reble’s Motion to  
7 Proceed Pseudonymously. (Docs. 111, 114, 117.) After the hearing, the Court denied  
8 Defendants’ Motion to Stay and Plaintiff Reble’s Motion to Proceed Pseudonymously.  
9 (Docs. 121, 122.) Plaintiffs then filed a Third Amended Complaint adding Plaintiff  
10 Reble’s true name. (Doc. 134.)

## 11       **II.     LEGAL STANDARD**

12           An injunction is an “extraordinary remedy never awarded as of right.” *Winter v.*  
13 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “To be entitled to a permanent  
14 injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) that it has  
15 suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the  
16 balance of hardships justify a remedy in equity; and (5) that the public interest would not  
17 be disserved by a permanent injunction.” *Indep. Training & Apprenticeship Program v.*  
18 *Cal. Dep’t of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013) (citing *eBay Inc. v.*  
19 *MerchExch., LLC*, 547 U.S. 388, 391 (2006)); *see also Amoco Prod. Co. v. Village of*  
20 *Gambell*, 480 U.S. 531, 546 n.12 (1987) (“The standard for a preliminary injunction is  
21 essentially the same as for a permanent injunction with the exception that the plaintiff must  
22 show a likelihood of success on the merits rather than actual success.”). “The decision to  
23 grant or deny permanent injunctive relief is an act of equitable discretion by the district  
24 court.” *eBay Inc.*, 547 U.S. at 391.

## 25       **III.   DISCUSSION**

26           Plaintiffs seek a permanent injunction barring Defendants from enforcing the  
27 Contractor and Employee Mandates nationwide. (Doc. 72 at 25.) Plaintiffs challenge the  
28 Contractor Mandate’s legality on numerous grounds. First, Plaintiffs contend that the

1 Contractor Mandate exceeds the President’s statutory authority under the Procurement Act.  
2 (Doc. 134 at 54–56 ¶¶ 150–60.) The Procurement Act, they argue, was enacted “to ensure  
3 the efficient purchase of goods and services, not to empower the Executive Branch to  
4 engage in far-reaching public health programs that are either unrelated to—or outright  
5 contrary to—the explicit efficiency rationale.” (Doc. 34 at 23.) There is no nexus, in  
6 Plaintiffs’ view, between the Contractor Mandate and federal procurement and, even if  
7 there were, “Defendants have not made any specific administrative findings” establishing  
8 such a nexus. (*Id.* at 24–27.) Second, Plaintiffs argue that by failing to publish the  
9 contractor guidance in the Federal Register for public comment, Defendants violated the  
10 procedural requirements of the Procurement Policy Act. (Doc. 134 at 56–57 ¶¶ 161–66.)  
11 Third, Plaintiffs claim that the mandate violates the Tenth Amendment and principles of  
12 federalism because “the power to impose vaccine mandates, to the extent that such power  
13 exists at all, is part of the police powers reserved to the States.” (Docs. 34 at 19; 134 at 58–  
14 59 ¶¶ 175–81.) Fourth, Plaintiffs claim, under the Administrative Procedure Act (“APA”),  
15 that the mandate is arbitrary and capricious and should have gone through notice-and-  
16 comment procedures.<sup>7</sup> (Doc. 134 at 61–64 ¶¶ 192–215.) Fifth, Plaintiffs contend that the  
17 mandate violates the anticommandeering doctrine “by requiring agencies and  
18 political subdivisions of the State to enforce the Contractor Mandate against its  
19 own employees.” (*Id.* at 59–60 ¶¶ 182–85.) Finally, Plaintiffs contend that, to the extent  
20 the mandate is authorized by statute, the statute violates the nondelegation doctrine.<sup>8</sup> (*Id.*  
21 at 60–61 ¶¶ 184–89.)

22 Plaintiffs challenge *both* the Contractor Mandate and Employee Mandate on two  
23 additional grounds. First, they assert that the mandates are unlawful under the Emergency  
24 Use Authorization statute, 21 U.S.C. § 360bbb-3, because the mandates “strip from all

25 <sup>7</sup> The Court will not address the substance of Plaintiffs’ APA claims because those claims  
26 have not been adequately briefed. The claims are asserted in Plaintiffs’ Third Amended  
27 Complaint (*see* Doc. 134 at 61–64 ¶¶ 192–215), but have not been addressed in any  
subsequent filing. Plaintiffs have therefore failed to demonstrate that they are entitled to  
relief on those grounds.

28 <sup>8</sup> The Court addresses Plaintiffs’ Tenth Amendment, anticommandeering doctrine, and  
nondelegation doctrine arguments in conjunction with its analysis of whether the  
Contractor Mandate violates the Procurement Act. *See infra* Section III.B.1.

1 federal employees, contractors, and subcontractors” the right to refuse to receive a vaccine  
2 approved through abbreviated emergency use procedures—an opportunity that, in  
3 Plaintiffs’ view, the statute provides. (*Id.* at 57–58 ¶¶ 167–71.) Second, Plaintiffs argue  
4 that the mandates violate the due process rights of federal and contractor employees to  
5 bodily integrity and to refuse medical treatment. (*Id.* at 58 ¶¶ 172–74.)

6 In addition to contesting the substance of Plaintiffs’ arguments, Defendants contend  
7 that the Court lacks jurisdiction to entertain Plaintiffs’ claims. Thus, before addressing the  
8 substance of those claims, the Court must determine whether it has jurisdiction.

## 9 A. Jurisdiction

### 10 1. Justiciability

11 Article III authorizes the federal courts to resolve only “cases” and “controversies.”  
12 U.S. Const. art. III, § 2. Federal courts may not issue pronouncements on questions of law  
13 arising outside of such “cases and controversies,” because doing so would be “inimical to  
14 the Constitution’s democratic character.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563  
15 U.S. 125, 133 (2011). This constitutional limitation on federal jurisdiction is enforced  
16 through various justiciability doctrines. Defendants assert that Plaintiffs’ claims are  
17 nonjusticiable under two such doctrines: standing and ripeness.

18 The “irreducible constitutional minimum of standing” consists of three components.  
19 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking federal jurisdiction  
20 must prove that: “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized  
21 and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable  
22 to the challenged action of the defendant; and (3) it is likely, as opposed to merely  
23 speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth,*  
24 *Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan*, 504  
25 U.S. at 560–61).

26 Ripeness, on the other hand, is “‘peculiarly a question of timing,’ designed to  
27 ‘prevent the courts, through avoidance of premature adjudication, from entangling  
28 themselves in abstract disagreements.’” *Thomas v. Anchorage Equal Rts. Comm’n*, 220

1 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (citing *Reg'l Rail Reorg. Act Cases*, 419 U.S.  
2 102, 140 (1974); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). Ripeness, like  
3 standing, includes both a constitutional and a prudential component. *See In re Coleman*,  
4 560 F.3d 1000, 1004 (9th Cir. 2009). Constitutional ripeness requires that the issues  
5 presented be “definite and concrete, not hypothetical or abstract.” *Thomas*, 220 F.3d at  
6 1139. In assessing whether a case is ripe for adjudication, the Court must ask “whether the  
7 plaintiffs face ‘a realistic danger of sustaining a direct injury as a result of the [challenged  
8 law’s] operation or enforcement,’ or whether the alleged injury is too ‘imaginary’ or  
9 ‘speculative’ to support jurisdiction.” *Id.* (quoting *Babbitt v. United Farm Workers Nat’l*  
10 *Union*, 442 U.S. 289, 298 (1979)). Where a dispute hangs on “contingent future events that  
11 may not occur as anticipated, or indeed may not occur at all,” *Clinton v. Acequia, Inc.*, 94  
12 F.3d 568, 572 (9th Cir. 1996) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473  
13 U.S. 568, 580–81 (1985)), it may be too speculative to present a justiciable controversy.  
14 *See In re Coleman*, 560 F.3d at 1005. On the other hand, “a litigant need not ‘await the  
15 consummation of threatened injury to obtain preventive relief. If the injury is certainly  
16 impending, that is enough.” *Addington v. U.S. Airline Pilots Ass’n*, 606 F.3d 1174, 1179  
17 (9th Cir. 2010) (emphasis omitted) (quoting *United States v. Streich*, 560 F.3d 926, 931  
18 (9th Cir. 2009)).

19 Prudential ripeness, on the other hand, requires the Court to assess “the fitness of  
20 the issues for judicial decision” and “the hardship to the parties of withholding court  
21 consideration.” *Abbott Labs.*, 387 U.S. at 149. The Ninth Circuit has held that “[a] claim is  
22 fit for decision if the issues raised are primarily legal, do not require further factual  
23 development, and the challenged action is final.” *US West Commc’ns v. MFS Intelenet,*  
24 *Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (quoting *Standard Alaska Prod. Co. v. Schaible*,  
25 874 F.2d 624, 627 (9th Cir. 1989)). To satisfy the hardship requirement, on the other hand,  
26 the party invoking federal jurisdiction must show “hardship of a legal kind, or something  
27 that imposes a significant practical harm.” *Nat. Res. Def. Council v. Abraham*, 388 F.3d  
28 701, 706 (9th Cir. 2004).

1 Ripeness and standing are closely related doctrines. *See Thomas*, 220 F.3d at 1138  
2 (“Sorting out where standing ends and ripeness begins is not an easy task.”); *see also Susan*  
3 *B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (“The doctrines of standing and  
4 ripeness ‘originate’ from the same Article III limitation.”). Indeed, the Ninth Circuit has  
5 characterized the ripeness inquiry as “standing on a timeline.” *Thomas*, 220 F.3d at 1138.  
6 Thus, whether the Court addresses justiciability under the rubric of standing or ripeness,  
7 the analysis is materially the same. *See Montana Env’t Info. Ctr. v. Stone-Manning*, 766  
8 F.3d 1184, 1189 (9th Cir. 2014).

9 **i. Reble**

10 Defendants contend that Plaintiff Reble’s claims challenging the Employee  
11 Mandate are constitutionally and prudentially unripe. (Doc. 52 at 27.) The Court agrees.

12 Reble, a Criminal Investigator with the U.S. Marshals Service, has been a  
13 Department of Justice employee for more than 30 years. He works at the federal  
14 courthouse in Phoenix, Arizona. (Doc. 134 at 7–8 ¶ 12.) He strongly opposes and has not  
15 taken the COVID-19 vaccine. (*Id.*) He does not intend to comply with the Employee  
16 Mandate and has requested a medical exemption therefrom.<sup>9</sup> (*Id.*) His exemption request  
17 has not yet been granted or denied and instead remains pending with the U.S. Marshals  
18 Service. (*Id.*) While his exemption request is pending, Reble is not required to be  
19 vaccinated and is not subject to disciplinary action. (*See* Doc. 138 at 2 n.1.) In the event  
20 his exemption request is ultimately granted, Reble will not have to be vaccinated. If his  
21 exemption request is denied, he will have two weeks from the denial to receive his first (or  
22 only) dose of an approved vaccine before being subject to discipline. (Docs. 52 at 28; 138  
23 at 2 n.1.)

24 Reble challenges the Employee Mandate on two grounds. First, he argues the  
25 mandate is unlawful under § 360bbb-3 because it does not permit him to refuse to receive  
26 a vaccine approved through emergency use procedures. (Doc. 134 at 57–58 ¶¶ 167–71.)  
27 Second, he argues that the mandate violates his substantive due process rights to “bodily

28 <sup>9</sup> Reble concedes that he does not qualify for a religious exemption to the Employee  
Mandate. (*See* Doc. 134 at 40–41 ¶ 112.)



1 integrity” and to “refuse medical treatment.” (*Id.* at 58 ¶¶ 172–74.)

2 Reble’s claims are nonjusticiable, because they depend on “contingent future events  
3 that may not occur as anticipated, or indeed may not occur at all.” *Trump v. New York*, 592  
4 U.S. —, 141 S. Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300  
5 (1998)). While his exemption request is pending with the Marshals Service, Reble is not  
6 required to be vaccinated and is not subject to discipline. And, in the event his exemption  
7 is eventually granted, he will not have to be vaccinated against COVID-19 at all. In that  
8 case, his claimed Article III injuries will never occur—he will not have to receive a vaccine  
9 approved through emergency use procedures, and his substantive due process rights will  
10 not be violated. *See Church v. Biden*, No. 1:21-cv-2815, 2021 WL 5179215, at \*1 (D.D.C.  
11 Nov 8, 2021) (“Plaintiffs, therefore, come before this Court complaining of a compulsory  
12 inoculation they may never need to take, and of adverse employment actions they may  
13 never experience.”). In that event, any opinion issued by the Court on the merits of Reble’s  
14 claims would be rendered merely advisory. *See* 13 Charles Alan Wright & Arthur R.  
15 Miller, *Federal Practice and Procedure* § 3529.1 (3d ed. 1998) (“The oldest and most  
16 consistent thread in the federal law of justiciability is that federal courts will not give  
17 advisory opinions.”).

18 Reble’s arguments in favor of justiciability are unpersuasive. He first contends that,  
19 “[g]iven the limited and strict approach Defendants have applied to exemption requests,  
20 and reports that nearly all such requests are being denied,” it is likely that his exemption  
21 request will also be denied. (Doc. 134 at 8 ¶ 12.) But the record is devoid of evidence that  
22 nearly all requests are being denied or that Reble’s request, in particular, is likely to be  
23 denied. Reble likewise provides no evidence that the Marshals Service or Department of  
24 Justice will impose sanctions or discipline in the event his request is granted. In fact,  
25 Defendants’ policies make clear that exemption requests will be considered seriously, and  
26 that no discipline will be imposed in the event exemptions are granted. *See, e.g.*,  
27 Vaccinations, FAQs, Safer Federal Workforce, [https://www.saferfederalworkforce.gov/  
28 faq/vaccinations/](https://www.saferfederalworkforce.gov/faq/vaccinations/) (last visited Jan. 25, 2022) (“Determining whether an exception is legally



1 required will include consideration of factors such as the basis for the claim; the nature of  
2 the employee’s job responsibilities; and the reasonably foreseeable effects on the agency’s  
3 operations.”).

4 Reble further contends that because his claims involve only legal, and not factual,  
5 disputes, the claims are ripe for judicial review, notwithstanding his alleged injury being  
6 contingent on future events. (Doc. 144 at 2–3.) He is mistaken. While it is generally true  
7 as a matter of *prudential* ripeness that the more an issue presented is purely one of law, the  
8 more likely the issue is to be ripe, *see, e.g., Artway v. Att’y Gen. of N.J.*, 81 F.3d 1235,  
9 1249 (3d Cir. 1996), the mere potential for future injury, standing alone, is insufficient to  
10 render a case justiciable under Article III, even where the issue presented is primarily legal,  
11 *see Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 236 (D.C. Cir. 1988).

12 Reble’s claims are therefore unripe. *See Church*, 2021 WL 5179215, at \*8–10  
13 (holding federal employees’ claims challenging EO 14043 unripe due to pending exception  
14 requests); *Rodden v. Fauci*, No. 3:21-cv-317, — F. Supp. 3d —, 2021 WL 5545234, at \*3  
15 (S.D. Tex. Nov. 27, 2021) (same); *McCray v. Biden*, No. 1:21-cv-2882, 2021 WL 5823801,  
16 at \*8–9 (D.D.C. Dec. 7, 2021) (same); *Donovan v. Vance*, — F. Supp. 3d —, No. 4:21-cv-  
17 5148, 2021 WL 5979250, at \*4–5 (E.D. Wash. Dec. 17, 2021) (same); *AFGE Local 501 v.*  
18 *Biden*, No. 21-cv-23828, slip op. at 13–18 (S.D. Fla. Dec. 22, 2021) (same).

## 19 **ii. The State**

20 Defendants also contend that the State’s claims are nonjusticiable. In particular,  
21 Defendants argue that the State: (1) cannot show “sovereign injury” because “the federal  
22 government’s regulation of its own contractual affairs does not impinge on the state’s  
23 police power,” and (2) cannot show “economic injury” because the State “provides no  
24 evidence that it has lost, or imminently will lose, any federal contract; and its generalized  
25 fears of economic disruptions are too speculative to satisfy Article III.” (Doc. 108 at 8.)

26 The State advances multiple standing theories in response. First, it alleges that  
27 “Defendants’ actions directly injure the State’s sovereign, quasi-sovereign, and proprietary  
28 interests by denying Arizona residents of the benefit of the Due Process Clause.” (Doc. 134

1 at 39 ¶ 105.) Second, the State argues that it has standing in its capacity as a contractor,  
2 because: (1) the Contractor Mandate requires the State to either violate the Constitution  
3 and federal and state law or face the loss of federal funds and contracts; and (2) the  
4 Contractor Mandate will cause State employees to resign, which will cause significant  
5 harm to the State’s operations given the current labor market. (*Id.* ¶ 106.) Third, “a natural  
6 and predictable consequence of the Contractor Mandate is that numerous employees may  
7 be fired, retire, or quit their jobs, including employees of businesses within the State. This  
8 injures the State’s quasi-sovereign interest in the economic well-being of its citizens[, and]  
9 injures the State in that it will likely increase the burden on the State’s unemployment  
10 insurance funds.” (*Id.* ¶ 107.) Fourth, “a natural and predictable consequence of the  
11 Contractor Mandate is that employers who are critical to the supply chain, and are also  
12 federal contractors, will likely lose significant numbers of employees. It is entirely  
13 predictable, therefore, that the Contractor Mandate will exacerbate current supply chain  
14 issues.” (*Id.* at 39–40 ¶ 108.) Fifth, the State contends that “[b]ecause the Contractor  
15 Mandate claims to supersede all contrary State law, it injures Arizona’s interest in setting  
16 its own laws regarding public health and workplace issues that would otherwise apply to  
17 contractors within Arizona’s borders, as well as preempting State religious-liberty  
18 protections under the State Constitution and State statute.” (*Id.* at 40 ¶ 109.) Finally, the  
19 State contends that because the “Contractor Mandate requires employees to prove  
20 vaccination status with documentation,” and because “agencies of the State often possess  
21 such documentation,” “[a] predictable consequence of the Contractor Mandate is . . . to  
22 increase the number of people seeking documentation from the [State] regarding  
23 vaccination status,” which will in turn “increase costs to the State.” (*Id.* ¶ 110.)

24 State standing depends on the capacity in which the state initiates suit. *See Gov’t of*  
25 *Manitoba v. Bernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019); *see also* Erwin Chemerinsky,  
26 *Federal Jurisdiction* 125 (8th ed. 2021) (“[A] distinction must be drawn between a  
27 government entity suing to remedy injuries that it has suffered and suing in a representative  
28 capacity on behalf of its citizens.”). In a direct-injury suit, the state seeks redress for its

1 own injury. In such a case, the state need only meet the ordinary demands of Article III.  
2 That is, it needs to prove only that it has suffered an injury in fact that is fairly traceable to  
3 the defendant’s conduct and redressable by a favorable ruling. *Bernhardt*, 923 F.3d at 178.  
4 In a *parens patriae* suit, on the other hand, the state seeks redress for the injuries of its  
5 citizens. State suits as *parens patriae* are permitted because “at a minimum, a State has a  
6 quasi-sovereign interest ‘in the health and well-being—both physical and economic—of  
7 its residents’ and ‘in not being discriminatorily denied its rightful status within the federal  
8 system.’” *Bernhardt*, 922 F.3d at 178 (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico*  
9 *ex rel. Barez*, 458 U.S. 592, 607 (1982)). To have standing in such a case, the state  
10 ordinarily must allege both that its citizens are harmed and that the harm is one that the  
11 state, if possible, would likely attempt to address through its lawmaking powers. *See Snapp*,  
12 458 U.S. at 607.

13 The Supreme Court has long-since held, however, that states lack standing as *parens*  
14 *patriae* to bring suit against the federal government. *See Massachusetts v. Mellon*, 262 U.S.  
15 447, 485–86 (1923) (“While the state, under some circumstances, may sue [as *parens*  
16 *patriae*] for the protection of its citizens, it is no part of its duty or power to enforce their  
17 rights in respect of their relations with the federal government.”). This rule, often referred  
18 to as the “*Mellon* bar,” is founded on the principle that because the citizens of a state “are  
19 also citizens of the United States,” *id.* at 485, the federal government is “the ultimate *parens*  
20 *patriae* of every American citizen.” *South Carolina v. Katzenbach*, 383 U.S. 301, 324  
21 (1966). Thus, Arizona cannot sue Defendants as *parens patriae* to vindicate the rights of  
22 its citizens. *Mellon*, 262 U.S. 447. To have standing to challenge the vaccine mandates,  
23 then, it must show direct injury.

24 The State has shown that it is likely to suffer direct injury as a result of the  
25 Contractor Mandate. The State and its agencies are federal contractors subject to the  
26 mandate. Absent an injunction, the State will be required to choose between forfeiting  
27 numerous and significant federal contracts, and requiring its employees to be vaccinated  
28 against COVID-19. Although none of the State’s current contracts include a vaccination

1 clause, federal agencies have already demanded that multiple Arizona agencies,  
2 including its public universities, implement the Contractor Mandate and require their  
3 employees to receive the vaccine. Despite Defendants’ assertions, these demands have, on  
4 multiple occasions, been phrased as mandatory, rather than permissive, requests for  
5 contract modifications. A brief recitation of these demands is warranted.

6 1. The Arizona Board of Regents (“ABOR”) oversees the management,  
7 direction, and governance of Arizona’s public universities—Arizona State University,  
8 Northern Arizona University, and the University of Arizona. (Doc. 134-5 at 2 ¶ 1.) All  
9 three universities are federal contractors. In 2021, their combined federal contracting  
10 revenues totaled \$1,207,926,800. (*Id.* ¶ 2.) The universities will thus forfeit more than a  
11 billion dollars if they do not adhere to the Contractor Mandate. As a result, they are now  
12 actively engaged in efforts to comply with the mandate, including communicating the  
13 vaccination requirement to current, incoming, and prospective employees; gathering proof  
14 of vaccination; and reviewing requests for accommodations from individuals who cannot  
15 be vaccinated for medical or religious reasons. (*Id.* at 2–3 ¶¶ 3–4.)

16 2. The Arizona State Retirement System (“ASRS”), a State agency that  
17 administers benefits for qualified Arizona employees, owns a building in Phoenix, Arizona.  
18 ASRS leases space in the building to GSA. (Doc. 48-4 at 3.) On October 18, 2021, GSA  
19 sent an email to ASRS stating that GSA was “amending its existing leases” pursuant to EO  
20 14042 and directing ASRS to review and sign an amendment to its current lease requiring  
21 ASRS to adhere to the Contractor Mandate. (*Id.* at 7–9.)

22 3. The Division of Civil Rights Section (“DCRS”) of the Arizona Attorney  
23 General’s Office (“AGO”) works closely with federal agencies, including the Equal  
24 Employment Opportunity Commission (“EEOC”), to enforce civil rights laws. Since 2019,  
25 DCSC and EEOC have worked under a work-sharing agreement through which EEOC  
26 provides significant funding to DCRS to assist it in enforcing Title VII. (Doc. 48-3 at 3–  
27 4.) During the week of October 25, 2021, EEOC requested that DCRS extend its workshare  
28 agreement and incorporate a vaccination clause. (*Id.* at 4.) EEOC gave DCRS a deadline

1 of November 2, 2021, to do so. (*Id.*)

2 4. The Arizona Department of Transportation (“ADOT”) owns a port of entry  
3 in Nogales, Arizona, that it leases to GSA for use by the Federal Motor Carrier Safety  
4 Administration. (Doc. 134-6 at 4–5.) On October 14, 2021, GSA sent ADOT a letter stating  
5 that a contract modification implementing the Contractor Mandate “is *mandatory* and your  
6 acceptance is required in order to ensure compliance with EO 14042” and that contract  
7 “modifications must be finalized by **November 14, 2021.**” (*Id.* at 7 (emphasis in original).)

8 5. On October 22, 2021, the Center for Disease Control (“CDC”) emailed the  
9 Arizona Department of Health Services (“ADHS”) requesting that ADHS agree to a  
10 bilateral contract modification incorporating the Contractor Mandate. (Doc. 134-7 at 4–5.)  
11 The email indicated that “**Contractors will sign and return the modification via email**  
12 **to the Contracting Officer of record by November 9, 2021.**” (*Id.* at 11 (emphasis in  
13 original).)

14 6. The Arizona Department of Public Safety (“DPS”) contracts with the  
15 National Park Service (“NPS”) to provide laboratory testing. On November 2, 2021, NPS  
16 sent an email to DPS demanding that DPS sign a contract modification incorporating the  
17 Contractor Mandate. (Doc. 134-8 at 4–5.)

18 7. The Arizona Department of Corrections, Rehabilitation, and Reentry  
19 (“ADCRR”) has a contract with the U.S. Forest Service through which Arizona inmates  
20 perform work on Forest Service land. (Doc. 134-9 at 4–5.) On September 28, 2021, the  
21 Forest Service sent an email to ADCRR stating that anyone performing under the contract  
22 would be required to comply with new safeguards, including mandatory vaccine  
23 certification. (*Id.* at 7.)

24 Defendants argue that because many of these contracts will remain in force for  
25 several more years, the State’s harm is too remote to confer standing. But Defendants are  
26 not demanding that Arizona agencies agree to incorporate a vaccination clause when their  
27 contracts may be up for renewal; instead, Defendants are requiring State agencies to agree  
28 to modify their contracts *now*. Thus, Defendants’ demands put the State to an immediate

1 choice: require its employees to be vaccinated now, or face the loss of consequential federal  
2 contracts in the future. *See* President Joseph Biden, Remarks on Fighting the COVID-19  
3 Pandemic (Sept. 9, 2021), [https://www.whitehouse.gov/briefing-room/speeches-](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/)  
4 [remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/](https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/).  
5 (“If you want to do business with the federal government, vaccinate your workforce.”); *see*  
6 *also Kentucky*, 2021 WL 5587446, at \*4 (“[I]f the government is already attempting to  
7 require contracts not officially covered by the vaccine mandate to still include such a  
8 mandate, it stands to reason that contractors who do not comply will likely be blacklisted  
9 from future contracting opportunities if they refuse to comply.”). The State’s alleged harm  
10 is therefore imminent and real.

11 Relatedly, Defendants argue that the Contractor Mandate does not invade the State’s  
12 sovereignty at all because it is merely “an exercise of the federal government’s  
13 ‘unrestricted power’ to ‘determine those with whom it will deal, and to fix the terms and  
14 conditions upon which it will’ enter into contracts.” (Doc. 108 at 12 (citing *Perkins v.*  
15 *Lukens Steel Co.*, 310 U.S. 113, 127 (1940)).) At first blush, this argument seems to have  
16 some salience. After all, a private entity could require parties with whom it contracts to  
17 either vaccinate their workforces or risk losing its business. It may seem odd, then, to  
18 preclude the federal government from doing what a private corporation could do. But,  
19 despite Defendants’ arguments to the contrary, the federal government is not simply  
20 another contracting entity. It is both a contractor and a regulator, wielding immense  
21 coercive power. And although federal contracts provide the mechanism through which the  
22 Contractor Mandate is implemented, the mandate is unquestionably both regulatory and  
23 policy-making in character.

24 The D.C. Circuit rejected a similar argument in *Chamber of Commerce v. Reich*. 74  
25 F.3d 1322 (D.C. Cir. 1996). That case involved a challenge to an EO issued by President  
26 Clinton prohibiting federal agencies from contracting with employers that hired permanent  
27 replacements for lawfully striking employees. *Id.* at 1324. There, as here, the federal  
28 government argued that “if a private contractor were permitted to refuse to buy goods from



1 an employer who permanently replaced strikers—which ordinarily he would be—then so  
2 should the federal government.” *Id.* at 1336. As the primary support for its argument, the  
3 federal government cited a 1993 case in which the Supreme Court held that a  
4 Massachusetts agency’s decision to require certain non-union contractors to enter into a  
5 collective bargaining agreement to be eligible for contracts on the Boston Harbor cleanup  
6 project was “not government regulation,” because the agency was acting only in its  
7 capacity as a contractor. *See Bldg. & Const. Trades Council of Metro. Dist. v. Associated*  
8 *Builders & Contractors of Massachusetts/Rhode Island, Inc. (Boston Harbor)*, 507 U.S.  
9 218, 232 (1993). In rejecting the government’s argument, the D.C. Circuit explained:

10 In *Boston Harbor*, the Court’s analysis of the behavior of [the  
11 Massachusetts agency] was based on the premise, stated after  
12 its summary of its precedent, that:

13 “When the State acts as regulator, it performs a role that is  
14 characteristically a governmental rather than a private role,  
15 boycotts notwithstanding. Moreover, as regulator of private  
16 conduct, the State is more powerful than private parties. These  
17 distinctions are far less significant when the State acts as a  
18 market participant *with no interest in setting policy* . . . . We  
19 left open [in *Wis. Dep’t of Indus. v. Gould Inc.*, 475 U.S. 282,  
20 286 (1986)] the question whether a State may act without  
21 offending the pre-emption principles of the NLRA when it acts  
22 as a proprietor and its acts therefore are not ‘*tantamount to*  
23 *regulation,*’ or *policy-making.*” [*Boston Harbor*, 507 U.S.] at  
24 229 (emphases added). The premise on which the Court’s  
25 further analysis rested, then, was that the Massachusetts  
26 governmental entity . . . was not seeking to set general policy  
27 in the Commonwealth; it was just trying to operate as if it were  
28 an ordinary general contractor whose actions were  
“specifically tailored to one particular job, the Boston Harbor  
clean-up project.” *Id.* at 232. Surely, the result would have been  
entirely different, given the Court’s reasoning, if  
Massachusetts had passed a general law or the Governor had  
issued an Executive Order requiring all construction  
contractors doing business with the state to enter into collective  
bargaining agreements . . . .

It does not seem to us possible to deny that the President’s



1 Executive Order seeks to set a broad policy governing the  
2 behavior of thousands of American companies and affecting  
3 millions of American workers. The President has, of course,  
4 acted to set procurement policy rather than labor policy. But  
5 the former is quite explicitly based—and would have to be  
6 based—on his views of the latter.<sup>10</sup>

7 *Reich*, 74 F.3d at 1336–37.

8 So too here. It is beyond doubt that the Contractor Mandate “seeks to set a broad  
9 policy governing the behavior of thousands of American companies and affecting millions  
10 of American workers.” *Id.* at 1337; *see also* Path Out of the Pandemic: President Biden’s  
11 COVID-19 Action Plan, The White House, <https://www.whitehouse.gov/covidplan/> (last  
12 visited Jan. 25, 2022) (describing EO 14042 as a plan “[r]equiring [v]accinations  
13 for . . . [m]illions of [c]ontractors”). Workers employed by federal contractors comprise  
14 approximately one-fifth of the entire U.S. labor force and federal government spending  
15 accounts for more than a quarter of the national economy. (Doc. 134 at 36 ¶ 98, 38 ¶ 104.)  
16 *See* History of Executive Order 11246, Office of Contract Compliance Programs,  
17 Department of Labor, [https://www.dol.gov/agencies/ofccp/about/executive-order-11246-](https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history)  
18 *history* (last visited Jan. 25, 2022). Defendants’ argument that the State has no standing  
19 because the federal government is merely acting as contractor is thus unpersuasive. The  
20 Contractor Mandate regulates the State, and the State has standing to challenge that  
21 regulation. *See Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (holding that states are  
22 “entitled to special solicitude in the standing analysis”).

23 The State also “ha[s] a legally protected sovereign interest in ‘the exercise of  
24 sovereign power over individuals and entities within [its] jurisdiction[, which] involves the  
25 power to create and enforce a legal code.’” *Wyoming ex rel. Crank v. United States*, 539  
26 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Snapp*, 458 U.S. at 601); *see also Hawaii v.*  
27 *Trump*, 859 F.3d 741, 765 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 377 (2017)  
(mem.) (similar); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 269 (4th Cir. 2011)

28 <sup>10</sup> While the D.C. Circuit addressed the government’s argument on the merits, the court’s  
reasoning applies with equal force to Defendants’ jurisdictional argument.

1 (collecting cases where state was found to possess sovereign standing on this basis). Thus,  
2 because the Contractor Mandate clearly conflicts with Arizona’s laws and governance  
3 policies, *see infra* Section III.B.1, the State has Article III standing to challenge its legality.  
4 *See Oregon v. Trump*, 406 F. Supp. 3d 940, 958 (D. Or. 2019) (“A state or locality has  
5 standing to challenge interference with its operational and governance decisions.”); *see*  
6 *also Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 50 n.17 (1986)  
7 (holding that “there is no question concerning the State’s standing” where federal law  
8 “diminish[es] . . . [the State’s] sovereignty” by interfering with “the State’s ability to  
9 structure its relationship with its employees” (internal citations omitted)).

10 The Court agrees with Defendants, however, that the State lacks standing to  
11 challenge the Employee Mandate. Neither the State nor its employees are subject to the  
12 Employee Mandate. Nor does the Employee Mandate threaten to infringe the State’s  
13 sovereignty by regulating in an area of traditional state concern or by displacing  
14 otherwise valid state law. Instead, it is an exercise of the President’s considerable  
15 constitutional authority to regulate the internal affairs of the executive branch. *See Free*  
16 *Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (“[I]f any power whatsoever is in its  
17 nature Executive, it is the power of appointing, overseeing, and controlling those who  
18 execute the laws.” (citing James Madison, 1 Annals of Cong. 463 (1789)); *see also Rydie*  
19 *v. Biden*, No. CV DKC 21-2696, 2021 WL 5416545, at \*3 (D. Md. Nov. 19, 2021) (“The  
20 President derives his authority to regulate the federal workforce from the Constitution, not  
21 from Congress’s enactments.”). Plaintiffs’ challenge to the Employee Mandate will  
22 therefore be denied, and the remainder of this Order will address only Plaintiffs’ claims  
23 challenging the Contractor Mandate.

## 24 **2. The Contract Disputes Act and the Tucker Act**

25 Defendants argue that even if the State has Article III standing, its claims  
26 challenging the Contractor Mandate come within the exclusive jurisdiction of the Court of  
27 Federal Claims under the Contract Disputes Act (“CDA”) and the Tucker Act, such that  
28 this Court is not a proper forum. (Doc. 52 at 34–16.)

1           The CDA “established a comprehensive framework for resolving contract disputes  
2 between executive branch agencies and government contractors.” *Anselma Crossing, L.P.*  
3 *v. USPS*, 637 F.3d 238, 240 (3d Cir. 2011) (quoting *Menominee Indian Tribe v. United*  
4 *States*, 614 F.3d 519, 521 (D.C. Cir. 2010)). It is “intended to keep government contract  
5 disputes out of district courts,” and “limits review of the merits of government contract  
6 disputes to certain forums” with specialized knowledge and experience in the complex  
7 legal area that is government contracting. *Id.* at 240. Under the CDA, breach-of-contract  
8 claims against the federal government must first be decided by a contracting officer, and  
9 then may be appealed either to a board of contract appeals or to the Court of Federal Claims.  
10 *See* 41 U.S.C. §§ 7103–7104.

11           When the CDA applies, it provides the exclusive mechanism for contract dispute  
12 resolution. *Tex. Health Choice, L.C. v. OPM*, 400 F.3d 895, 898 (Fed. Cir. 2005). The Act  
13 only applies, however, “to claims sounding in contract.” *Anselma Crossing*, 637 F.3d at  
14 240; *see also* 28 U.S.C. § 1346(a)(2) (“[T]he district courts shall not have jurisdiction of  
15 any civil action or claim against the United States *founded upon any express or implied*  
16 *contract* with the United States.” (emphasis added)). Here, the State’s claims do not sound  
17 in contract, but in the Constitution and laws of the United States. Such claims fall squarely  
18 within the wheelhouse of the Article III courts, and do not require the expertise of the Court  
19 of Federal Claims. Thus, this case does not come within that court’s exclusive jurisdiction.

20           The Tucker Act likewise does not prevent the Court from exercising jurisdiction in  
21 this case. Under that Act, the Court of Federal Claims has exclusive “jurisdiction to render  
22 judgment on an action by an interested party objecting to a solicitation by a Federal agency  
23 for bids or proposals for a proposed contract or to a proposed award or the award of a  
24 contract or any alleged violation of statute or regulation in connection with a procurement  
25 or a proposed procurement.”<sup>11</sup> 28 U.S.C. § 1491(b)(1). Given this language, Defendants

26 \_\_\_\_\_  
27 <sup>11</sup> While the text of § 1491(b) provides that the district courts and Court of Federal Claims  
28 have concurrent jurisdiction over these matters, the Alternative Dispute Resolution Act of  
1996 included a “sunset provision, which terminated federal district court jurisdiction over  
bid protests on January 1, 2001.” *Emery Worldwide Airlines, Inc. v. United States*, 264  
F.3d 1071, 1079 (Fed. Cir. 2001).

1 contend that any contractor challenging the solicitation requirements for new federal  
2 contracts that include a vaccination clause would have to proceed in the Court of Federal  
3 Claims, since “[a]ny claim Arizona might be able to bring on behalf of a State  
4 agency . . . would not be cognizable in District Court.” (Doc. 52 at 35.) But Defendants are  
5 mistaken. As the Ninth Circuit has held: “The Tucker Act, by its terms, applies only to  
6 claims for money damages. Therefore, it does not preclude review of agency action when  
7 the relief sought is other than money damages.” *South Delta Water Agency v. U.S. Dep’t*  
8 *of Interior*, 767 F.2d 531, 540 (9th Cir. 1985) (quoting *Rowe v. United States*, 633 F.2d  
9 799, 802 (9th Cir. 1980)). Thus, because Plaintiffs seek only injunctive relief, the Tucker  
10 Act does not bar their claims from proceeding in district court.

11 Moreover, jurisdiction under the Tucker Act depends on the “source of the rights  
12 upon which the plaintiff bases its claim.” *North Star Alaska v. United States*, 14 F.3d 36,  
13 37 (9th Cir. 1994) (quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982)).  
14 As mentioned above, Plaintiffs do not object to “a solicitation by a Federal agency for bids  
15 or proposals for a proposed contract,” see 28 U.S.C. § 1491(b)(1), and do not ask the Court  
16 to interpret contractual language or to decide contractual rights. Instead, Plaintiffs ask the  
17 Court to resolve claims based on the Constitution and federal law. Thus, Plaintiffs’ claim  
18 is “that the government is violating the law,” not that “the government is following a  
19 different law from the one stated in the contract.” *North Star Alaska*, 14 F.3d at 36, 37 n.2.  
20 Accordingly, the Tucker Act does not divest the Court of jurisdiction.

### 21 3. Causes of Action

22 Finally, Defendants argue that the Court lacks authority to review the Contractor  
23 Mandate because Plaintiffs lack the necessary cause of action to pursue their claims under  
24 the Procurement Act, the Procurement Policy Act, and the APA. (Doc. 108 at 15–17.)

25 The APA’s judicial review provision provides that “[a] person suffering legal wrong  
26 because of agency action, or adversely affected or aggrieved by agency action” is entitled  
27 to judicial review. 5 U.S.C. § 702. Courts have subject-matter jurisdiction to review only  
28 *final* agency action under the APA. *See id.* § 704. Courts will deem agency action final if

1 “the action . . . mark[s] the ‘consummation’ of the agency’s decisionmaking process,” and  
 2 “the action [is] one by which rights or obligations have been determined, or from which  
 3 legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations  
 4 omitted).

5 As a general matter, presidential action falls outside the scope of direct review under  
 6 the APA, because the “President is not an agency within the meaning of the [APA],” *see*  
 7 *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992), and presidential action is therefore  
 8 not “agency action” reviewable under § 702. *But cf.* Elena Kagan, *Presidential*  
 9 *Administration*, 114 Harv. L. Rev. 2245, 2350–51 (2001) (“It is true that the Supreme Court  
 10 held in *Franklin v. Massachusetts* that the President is not an ‘agency’ as defined in the  
 11 APA and his actions therefore are not subject to the judicial review provisions of that  
 12 statute. . . . [But w]hen the challenge is to an action delegated to an agency head but  
 13 directed by the President, a different situation obtains: then, the President effectively has  
 14 stepped into the shoes of an agency head, and the review provisions usually applicable to  
 15 that agency’s action should govern.”).

16 Defendants argue that because the Acting OMB Director’s determination “was an  
 17 exercise of presidential authority delegated under 3 U.S.C. § 301,”<sup>12</sup> the determination  
 18 “cannot be subject to judicial review under the APA.”<sup>13</sup> (Doc. 108 at 15.) Further,

19 <sup>12</sup> 3 U.S.C. § 301 provides, in pertinent part: “The President of the United States is  
 20 authorized to designate and empower the head of any department or agency in the executive  
 21 branch, or any official thereof who is required to be appointed by and with the advice and  
 22 consent of the Senate, to perform without approval, ratification, or other action by the  
 23 President (1) any function which is vested in the President by law, or (2) any function  
 24 which such officer is required or authorized by law to perform only with or subject to the  
 25 approval, ratification, or other action of the President: Provided, That nothing contained  
 26 herein shall relieve the President of his responsibility in office for the acts of any such head  
 27 or other official designated by him to perform such functions.”

28 <sup>13</sup> There is rather little case law (and none binding on this Court) addressing whether agency  
 action undertaken pursuant to a presidential delegation under § 301 is insulated from  
 judicial review under the APA. *Compare Detroit Int’l Bridge Co. v. Canada*, 189 F. Supp.  
 3d 85, 100 (D.D.C. 2016) (“Several cases have concluded that an agency’s action on behalf  
 of the President, involving discretionary authority committed to the President, is  
 ‘presidential’ and unreviewable under the APA.”), *and Nat. Res. Def. Council, Inc. v. U.S.*  
*Dep’t of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) (finding no judicial review under  
 the APA where the President delegated his authority), *and Tulare Cnty. v. Bush*, 185 F.  
 Supp. 2d 18, 28 (D.D.C. 2001) (same), *with Sierra Club v. Clinton*, 689 F. Supp. 2d 1147,  
 1156–57 (D. Minn. 2010) (reaching the opposite conclusion), *and Indigenous Envt’l*  
*Network v. U.S. Dep’t of State*, No. cv-17-29, 2017 WL 5632435, at \*6 (D. Mont. Nov. 22,

1 Defendants argue that the SFWTF contractor guidance and the FAR Memorandum are  
2 unreviewable under the APA because they have no standalone force and are therefore not  
3 final agency action.<sup>14</sup> (*Id.* at 15–16.)

4 While the Court doubts the validity of Defendants’ interpretation of the APA and  
5 § 301,<sup>15</sup> the Court need not consider whether Plaintiffs claims are reviewable under the  
6 APA, because even if this case presents no “final agency action” reviewable under that  
7 statute, “courts have also permitted judicial review of presidential orders implemented  
8 through the actions of other federal officials. This cause of action, which exists outside of  
9 the APA, allows courts to review *ultra vires* actions by the President that go beyond the  
10 scope of the President’s statutory authority.” *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir.  
11 2017), *reversed and remanded on other grounds*, 585 U.S. —, 138 S. Ct. 2392 (2018); *see*  
12 *also Reich*, 74 F.3d at 1327–28 (collecting cases and holding that plaintiff’s challenge to  
13 an EO promulgated under the Procurement Act was permissible as a non-statutory review  
14 action); *United States v. Bozarov*, 974 F.2d 1037, 1045 (9th Cir. 1992) (similar); *see*  
15 *generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97  
16 Colum. L. Rev. 1612, 1614 (1997). As in the cases cited, non-statutory review of  
17 Plaintiffs’ claims is appropriate here because Plaintiffs allege that the President, in  
18 promulgating EO 14042 and 14043, acted beyond his statutory authority.

19 Moreover, judicial review of Plaintiffs’ claims obtains because “review of the  
20 legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the  
21 officers who attempt to enforce the President’s directive.” *Franklin*, 505 U.S. at 828  
22 2017) (same), *and Protect Our Cmty. Found. v. Chu*, No. 12-cv-3062, 2014 WL 1289444,  
23 at \*6 (S.D. Cal. Mar. 27, 2014) (same).

24 <sup>14</sup> Defendants are likely right on this point. *See infra* Section III.B.2.ii; *see also Kentucky*,  
2021 WL 5587446, at \*11 (“FAR Council Guidance is not subject to judicial review  
25 pursuant to the APA because the Guidance does not constitute final agency action.”).

26 <sup>15</sup> While the APA is not available to review actions involving the exercise of discretionary  
27 authority vested in the President for abuse of discretion, *see Detroit Int’l Bridge Co.*, 189  
28 F. Supp. 3d at 99, courts *may* review a President’s assertion of statutory power to determine  
whether it is authorized by statute, *see Corus Grp. PLC v. Int’l Trade Comm’n*, 352 F.3d  
1351, 1359 (Fed. Cir. 2003); *see also Reich*, 74 F.3d at 1331–32 & n.5 (“[The Court’s]  
holding [in *Dalton v. Specter*, 511 U.S. 462 (1994)] merely stands for the proposition that  
when a statute entrusts a discrete specific decision to the President and contains no  
limitations on the President’s exercise of that authority, judicial review of an abuse of  
discretion claim is not available.”).



1 (Scalia, J., concurring in part and concurring in the judgment). Here, Plaintiffs seek to  
2 enjoin not only the President, but also the officers and entities charged with carrying out  
3 his instructions. *See Hawaii*, 878 F.3d at 680–81. The Contractor Mandate is not self-  
4 executing; it involves a substantial number of officials and entities within the executive  
5 apparatus that are unquestionably subject to this Court’s equitable jurisdiction. Thus, that  
6 Plaintiffs’ claims implicate presidential action and raise questions regarding presidential  
7 authority does not preclude judicial review.<sup>16</sup> *See Reich*, 74 F.3d at 1326 (“That the  
8 ‘executive’s’ action here is essentially that of the President does not insulate the entire  
9 executive branch from judicial review.”); *see also* Kevin M. Stack, *The Statutory*  
10 *President*, 90 Iowa L. Rev. 539, 555–56 (2005) (“In almost all cases of presidential orders,  
11 it will be possible to identify a defendant other than the president himself that acts upon  
12 the order. Indeed, this mode of review has a long history: it was the basis for review of the  
13 validity of executive action in *Marbury v. Madison*, *Youngstown Sheet & Tube Co. v.*  
14 *Sawyer*, and *Dames & Moore v. Regan*.”).

15 Accordingly, the Court has jurisdiction to resolve Plaintiffs’ claims challenging the  
16 Contractor Mandate. The Court will now turn to the merits of those claims.

## 17 **B. Actual Success on the Merits**

### 18 **1. Procurement Act**

19 The Procurement Act, 40 U.S.C. § 101 et seq., was enacted in 1949 to “provide the  
20 Federal Government with an economical and efficient system” for the procurement and  
21 management of federal property. *Id.* § 101. The Act was passed in response to the Hoover  
22 Commission’s recommendation that the federal government streamline and modernize its  
23 procurement and property management processes. *See AFL-CIO v. Kahn*, 618 F.2d 784,  
24 787–88 (D.C. Cir. 1979). Among other things, the Hoover Commission recommended that  
25 an agency be created to oversee government acquisitions and that it be placed within the  
26 Executive Office of the President. *Id.* at 788. “Congress, however, was reluctant to saddle

27 <sup>16</sup> Nor does sovereign immunity bar Plaintiffs’ claims. The APA, 5 U.S.C. § 702, waives  
28 sovereign immunity with respect to suits against federal actors for injunctive relief, even  
where the suit does not proceed under the APA. *See Reich*, 74 F.3d at 1328 (“The APA’s  
waiver of sovereign immunity applies to any suit whether under the APA or not.”).



1 the relatively small Executive Office with such a vast administrative burden, so it set up  
2 the General Services Administration as an independent agency. But in response to the  
3 Hoover Commission’s concern that the strength of the presidency support the new agency,  
4 Congress added Section [121(a)] . . . .” *Id.*

5 Section 121(a) grants the President authority to “prescribe such policies and  
6 directives that the President considers necessary to carry out [the Act].” 40 U.S.C. § 121(a).  
7 This statutory grant of authority, while broad, is not unqualified. Rather, the President’s  
8 policies “must be consistent with [the Act].” *Id.* This means that there must be a nexus  
9 between policies enacted pursuant to § 121(a) and the Procurement Act’s purpose to  
10 promote economy and efficiency in federal procurement and property management. *See*  
11 *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979) (“[I]t is necessary to establish a nexus  
12 between the regulations and some delegation of the requisite legislative authority by  
13 Congress.”); *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981)  
14 (finding that executive branch policies “must be reasonably related to the Procurement  
15 Act’s purpose of ensuring efficiency and economy in government procurement . . . in order  
16 to lie within the statutory grant”).<sup>17</sup>

17 In conducting this “nexus” inquiry, courts have defined “economy” and “efficiency”  
18 broadly. *See, e.g., Kahn*, 618 F.2d at 789 (“‘Economy’ and ‘efficiency’ are not narrow  
19 terms; they encompass those factors like price, quality, suitability, and availability of goods  
20 or services that are involved in all acquisition decisions.”); *Reich*, 74 F.3d at 1333 (“The  
21 President’s authority to pursue ‘efficient and economic’ procurement . . . has been  
22 interpreted to permit such broad-ranging Executive Orders as [those] guaranteeing equal  
23 employment opportunities, and restricting wage increases on the part of government  
24 contractors—measures which certainly reach beyond any narrow concept of efficiency and  
25 economy in procurement.”). As a result, a broad range of executive branch policies issued  
26 under § 121(a) have been upheld as valid. *See, e.g., Kahn*, 618 F.2d at 790–91 & n.32  
27 (collecting cases regarding use of the Procurement Act to impose “a series of

28 <sup>17</sup> The Ninth Circuit has not yet addressed the scope of the President’s authority under the Procurement Act.

1 antidiscrimination requirements for Government contractors”); *City of Albuquerque v. U.S.*  
2 *Dep’t of Interior*, 379 F.3d 901 (10th Cir. 2004) (urban renewal); *UAW-Labor Emp. &*  
3 *Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003) (promoting rights of union  
4 members); *AFGE v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (conservation of gasoline  
5 during oil crisis). Other executive branch policies, however, have been invalidated as  
6 exceeding the President’s authority under the Act. *See, e.g., Reich*, 74 F.3d 1322 (order  
7 disqualifying employers who hire replacement workers during lawful strike from certain  
8 federal contracts); *Liberty Mut.*, 639 F.2d 164 (order requiring federal contractors and  
9 subcontractors to comply with certain anti-discrimination and affirmative action  
10 measures).

11 In an attempt to establish the requisite nexus, EO 14042 instructed the OMB  
12 Director, “as an exercise of the delegation of my authority under the Federal Property and  
13 Administrative Services Act,” to “determine whether [the SFWTF contractor guidance]  
14 will promote economy and efficiency in Federal contracting if adhered to by Government  
15 contractors and subcontractors.” 86 Fed. Reg. at 50,985–86. Acting Director Young issued  
16 a responsive determination on September 28, 2021. 86 Fed. Reg. 53,691. The initial  
17 determination made only the conclusory statement that Young had “determined that  
18 compliance by Federal contractors and subcontractors with COVID-19 workplace safety  
19 protocols detailed in [the SFWTF contractor guidance] will improve economy and  
20 efficiency by reducing absenteeism and decreasing labor costs for contractors and  
21 subcontractors working on or in connection with a Federal Government contract.” *Id.* at  
22 53,692. The determination included neither findings nor evidence to support Young’s  
23 conclusion.

24 Perhaps realizing the determination’s deficiencies, Acting Director Young  
25 published a revised determination to the Federal Register on November 16, 2021. 86 Fed.  
26 Reg. 63,418. The revised determination again attempts to establish the requisite nexus  
27 between the Contractor Mandate and the purposes of the Procurement Act. The revised  
28 determination states, *inter alia*, that “the overall effect of enacting these protocols for

1 Federal contractors and subcontractors will be to decrease the spread of COVID-19, which  
2 will in turn decrease worker absence, save labor costs on net, and thereby improve  
3 efficiency in Federal contracting.” *Id.* at 63,421.

4 Defendants argue that the revised determination “easily satisfies [the] ‘lenient’  
5 [nexus] standard” and in fact provides “far more detail than the Procurement Act requires.”  
6 (Docs. 52 at 40; 108 at 17.) Plaintiffs disagree. In their view, the revised determination  
7 “makes only a pretextual attempt to establish a nexus with economy and efficiency. Indeed,  
8 before it makes any mention of economy and efficiency, or even of procurement at all, it  
9 explicitly states that its actual main objective is to achieve public health goals, specifically,  
10 ‘to get more people vaccinated.’” (Doc. 72 at 17 (quoting 86 Fed. Reg. at 63,418).)

11 The Contractor Mandate exceeds the President’s authority under the Procurement  
12 Act, for several reasons. First, the sheer scope of the President’s claimed authority counsels  
13 against Defendants’ interpretation of § 121(a). *See Ala. Ass’n of Realtors v. HHS*, 594 U.S.  
14 —, 141 S. Ct. 2485, 2489 (2021). Defendants’ reading of § 121(a) would grant the  
15 President “a breathtaking amount of authority.” *Id.* Indeed, “[i]t is hard to see what  
16 measures [Defendants’] interpretation would place outside” the President’s reach. *Id.* As  
17 long as the federal government could articulate *some* connection—no matter how  
18 tenuous—between the enacted policy and the broad goals of achieving economy and  
19 efficiency in federal procurement, the policy would be consistent with the statute. If, for  
20 example, the President determined that obesity, diabetes, and other health issues were  
21 linked to the consumption of sugary drinks and fast food, and that such health issues led to  
22 absenteeism and a lack of productivity in the workplace, he could, on Defendants’ reading,  
23 issue an executive order requiring all federal contractor employees to refrain from  
24 consuming soda or eating fast food. But in reality, the President’s authority under the Act  
25 is not so broad. *See Kahn*, 618 F.2d at 793 (“[O]ur decision today does not write a blank  
26 check for the President to fill in at his will. The procurement power must be exercised  
27 consistently with the structure and purposes of the statute that delegates that power.”).  
28 Rather, policies promulgated under the Procurement Act must relate—more than

1 incidentally—to *procurement*. See *Liberty Mut.*, 639 F.2d at 171 (“[A]n ‘exercise of quasi-  
2 legislative authority by [the executive branch] must be rooted in a grant of (legislative)  
3 power by the Congress,’ and lie ‘reasonably within the contemplation of that grant of  
4 authority.’” (quoting *Chrysler*, 441 U.S. at 302, 306)).

5 “We expect Congress to speak clearly when authorizing [the executive branch] to  
6 exercise powers of ‘vast economic and political significance.’” *Ala. Ass’n of Realtors*, 141  
7 S. Ct. at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). There is  
8 little doubt that the Contractor Mandate qualifies as an exercise of such power. See *NFIB*  
9 *v. OSHA*, 595 U.S. —, 142 S. Ct. 661, 665 (2022). As mentioned previously, federal  
10 contractor employees comprise nearly a fifth of the entire U.S. labor force. The mandate  
11 covers virtually all such employees, including employees who are not themselves working  
12 on federal contracts, have previously been infected with COVID-19, work entirely  
13 outdoors, and work remotely full time. Clearly the mandate “is no ‘everyday exercise of  
14 federal power.’” *Id.* (quoting *In re MCP No. 165*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton,  
15 C.J., dissenting). “The question, then, is whether the Act *plainly* authorizes” the mandate.  
16 *Id.* (emphasis added). It does not.

17 The Act authorizes the President to prescribe policies and directives related to  
18 procurement, not public health. See 40 U.S.C. §§ 101, 121(a) (“The President may  
19 prescribe policies and directives” that are “consistent with” the Act’s purpose to “provide  
20 the Federal Government with an economical and efficient system” for the procurement and  
21 management of federal property). Indeed, no provision of the Act so much as mentions  
22 either public health or vaccination.<sup>18</sup> See *NFIB*, 142 S. Ct. at 665; see also *Chrysler*, 441  
23 U.S. at 304 n.34. Such matters fall clearly outside the expertise of the FAR Council and  
24 OMB. See *NFIB*, 142 S. Ct. at 665. Nor does the legislative history indicate that Congress  
25 intended the President to possess such broad authority under the Act. See *Kahn*, 618 F.2d  
26 at 799 (MacKinnon, J., dissenting) (“It is no accident that the majority opinion cannot point  
27 to any legislative history . . . for there is not a single passage in that history . . . remotely

28 <sup>18</sup> For this reason, the Contractor Mandate is even more clearly unlawful than the OSHA  
mandate that was recently stayed by the Supreme Court. See *NFIB*, 142 S. Ct. 661.

1 supporting the use of the procurement power to achieve nonprocurement objectives.”); *see*  
2 *also* Kimberly Egerton, Note, *Presidential Power over Federal Contracts under the*  
3 *Federal Property and Administrative Services Act: The Close Nexus Test of AFL-CIO v.*  
4 *Kahn*, 1980 Duke L.J. 205, 206–08. Nor has the President, in the seventy years since the  
5 Procurement Act was enacted, ever used his authority under the Act to effectuate sweeping  
6 public health policy. *See NFIB*, 142 S. Ct. at 666. “This ‘lack of historical precedent,’  
7 coupled with the breadth of authority that the [President] now claims, is a ‘telling  
8 indication’ that the mandate extends beyond the [President’s] legitimate reach.” *Id.*  
9 (quoting *Free Enter. Fund*, 561 U.S. at 505).

10 While it is of course true that the pandemic will have *some* impact on federal  
11 procurement, that alone does not render the Contractor Mandate a *procurement* policy or  
12 directive. As the Supreme Court recently explained:

13 Although COVID-19 is a risk that occurs in many workplaces,  
14 it is not an *occupational* hazard in most. COVID-19 can and  
15 does spread at home, in schools, during sporting events, and  
16 everywhere else that people gather. That kind of universal risk  
17 is no different from the day-to-day dangers that all face from  
18 crime, air pollution, or any number of communicable diseases.  
19 Permitting OSHA to regulate the hazards of daily life—simply  
20 because most Americans have jobs and face those same risks  
21 while on the clock—would significantly expand OSHA’s  
22 regulatory authority without clear congressional authorization.

23 *Id.* at 665. The same is true here. That contractor employees, like private sector employees,  
24 face ‘the hazards of daily life’ while on the clock does not grant the President carte blanche  
25 to regulate with respect to those hazards. To hold otherwise “would significantly expand  
26 [the President’s procurement] authority without clear congressional authorization.” *Id.*

27 It is telling that, since the pandemic began, Congress has passed no legislation  
28 mandating vaccination despite enacting several other significant pandemic-related  
measures. *See id.* at 662–63. Indeed, “the most noteworthy action concerning . . . vaccine  
mandate[s] by either House of Congress has been a majority vote of the Senate  
disapproving [OSHA regulations requiring vaccine-or-test for certain private employers]  
on December 8, 2021.” *Id.* at 666. This congressional silence, while not dispositive,

1 counsels against reading § 121(a) as impliedly conferring on the President broad  
2 authority to mandate compulsory vaccination.

3 Contrary to Defendants’ assertions, this case is clearly distinct from *Biden v.*  
4 *Missouri*, 595 U.S. —, 142 S. Ct. 647 (2022). In that case, the Supreme Court upheld a  
5 regulation promulgated by the Secretary of Health and Human Services (“HHS”) that  
6 mandates vaccination for certain healthcare workers employed in facilities accepting  
7 Medicare and Medicaid funding. *Id.* at 650. As authority for the regulation, the HHS  
8 Secretary cited 42 U.S.C. § 1302, which authorizes the Secretary to promulgate regulations  
9 “as may be necessary to the efficient administration of the functions with which [he] is  
10 charged.” As Defendants note, this statutory grant of authority bears some resemblance to  
11 the authority granted the President under the Procurement Act. (*See* Doc. 152 at 5.) But  
12 these statutory grants also bear a significant, and dispositive, distinction. As the Supreme  
13 Court noted, it is “perhaps the most basic” function of the HHS Secretary, “given the  
14 Department’s core mission,” to “ensure that the healthcare providers who care for Medicare  
15 and Medicaid patients protect their patients’ health and safety.” *Missouri*, 142 S. Ct. at 650.  
16 Consequently, authority to issue regulations respecting patients’ health and safety is  
17 inherent in the Secretary’s authority to regulate “as may be necessary to  
18 the . . . administration of his functions.” 42 U.S.C. § 1302. It was for this reason that the  
19 Supreme Court determined the vaccination mandate fell “within the authorities that  
20 Congress has conferred upon [the HHS Secretary].” *Missouri*, 142 S. Ct. at 652.

21 After all, ensuring that providers take steps to avoid  
22 transmitting a dangerous virus to their patients is consistent  
23 with the fundamental principle of the medical profession: first,  
24 do no harm. It would be the “very opposite of efficient and  
effective administration for a facility that is supposed to make  
people well to make them sick with COVID-19.”

25 *Id.* at 652 (quoting *Florida v. HHS*, 19 F.4th 1271, 1288 (11th Cir. 2021)).

26 In the instant case, on the other hand, Defendants argue that the Contractor  
27 Mandate is authorized by a statute granting the President authority to issue regulations  
28 respecting procurement. Unlike the authority granted the HHS Secretary under 42 U.S.C.



1 § 1302, however, the authority granted the President under the Procurement Act includes  
2 no inherent authority to regulate with respect to health and safety. Rather, the statute’s  
3 “most basic” function, *see Missouri*, 142 S. Ct. at 650, is to manage the government’s  
4 business affairs. *See* 40 U.S.C. § 101. Thus, this case involves a separate, wholly distinct  
5 grant of authority that was promulgated for reasons unrelated to the grant of authority at  
6 issue in *Missouri*.

7 Second, the Court agrees with Plaintiffs that Defendants’ broad view of the  
8 President’s authority under § 121(a) raises serious constitutional questions. The  
9 Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a  
10 Congress of the United States.” U.S. Const. art. I § 1. “Accompanying that assignment  
11 of power to Congress is a bar on its further delegation.” *Gundy v. United States*, 588 U.S.  
12 —, 139 S. Ct. 2116, 2123 (2019). Nevertheless, because “Congress simply cannot do its  
13 job absent an ability to delegate power under broad general directives,” *Mistretta v. United*  
14 *States*, 488 U.S. 361, 372 (1989), statutory delegation is generally permissible, “as long as  
15 Congress ‘lay[s] down by legislative act an intelligible principle to which the person or  
16 body authorized to [exercise the delegated authority] is directed to conform.’” *Gundy*, 139  
17 S. Ct. at 2123 (quoting *Mistretta*, 488 U.S. at 372). Although this intelligible-principle  
18 standard has historically been undemanding, *see, e.g., Nat’l Broad. Co. v. United States*,  
19 319 U.S. 190, 216 (1943) (upholding delegation to agency to regulate in the “public  
20 interest”); *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001) (upholding  
21 delegation to agency to issue air quality standards “requisite to protect the public health”),  
22 and the Supreme Court has on only two occasions found a delegation excessive, *see A.L.A.*  
23 *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refin. Co. v. Ryan*,  
24 293 U.S. 388 (1935), several members of the Court have recently indicated a willingness  
25 to revisit the contours nondelegation doctrine and inject substance into the intelligible-  
26 principle standard. In a recent dissent, for example, Justice Gorsuch, joined by Justice  
27 Thomas and Chief Justice Roberts, described the proper intelligible-principle inquiry as  
28 follows:



1 To determine whether a statute provides an intelligible  
2 principle, we must ask: Does the statute assign to the executive  
3 only the responsibility to make factual findings? Does it set  
4 forth the facts that the executive must consider and the criteria  
5 against which to measure them? And most importantly, did  
6 Congress, and not the Executive Branch, make the policy  
7 judgments? Only then can we fairly say that a statute contains  
8 the kind of intelligible principle the Constitution demands.

9 *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *see also id.* at 2131 (Alito, J.,  
10 concurring in the judgment) (“If a majority of this Court were willing to reconsider the  
11 approach we have taken for the past 84 years, I would support that effort.”). On this  
12 formulation of the nondelegation doctrine, Defendants’ reading of the statutory delegation  
13 in § 121(a)—the reading that would permit the executive to issue the Contractor  
14 Mandate—is perhaps unconstitutional. *See Kentucky*, 2021 WL 5587446, at \*9; *see also*  
15 *Kahn*, 618 F.2d at 811 (MacKinnon, J., dissenting) (“[A]ssuming that Congress did indeed  
16 intend to grant the President the power to impose mandatory wage and price standards on  
17 government contractors, the terms it used to do so do not provide a constitutionally  
18 sufficient standard for delegating legislative authority.”). The constitutional avoidance  
19 doctrine therefore counsels in favor of construing § 121(a) to avoid the nondelegation  
20 question. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of  
21 the Congress is drawn in question, and even if a serious doubt of constitutionality is raised,  
22 it is a cardinal principle that this Court will first ascertain whether a construction of the  
23 statute is fairly possible by which the question may be avoided.”).

24 Third, the Contractor Mandate intrudes into an area traditionally and principally  
25 reserved to the states. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707,  
26 719 (1985) (“[T]he regulation of health and safety matters is primarily, and historically,  
27 a matter of local concern.”); *see also S. Bay United Pentecostal Church v. Newsom*, 590  
28 U.S. —, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application  
for injunctive relief) (“Our Constitution principally entrusts ‘[t]he safety and the health of  
the people’ to the politically accountable officials of the States.” (quoting *Jacobson v.*  
*Massachusetts*, 197 U.S. 11, 38 (1905))).

The federal government is one of limited, enumerated powers. *See Gregory v.*

1 *Ashcroft*, 501 U.S. 452, 457 (1991); *see also Printz v. United States*, 521 U.S. 898, 918–19  
2 (1997) (“Although the States surrendered many of their powers to the new Federal  
3 Government, they retained ‘a residuary and inviolable sovereignty.’” (quoting *The*  
4 *Federalist* No. 39, at 245 (J. Madison))). This principle is implicit in both the structure and  
5 text of the Constitution and was made express by the Tenth Amendment. *See Printz*, 521  
6 U.S. at 919. That Amendment reads: “The powers not delegated to the United States by  
7 the Constitution, nor prohibited by it to the States, are reserved to the States respectively,  
8 or to the people.” U.S. Const. amend. X. The “police power” is therefore “inherent in the  
9 states” and was “reserved from the grant of powers to the federal government by the  
10 Constitution.” *United States v. Constantine*, 296 U.S. 287, 295–96 (1935); *see also Barnes*  
11 *v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (“The traditional police power of the States is  
12 defined as the authority to provide for the public health, safety, and morals.”).

13 This traditional “police power” includes authority over compulsory vaccination.  
14 *See Zucht v. King*, 260 U.S. 174, 176 (1922) (“[I]t is within the police power of a state to  
15 provide for compulsory vaccination.”); *see also Jacobson*, 197 U.S. at 25 (“[T]he police  
16 power of a state must be held to embrace, at least, such reasonable regulations established  
17 directly by legislative enactment as will protect the public health and the public safety.”);  
18 *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring) (“There is no question that state and local  
19 authorities possess considerable power to regulate public health.”). It also includes, as a  
20 general matter, power to prohibit vaccination from being compelled. Consistent with that  
21 authority, Arizona has enacted laws prohibiting State and local government entities from  
22 imposing vaccine mandates. *See Arizona Executive Order 2021-19*; *Arizona Executive*  
23 *Order 2021-18*; A.R.S. §§ 36-114, 36-184.

24 Of course, that the states possess authority over compulsory vaccination does not  
25 compel the conclusion that the federal government does not. State and federal  
26 governments regularly exercise concurrent regulatory authority. *See Gregory*, 501 U.S. at  
27 457–61. Indeed, “[a]s long as it is acting within the powers granted it under the  
28 Constitution, Congress may impose its will on the States.” *Id.* at 460. Nevertheless, where

1 the federal government seeks to preempt state law in an area that “the States have  
2 traditionally occupied,” there is a strong presumption “that the historic police powers of  
3 the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and  
4 manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal  
5 citations and quotation marks omitted). Thus, while it may be that Congress has authority  
6 to compel vaccination, there is no indication that it intended to do so through the  
7 Procurement Act. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*,  
8 531 U.S. 159, 172 (2001) (“Where an [executive branch] interpretation of a statute invokes  
9 the outer limits of Congress’ power, we expect a clear indication that Congress intended  
10 that result.”).

11 The Contractor Mandate thus exceeds the President’s authority under the  
12 Procurement Act.

## 13 2. Procurement Policy Act

14 The Procurement Policy Act, 41 U.S.C. §§ 1101–2313, establishes the Office of  
15 Federal Procurement Policy (“OFPP”) within OMB to “provide overall direction of  
16 Government-wide procurement policies, regulations, procedures, and forms for executive  
17 agencies.” *Id.* § 1101(b)(1). OFPP’s Acting Administrator works with the GSA  
18 Administrator, the Secretary of Defense, and the NASA Administrator (collectively, the  
19 “FAR Council”) to “prescribe Government-wide procurement policies” and to issue  
20 government-wide procurement regulations, procedures, and forms. *Id.* §§ 1102, 1121(b),  
21 (c)(2) & (d); 1303(a)(1). Those government-wide directives are “implemented in a single  
22 Government-wide procurement regulation called the Federal Acquisition Regulation.” *Id.*  
23 §§ 1121(b); 1303(a)(1). Executive agencies must follow the FAR when procuring property  
24 or services. *Id.* § 1121(c).

25 When the FAR Council or agencies prescribe procurement regulations, they must  
26 comply with procedural requirements set forth in 41 U.S.C. § 1707. That section requires  
27 that agency heads publish a proposed “procurement policy, regulation, procedure, or form”  
28 in the Federal Register if the proposal “relates to the expenditure of appropriated funds”

1 and either “has a significant effect beyond the internal operating procedures of the agency  
2 issuing the policy” or “has a significant cost or administrative impact on contractors.” *Id.*  
3 § 1707(a)(1). Although ordinarily the proposal “may not take effect until 60 days after” its  
4 publication, the proposal may take effect immediately on a temporary basis “if urgent and  
5 compelling circumstances make compliance with the requirements impracticable.” *Id.*  
6 § 1707(a), (d). Even then, however, the proposal must be subject to concurrent public  
7 comment. *Id.* § 1707(e).

8 Plaintiffs assert that the SFWTF FAQs, FAR Memorandum, and revised OMB  
9 determination are procurement “policies” and “procedures” that “relate to the expenditure  
10 of appropriated funds; have a significant effect beyond internal operating procedures; and  
11 impose a significant cost and administrative impact on contractors and offerors.” (Doc. 134  
12 at 56–57 ¶¶ 162–63.) They are therefore subject, Plaintiffs contend, to the procedural  
13 requirements of § 1707. And, because Defendants did not publish them in the Federal  
14 Register or otherwise waive the requirements of § 1707, Defendants did not comply with  
15 those requirements.

16 Defendants respond that the strictures of § 1707 do not apply either to exercises of  
17 delegated presidential authority like the revised OMB determination or to nonbinding  
18 guidance like the FAR Memorandum or SFWTF FAQs. (Doc. 108 at 23–26.) The Court  
19 will consider each argument in turn.

#### 20 **i. Revised OMB Determination**

21 Whether the revised OMB determination must adhere to the procedures set forth in  
22 § 1707 is a novel question. On the one hand, the requirements of § 1707 apply only to  
23 “executive agencies.” And the statutory definition of “executive agency” does not include  
24 the President. *See* 41 U.S.C. § 133; *see also Franklin*, 505 U.S. at 796. Thus, because  
25 Acting OMB Director Young issued her determination pursuant to a presidential  
26 delegation, the requirements of § 1707 may be inapplicable. *See supra* Section III.A.3  
27 (discussing this issue in the context of judicial review under the APA). The Court, however,  
28 need not resolve the question whether § 1707 applies to the revised determination

1 because, even if it does, Acting Director Young properly invoked the § 1707(d) waiver  
2 provision. *See* 86 Fed. Reg. at 63,423–85.

3 There is precious little case law interpreting § 1707(d).<sup>19</sup> What qualifies as “urgent  
4 and compelling” in this context is not well established. Defendants argue that the Court  
5 should adopt the standard applied to the good cause exception to the APA’s notice and  
6 comment procedures. (Doc. 108 at 25.) Under that standard, notice and comment are  
7 excused “in emergency situations, or where delay could result in serious harm.” *Jifry v.*  
8 *FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). While Plaintiffs do not suggest an alternative  
9 standard, they insist that the circumstances presented here are not “urgent and compelling.”  
10 (Doc. 72 at 21.) They give several reasons. First, Plaintiffs contend that no urgent and  
11 compelling circumstances exist here because “society’s interest in slowing the spread of  
12 COVID-19 cannot qualify as compelling forever.” (*Id.* at 21 (quoting *BST Holdings LLC*  
13 *v. OSHA*, 17 F.4th 604, 611 n.10 (5th Cir. 2021)).) Second, they argue that the revised  
14 determination’s “assertion that a waiver is now urgent and compelling is facially senseless  
15 when the OMB, through the same document, delayed the mandate compliance date from  
16 December 8, 2021, to January 14, 2022.” (Doc. 72 at 21.) In their view, “a purported  
17 ‘emergency’ that the entire globe has now endured for nearly two years, and which [the  
18 government] itself spent . . . months responding to” does not justify invocation of the  
19 urgent-and-compelling-circumstances exception. (*Id.* at 21–22.) And finally, Plaintiffs  
20 contend that because the revised determination was issued in bad faith, its explanation  
21 justifying invocation of § 1707(d) should therefore be disregarded. (*Id.* at 22.)

22 Plaintiffs’ arguments are unavailing. First, though it is undoubtedly true that  
23 “society’s interest in slowing the spread of COVID-19 cannot qualify as compelling  
24 forever,” it remains compelling today. *See Roman Cath. Diocese of Brooklyn v. Cuomo*,  
25 592 U.S. —, 141 S. Ct. 63, 67 (2020) (“Stemming the spread of COVID-19 is  
26 unquestionably a compelling interest.”); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th

27 \_\_\_\_\_  
28 <sup>19</sup> Westlaw, for instance, identifies only seventeen cases that cite § 1707. Of those, only  
five mention “urgent and compelling,” three of which involve challenges to the Contractor  
Mandate.

1 1173, 1187 (9th Cir. 2021) (Ikuta, J., dissenting) (same); *see also Does 1–3 v. Mills*, 595  
2 U.S. —, 142 S. Ct. 17, 20–21 (2021) (Gorsuch, J., dissenting) (“I accept that what we said  
3 11 months ago remains true today—that stemming the spread of COVID–19 qualifies as a  
4 compelling interest.”); *Kentucky*, 2021 WL 5587446, at \*12 (“[T]he Court finds that the  
5 FAR Council Guidance and subsequent OMB Determination in this matter did not run  
6 afoul of the proper administrative procedures.”). As the revised OMB determination states,  
7 “[t]his is a once in a generation pandemic, which has already resulted in more than  
8 46,405,253 cases of COVID-19, hospitalized more than 3,283,045 Americans, and taken  
9 more than 752,196 American lives. The pandemic continues to present an imminent threat  
10 to the health and safety of the American people . . . .”<sup>20</sup> 86 Fed. Reg. at 63,423.

11 Second, the mere fact of the pandemic’s duration does not render its resolution any  
12 less urgent or compelling. While it is true that “the entire globe has now endured [COVID-  
13 19] for nearly two years,” the virus continues to claim American lives, and inhibiting its  
14 progress remains vitally important.

15 Finally, there is no merit to Plaintiffs’ contention that the revised OMB  
16 determination was issued in bad faith. “[I]n reviewing agency action, a court is ordinarily  
17 limited to evaluating the agency’s contemporaneous explanation in light of the existing  
18 administrative record.” *See Dep’t of Comm. v. New York*, 588 U.S. —, 139 S. Ct. 2551,  
19 2573 (2019). A court may inquire into “the mental processes of administrative  
20 decisionmakers” only on a “strong showing of bad faith or improper behavior.” *Id.* at 2573–  
21 74. No such showing has been made here. As evidence of bad faith, Plaintiffs state only  
22 that “OMB waited to submit the Second OMB Notice until just minutes before the start of  
23 this Court’s hearing on Plaintiffs’ previous TRO/PI motion.” (Doc. 72 at 22.) This  
24 observation, without more, comes far short of the “strong showing” necessary to permit  
25 the Court to inquire into Defendants’ subjective motivations (much less invalidate the  
26 revised determination on that basis). *See Missouri*, 142 S. Ct. at 654 (“[W]e cannot say that

27  
28 <sup>20</sup> As of January 25, 2022, the virus had resulted in more than 70,641,725 reported cases  
and 864,203 deaths. *See* COVID Data Tracker, CDC, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited Jan. 25, 2022).



1 in this instance the two months the agency took to prepare a 73-page rule constitutes ‘delay’  
2 inconsistent with the Secretary’s finding of good cause.”).

3 The Court is persuaded that “urgent and compelling circumstances” made  
4 compliance with ordinary § 1707 procedures impracticable with respect to the revised  
5 OMB determination.<sup>21</sup> Therefore, because the revised determination was published in the  
6 Federal Register and “solicit[s] comment on all subjects of this determination,” 86 Fed.  
7 Reg. at 63,424, it complies with § 1707(e) and does not violate the Procurement Policy  
8 Act.

9 **ii. FAR Memorandum**

10 Plaintiffs contend that the FAR Memorandum is subject to § 1707 and therefore  
11 should have been published in the Federal Register and made available for public comment.  
12 (Doc. 72 at 23–24.) Defendants respond that the FAR Memorandum is merely nonbinding  
13 guidance and is therefore not a “procurement policy, regulation, procedure, or form”  
14 subject to § 1707. (Doc. 108 at 26.) *See* 41 U.S.C. § 1707(a)(1).

15 The FAR Memorandum “provide[s] agencies that award contracts under the [FAR]  
16 with initial direction for the incorporation of a clause into their solicitations and contracts  
17 to implement guidance issued by the [SFWTF] pursuant to [EO 14042].” FAR  
18 Memorandum at 1. The memorandum is not binding of its own force. Instead, it  
19 “encourage[s]” agencies to use their independent authority to temporarily deviate from the  
20 FAR and includes a sample vaccination clause that agencies may use in doing so. *Id.* at 3–  
21 5. The memorandum does not compel agencies to take any specific action but rather  
22 instructs contracting officers to adhere to “the direction[s] . . . issued by their respective  
23 agencies” for implementing the memorandum’s guidance. *Id.* at 2. Nor does the  
24 memorandum provide the FAR Council’s final guidance regarding COVID-19 safety  
25 clauses. *See id.* at 3 (“The FAR Council has opened a case . . . to make appropriate  
26 amendments in the FAR to reflect the requirements of [EO 14042]. Agencies are

27 \_\_\_\_\_  
28 <sup>21</sup> Generally, courts are more willing to permit procedural exceptions where, as here, the  
challenged measure is temporary and subject to concurrent public comment. *See Am. Fed’n  
of Gov’t Emps. v. Block*, 655 F.2d 1153, 1157–58 (D.C. Cir. 1981).

1 encouraged to make their deviations effective until the FAR is amended or the deviation is  
 2 otherwise rescinded by the agency.”). The memorandum does not appear in the Code of  
 3 Federal Regulations or the FAR.

4 Thus, as Defendants note, “the [FAR Memorandum] binds no one unless and until  
 5 an agency exercises its own discretion to either revise the suggested clause or incorporate  
 6 the suggested clause into a procurement contract.” (Doc. 108 at 26.) The memorandum is  
 7 therefore not a “procurement policy, regulation, procedure, or form” subject to § 1707.

### 8 **iii. Contractor FAQs**

9 Plaintiffs also contend that the Contractor FAQs are subject to § 1707. (Doc. 134 at  
 10 57 ¶¶ 164–66.) Plaintiffs are again mistaken. The Contractor FAQs, like the FAR  
 11 Memorandum, do not independently constitute a binding “policy, regulation, procedure, or  
 12 form.” Rather, the FAQs take on legal force only upon the approval of the Acting OMB  
 13 Director. (Doc. 108 at 25 n.9.) Moreover, the Contractor FAQs, and the URL address at  
 14 which they may be found, are explicitly referenced in the revised OMB determination. 86  
 15 Fed. Reg. at 63,421. Thus, the determination also provides the public with notice of, and  
 16 the ability to comment on, the Contractor FAQs.

### 17 **3. Emergency Use Authorization Statute**

18 Vaccines—and other medical products—that have not yet been fully approved by  
 19 the FDA may be approved under an Emergency Use Authorization (“EUA”) that is less  
 20 rigorous than the full approval process. The EUA procedure is set forth in 21 U.S.C.  
 21 § 360bbb-3. Plaintiffs submit (and the Court assumes, for present purposes) that the  
 22 vaccines available to federal contractor and subcontractor employees to satisfy the  
 23 Contractor Mandate are available only under EUAs and are therefore subject to the  
 24 requirements of 21 U.S.C. § 360bbb-3.<sup>22</sup> That Section provides, in relevant part:

25 \_\_\_\_\_  
 26 <sup>22</sup> Only the Pfizer Comirnaty vaccine has been fully approved by the FDA. The other two  
 27 available COVID-19 vaccines—manufactured by Moderna and by Johnson & Johnson—  
 28 are not fully approved and are only available under EUAs. The Court will assume,  
*arguendo*, that Plaintiffs are correct that Pfizer’s EUA and fully approved vaccines are  
 materially distinct, and that only Pfizer’s EUA vaccine is currently available in the United  
 States. (See Doc. 134 at 22 ¶¶ 67–68.) *But see* Vaccine Information Fact Sheet for  
 Recipients and Caregivers About Comirnaty (Oct. 29, 2021),

1 The Secretary [of Health and Human Services] may authorize the  
2 introduction . . . of a drug, device, or biological product intended  
for use in an actual or potential emergency . . . .

3 . . . .

4 With respect to the emergency use of an unapproved product, the  
5 Secretary, to the extent practicable given the applicable  
6 circumstances described in subsection (b)(1), shall, for a person  
7 who carries out any activity for which the authorization is issued,  
8 establish such conditions on an authorization under this section as  
the Secretary finds necessary or appropriate to protect the public  
health, including the following:

8 . . . .

9 (ii) Appropriate conditions designed to ensure that individuals to  
10 whom the product is administered are informed--

11 (I) that the Secretary has authorized the emergency use of the  
product;

12 (II) of the significant known and potential benefits and risks of  
13 such use, and of the extent to which such benefits and risks are  
unknown; and

14 (III) of the option to accept or refuse administration of the  
15 product, of the consequences, if any, of refusing administration of  
16 the product, and of the alternatives to the product that are  
available and of their benefits and risks.

17 21 U.S.C. § 360bbb-3. Plaintiffs contend that this provision confers on contractor and  
18 subcontractor employees, as recipients of vaccines available under EUAs, “the right to  
19 accept or refuse administration of the vaccines.” (Doc. 134 at 58 ¶ 169.) In Plaintiffs’ view,  
20 then, because the Contractor Mandate deprives federal contractor and subcontractor  
21 employees of the right to refuse to be vaccinated against COVID-19, the mandate is  
22 unlawful. (*Id.* ¶¶ 170–71.)

23 The statute confers no substantive right to refuse a vaccine or other medical product  
24 approved under an EUA. At most, it requires only that “individuals to whom the [vaccine]  
25 is administered . . . are *informed* . . . of the option to accept or refuse administration of the

26 <https://www.fda.gov/media/153716/download> (stating that the EUA and fully approved  
27 vaccines “can be used interchangeably without presenting any safety or effectiveness  
28 concerns”); *Johnson v. Brown*, No. 3:21-cv-01494, — F. Supp. 3d —, 2021 WL 4846060,  
at \*18 (D. Or. Oct. 18, 2021) (“[T]he August FDA [a]pproval of Pfizer-BioNTech’s mRNA  
vaccine was for the chemically and biologically identical vaccine that . . . was given EUA  
by the FDA in the United States.”).

1 product.” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii) (emphasis added). The statute is about the  
2 provision of information; as long as individuals receiving the vaccine are informed, the  
3 statutory requirement is met. *See Pelekai v. Hawaii*, No. 21-cv-00343, 2021 WL 4944804,  
4 at \*6 n.9 (D. Haw. Oct. 22, 2021); *see generally* Department of Justice, Office of Legal  
5 Counsel, Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from  
6 Requiring the Use of a Vaccine Subject to an Emergency Use Authorization, 45 Op. O.L.C.  
7 — (July 6, 2021), <https://www.justice.gov/olc/file/1415446/download>. Moreover, “as  
8 other courts have held, [the] conditions [in § 360bbb-3(e)] only relate to those who ‘carr[y]  
9 out any activity for which the authorization is issued,’ which are the medical providers who  
10 administer the vaccine, not those who issue vaccine mandates.” *Johnson*, 2021 WL  
11 4846060, at \*18 (citing *Valdez v. Grisham*, No. 21-cv-783, — F. Supp. 3d —, 2021 WL  
12 4145746, at \*4 (D.N.M. Sept. 13, 2021)).

13 Finally, even if the statute could be read to confer an individual right to refuse  
14 administration of an emergency use vaccine, the Contractor Mandate does not abridge that  
15 right. A hard choice, for which there may be significant consequences, is still a choice.  
16 Contractor and subcontractor employees may choose “either get the vaccine, apply for an  
17 exception, or look for employment elsewhere.” *Id.* Therefore, the Contractor Mandate  
18 does not violate § 360bbb-3.

#### 19 **4. Due Process Clause**

20 Plaintiffs also bring a due process challenge to the Contractor Mandate. The Due  
21 Process Clause of the Fifth Amendment to the Constitution provides that “[n]o person  
22 shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const.  
23 amend. V. The Supreme Court has held that the Clause includes both a substantive and a  
24 procedural component. *See Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).  
25 Plaintiffs invoke substantive due process, which “forbids the government from depriving  
26 a person of life, liberty, or property in such a way that shocks the conscience or interferes  
27 with the rights implicit in the concept of ordered liberty.” *Corales v. Bennett*, 567 F.3d 554,  
28 568 (9th Cir. 2009) (internal citations and quotation marks omitted).

1           Substantive due process analysis “begin[s] with a careful description of the asserted  
2 right.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). In so describing the right, courts should  
3 adopt a “narrow definition of the interest at stake,” *Raich v. Gonzales*, 500 F.3d 850, 863  
4 (9th Cir. 2007), “because guideposts for responsible decisionmaking in this unchartered  
5 area are scarce and open-ended.” *Glucksberg*, 521 U.S. at 720 (quoting *Collins v. City of*  
6 *Harker Heights*, 503 U.S. 115, 125 (1992)). *Glucksberg* provides a useful illustration of  
7 this principle. That case involved a substantive due process challenge to Washington’s ban  
8 on assisted suicide. In defining the liberty interest at stake, the Supreme Court rejected the  
9 plaintiffs’ suggestion that the interest was the “right to die,” the “right to control of one’s  
10 final days,” or “the right to choose a humane, dignified death.” *Id.* at 722. Instead, the Court  
11 held that the narrow question presented was whether “the Due Process Clause includes a  
12 right to commit suicide which itself includes a right to assistance in doing so.” *Id.* at 723.

13           Once the claimed right has been carefully defined, the court conducting the  
14 substantive due process analysis must then determine whether the right is “fundamental”  
15 in the sense that it is “deeply rooted in this Nation’s history and tradition and implicit in  
16 the concept of ordered liberty.” *Id.* at 720–21 (citations omitted). If the court determines  
17 that the right *is* fundamental, “substantive due process forbids the infringement of that right  
18 ‘at all, no matter what process is provided, unless the infringement is narrowly tailored to  
19 serve a compelling state interest.’” *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817 (9th Cir.  
20 2008) (quoting *Flores*, 507 U.S. at 301–02).

21           In applying these principles to the instant case, the Court concludes that Plaintiffs’  
22 claim fails. Plaintiffs contend that the Contractor Mandate violates contractor employees’  
23 fundamental “rights to bodily integrity and to refuse medical treatment.” (Doc. 134 at 18  
24 ¶¶ 57–58.) This definition of the alleged liberty interest at stake is far too broad. Properly  
25 construed, this case raises only the much narrower question whether there is a substantive  
26 due process right to refuse vaccination while an employee of a federal contractor. That  
27 question is easily answered in the negative. There is no such right, at least under prevailing  
28 Supreme Court precedent. *See Jacobson*, 197 U.S. 11 (holding that Massachusetts may

1 require all members of the public to be vaccinated against smallpox); *see also, e.g., Prince*  
2 *v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (citing *Jacobson* and holding that there is  
3 no “freedom from compulsory vaccination”); *Zucht*, 260 U.S. at 176 (similar); *Klaassen v.*  
4 *Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (Easterbrook, J.) (“Given *Jacobson*[,]  
5 . . . there can’t be a constitutional problem with vaccination against [COVID-19].”  
6 (citations omitted)); *Valdez*, 2021 WL 4145746, at \*5 (“[F]ederal courts have consistently  
7 held that vaccine mandates do not implicate a fundamental right and that rational basis  
8 review therefore applies in determining the constitutionality of such mandates.”); *Johnson*,  
9 2021 WL 4846060, at \*13 (“[T]he right to refuse vaccination is not a fundamental right.”  
10 (citation omitted)); *Dixon v. De Blasio*, No. 21-cv-05090, — F. Supp. 3d —, 2021 WL  
11 4750187, at \*8 (E.D.N.Y. Oct. 12, 2021) (same); *Klaassen v. Trs. of Ind. Univ.*, No. 1:21-  
12 cv-00238, — F. Supp. 3d. —, 2021 WL 3073926, at \*24 (N.D. Ind. July 18, 2021) (similar);  
13 *Norris v. Stanley*, No. 1:21-cv-00756, — F. Supp. 3d —, 2021 WL 4738827, at \*2 (W.D.  
14 Mich. Oct. 8, 2021) (similar).

15 Plaintiffs’ objections notwithstanding, *Jacobson* has never been overruled and  
16 remains binding on this Court.<sup>23</sup> *See Klaassen*, 7 F.4th at 593 (“Plaintiffs assert that the  
17 rational-basis standard used in *Jacobson* does not offer enough protection for their  
18 interests[,] . . . but a court of appeals must apply the law established by the Supreme  
19 Court.”). The Contractor Mandate, then, must pass only rational basis review. *Heller v.*  
20 *Doe*, 509 U.S. 312, 319–20 (1993). To do so, the mandate must merely be “rationally  
21 related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.  
22 432, 440 (1985); *see also Heller*, 509 U.S. at 321 (under rational basis review, “a [measure]  
23 is presumed constitutional, and the burden is on the one attacking the [measure] to negative  
24 every conceivable basis which might support it.” (internal citations and quotation marks

25  
26 <sup>23</sup> Plaintiffs assert that *Jacobson* is inapposite because it only “address[ed] whether *States*  
27 have the power to impose vaccine mandates” and did not “consider[] the constitutionality  
28 of the Federal government imposing such mandates . . . .” (Doc. 34 at 37.) Even if that were  
true, it does not bear on Plaintiffs’ substantive due process claim, which involves the  
question whether *individuals* have a fundamental constitutional right to refuse compulsory  
vaccination, irrespective of which unit of government (local, state, or federal) made the  
vaccination compulsory.



1 omitted)). It is. As has been mentioned, inhibiting the spread of COVID-19 is a legitimate  
2 interest. *See Roman Cath. Diocese*, 141 S. Ct. at 67. And requiring individuals to be  
3 vaccinated is rationally related to that interest. *See, e.g., Williams v. Brown*, No. 6:21-cv-  
4 01332, — F. Supp. 3d —, 2021 WL 4894264, at \*9 (D. Or. Oct. 19, 2021) (“[T]he Court  
5 has no trouble concluding that [Oregon’s] vaccine mandates [requiring all employees and  
6 workers employed by the executive branch of the Oregon state government to be fully  
7 vaccinated] are rationally related to a legitimate state interest.”); *see also Roman Cath.*  
8 *Diocese*, 141 S. Ct. at 63, 70 (Gorsuch, J., concurring) (describing *Jacobson* as applying  
9 rational basis review); *Heller*, 509 U.S. at 321 (“[C]ourts are compelled under rational-  
10 basis review to accept [the government’s] generalizations even when there is an imperfect  
11 fit between means and ends.”). Plaintiffs’ substantive due process challenge therefore fails.

## 12 **5. Claims Against the City of Phoenix**

13 Plaintiffs PLEA and Local 493 assert three claims against Defendant the City of  
14 Phoenix: violation of the Procurement Act; violation of the anticommandeering doctrine;  
15 and violation of Plaintiffs’ due process rights to bodily integrity and to refuse medical  
16 treatment. (Doc. 128.) Plaintiffs bring these claims against the City “as a relief defendant  
17 only; they do not allege that Phoenix is liable under or has breached the duties alleged in  
18 Counts I, IV, or VI.” (*Id.* at 2.) The Court will deny Plaintiffs’ claims.

19 Although this action was initially filed on September 14, 2021, the City was not  
20 named as a Defendant until November 19, 2021. (Doc. 72.) Then, it was named as a  
21 Defendant because, on November 18, 2021, the City, citing the Contractor Mandate,  
22 notified its employees that they would be required to receive the COVID-19 vaccine by  
23 January 18, 2022 or face discipline, up to and including termination. (Doc. 134 at 34 ¶ 10.)  
24 The City has since suspended its vaccine requirement. (Doc. 123-1.) Thus, any claims  
25 against it are likely nonjusticiable. But even if the City’s vaccination requirement were  
26 still in place, Plaintiffs’ claims would necessarily fail.

27 Plaintiffs’ claims against the City are based on a misunderstanding of the  
28 Declaratory Judgment Act., 28 U.S.C. § 2201. Although Plaintiffs are correct that a federal

1 court has jurisdiction under the Act where “the declaratory judgment defendant could have  
2 brought a coercive action in federal court to enforce its rights,” *Standard Ins. Co. v. Saklad*,  
3 127 F.3d 1179, 1181 (9th Cir. 1997) (quoting *Janakes v. USPS*, 768 F.2d 1091, 1093 (9th  
4 Cir. 1985)), jurisdiction to *seek* a declaratory judgment in federal court does not mean that  
5 such a judgment will issue. Jurisdiction is necessary, but alone insufficient, for a court to  
6 grant declaratory relief. Plaintiffs must also demonstrate that they are entitled to substantive  
7 relief.

8 Plaintiffs have made no such showing here. Indeed, Plaintiffs have conceded that  
9 the City is not liable on the claims asserted against it.<sup>24</sup> (Doc. 128 at 2.) Those claims will  
10 therefore be denied, and no injunction will issue against the City.

### 11 C. Irreparable Harm

12 To obtain an injunction, Plaintiffs must also demonstrate that they have suffered or  
13 are likely to suffer irreparable harm in the absence of injunctive relief. *See eBay Inc.*, 547  
14 U.S. at 391. Irreparable harm is “harm for which there is no adequate legal remedy, such  
15 as an award for damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir.  
16 2014). Economic harm is not generally considered irreparable, *E. Bay Sanctuary Covenant*  
17 *v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020), but where a party cannot recover the  
18 monetary damages flowing from its injury—as is often the case where the party challenges  
19 federal regulatory action—economic harm can be considered irreparable. *Id.* (citing  
20 *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)); *see also City & Cnty. of San*  
21 *Francisco v. USCIS*, 981 F.3d 742, 762 (“There is no dispute that . . . economic harm is  
22 sufficient to constitute irreparable harm because of the unavailability of monetary  
23 damages.”); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220–21 (1994) (Scalia, J.,  
24 concurring in part and concurring in the judgment) (“[A] regulation later held invalid

25 \_\_\_\_\_  
26 <sup>24</sup> Even absent Plaintiffs’ concession, their claims would fail. The City of Phoenix,  
27 obviously, is not a federal actor. It is therefore not subject to the strictures of the  
28 Procurement Act, which binds only federal actors, or the anticommandeering doctrine,  
which prevents the federal government, not local municipalities, from commandeering  
state governments. Thus, the City played no part in the enactment of the Contractor  
Mandate and plays no part in its enforcement. And, as described above, there is no due  
process right to refuse vaccination. *See supra* Section III.B.4.

1 almost *always* produces the irreparable harm of nonrecoverable compliance costs.”).  
2 Intangible injuries may also qualify as irreparable harm because such injuries generally  
3 lack an adequate legal remedy. *Ariz. Dream Act Coal.*, 757 F.3d at 1068.

4         Given these principles, Plaintiffs are likely to suffer irreparable harm. First, because  
5 many Arizona agencies are federal contractors (as detailed above), Plaintiffs face the loss  
6 of significant federal contracts and funds if the Contractor Mandate is not enjoined. *See*  
7 *supra* Section III.A.1.ii. Second, were the State to adhere to the mandate and require its  
8 employees to be vaccinated, some employees would resign or be terminated, harming the  
9 State’s operations through the loss of institutional knowledge and human capital, and  
10 requiring the State to incur significant recruitment, on-boarding, and training costs. Third,  
11 the State will incur significant compliance and monitoring costs should its agencies be  
12 required to adhere to the mandate. While these harms are primarily economic, they are not  
13 compensable through damages because Defendants are entitled to sovereign immunity.<sup>25</sup>

14         Moreover, because the Contractor Mandate conflicts with Arizona law, complying  
15 with the mandate would require the State to violate its own laws. *See supra* Section III.B.1.  
16 This infringement on Arizona’s sovereign interests constitutes irreparable harm. *See Abbott*  
17 *v. Perez*, 585 U.S. —, 138 S. Ct. 2305, 2324 n.17 (2018) (a state’s “inability to enforce its  
18 duly enacted plans clearly inflicts irreparable harm”); *Maryland v. King*, 567 U.S. 1301,  
19 1303 (2012) (Roberts, C.J., in chambers) (“Any time a State is enjoined by a court from  
20 effectuating statutes enacted by representatives of its people, it suffers a form of irreparable  
21 injury.”).

22         Plaintiffs are therefore likely to suffer irreparable harm, and an injunction may lie.

#### 23         **D. Balance of Hardships and Public Interest**

24         For an injunction to issue, Plaintiffs must also show that the balance of equities  
25 tips in their favor and that an injunction is in the public interest. *eBay Inc.*, 547 U.S. at 391.  
26 When the government is a party to the case, the balance of equities and public interest

27 \_\_\_\_\_  
28 <sup>25</sup> The APA, 5 U.S.C. § 702, waives sovereign immunity with respect to suits for injunctive relief but not suits for money damages. And, contrary to Defendants’ assertions, the CDA does not provide an adequate remedy for Plaintiffs’ injuries. *See supra* Section III.A.2.

1 factors merge. *See Doe #1 v. Trump*, 984 F.3d 848, 861–62 (9th Cir. 2020).

2 Defendants contend that enjoining the Contractor Mandate would disserve the  
3 public interest because it would increase “the spread of COVID-19 among millions of  
4 federal employees, federal contractors, and the members of the public with whom they  
5 interact” and would “hamper[] the efficiency of the federal workforce and the contractors  
6 on which the federal government depends.” (Doc. 52 at 55–56.) These arguments are  
7 unpersuasive.

8 Defendants have no legitimate interest in implementing or enforcing an unlawful  
9 vaccination policy. The public interest is always served by maintaining our constitutional  
10 structure, including through enforcing statutory limitations on the executive’s exercise of  
11 delegated authority. *See E. Bay Sanctuary Covenant*, 950 F.3d at 1281 (“[T]he public has  
12 an interest in ensuring that the statutes enacted by their representatives are not imperiled  
13 by executive fiat.” (internal citations and quotation marks omitted)); *see also, e.g., Gundy*,  
14 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (“[I]t would frustrate ‘the system of government  
15 ordained by the Constitution’ if Congress could merely announce vague aspirations and  
16 then assign others the responsibility of adopting legislation to realize its goals.” (quoting  
17 *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892))). Thus, while Defendants are of  
18 course correct that slowing the spread of the virus is in the public’s interest, achieving that  
19 objective through the unlawful means employed here is not. *See E. Bay Sanctuary*  
20 *Covenant*, 950 F.3d at 1282 (“[T]he weight we ascribe to this factor depends on the extent  
21 to which we agree that the [challenged executive branch policy] overrides plain  
22 congressional intent.”); *see also Kentucky*, 2021 WL 5587446, at \*1 (“This is not a case  
23 about whether vaccines are effective. They are. Nor is this a case about whether the  
24 government, at some level, and in some circumstances, can require citizens to obtain  
25 vaccines. It can.”); *In re MCP No. 165*, 21 F.4th 357, 389 (6th Cir. 2021) (Larsen, J.,  
26 dissenting) (“[Q]uestions of health science and policy lie beyond the judicial ken. . . . But  
27 this case asks a legal question: whether Congress authorized the action the agency took.”).

28 Despite Defendants’ arguments to the contrary, issuing an injunction here would do

1 them little harm, since they retain the right to recommend vaccination among contractors  
2 and to seek contractual remedies in the event a contractor fails to adequately perform on a  
3 contract. *See Florida*, slip. op. at 37. Declining to issue an injunction, on the other hand,  
4 would substantially harm the State, as it would be forced to either forfeit important  
5 federal contracts or violate its own laws and policies. *See supra* Section III.B.1. Moreover,  
6 because “the mere specter of the Mandate has contributed to untold economic upheaval in  
7 recent months,” stemming the “economic uncertainty” and “workplace strife” surrounding  
8 the mandate is clearly in the public’s interest. *BST Holdings*, 17 F.4th at 618.

9 Thus, the balance of the equities and the public interest weigh in favor of issuing  
10 an injunction.

#### 11 **IV. SCOPE OF RELIEF**

12 Plaintiffs have adequately demonstrated that they are entitled to an injunction on the  
13 Contractor Mandate. But before the injunction can issue, the Court must determine its  
14 appropriate scope. Plaintiffs seek a nationwide injunction “because of the nationwide  
15 scope of the mandates, and because of their systemic impact.” (Doc. 72 at 25.) Defendants,  
16 on the other hand, contend that any injunction “must be tailored to redress [the State’s]  
17 particular injury.” (Doc. 108 at 27 (quoting *Gill v. Whitford*, 585 U.S. —, 138 S. Ct. 1916,  
18 1934 (2018)).)

19 While the reasoning employed herein applies with equal force to the federal  
20 government’s dealings with contractors throughout the nation, history and prudence  
21 counsel in favor of granting only a limited injunction. *See Hawaii*, 138 S. Ct. at 2424–29  
22 (Thomas, J., concurring) (“I am skeptical that district courts have the authority to enter  
23 universal injunctions. These injunctions did not emerge until a century and a half after the  
24 founding. And they appear to be inconsistent with longstanding limits on equitable relief  
25 and the power of Article III courts.”). Universal injunctions “prevent[] legal questions from  
26 percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case  
27 a national emergency for the courts and for the Executive Branch.” *Id.* at 2425; *see also*  
28 *DHS v. New York*, U.S. —, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) (“The

1 traditional system of lower courts issuing interlocutory relief limited to the parties at  
2 hand . . . encourages multiple judges and multiple circuits to weigh in only after careful  
3 deliberation, a process that permits the airing of competing views that aids this Court’s own  
4 decisionmaking process.”).

5 Equitable remedies should redress only the injuries sustained by a particular plaintiff  
6 in a particular case. *See DHS*, 140 S. Ct. at 600 (Gorsuch, J., concurring). This narrow  
7 understanding of the district courts’ equitable power is consistent with the courts’  
8 longstanding view that the judicial power is limited to the resolution of individual cases  
9 and controversies. *See* U.S. Const. art. III, § 2; *see also Hawaii*, 138 S. Ct. at 2427–28  
10 (Thomas, J., concurring) (citing sources).

11 Consistent with these principles, the Court will issue an injunction limited to the  
12 geographic boundaries of the State of Arizona.

#### 13 **V. CONCLUSION**

14 The Court has jurisdiction to adjudicate Plaintiffs’ claims challenging the  
15 Contractor Mandate but lacks jurisdiction over Plaintiffs’ claims challenging the  
16 Employee Mandate. The Contractor Mandate exceeds the scope of the President’s  
17 authority under the Procurement Act. The Court will therefore issue an order enjoining  
18 the federal Defendants, but not the City of Phoenix, from enforcing the Contractor  
19 Mandate. There being no just reason for delay, *see* Fed. R. Civ. P. 54(b), the Court will  
20 enter judgment on the Vaccine Counts upon entering a permanent injunction, in a  
21 subsequent order. The Immigration Counts remain pending.

22 Accordingly,

23 **IT IS ORDERED** granting Plaintiffs’ Motion to Bifurcate Claims and Consolidate  
24 Trial on the Merits (Doc. 73).

25 **IT IS FURTHER ORDERED** granting in part, and denying in part, Plaintiffs’  
26 Motion for Preliminary Injunction (Doc. 72), as set forth herein.

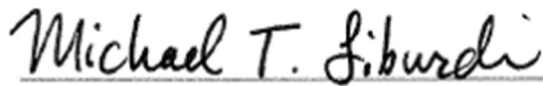
27 **IT IS FURTHER ORDERED** that consistent with the terms of this Order,  
28 Plaintiffs the State of Arizona and Arizona Attorney General Mark Brnovich shall submit



1 a proposed form of injunction by no later than **Tuesday, February 1, 2022**. The proposed  
2 form of injunction shall detail the individuals and entities that are enjoined, the capacity in  
3 which they are enjoined, and the precise activities they are enjoined from engaging in. The  
4 proposed injunction must be specific enough to give Defendants notice as to exactly what  
5 comes within its scope.

6 **IT IS FINALLY ORDERED** that Defendants may submit objections to Plaintiffs'  
7 proposed form of injunction by no later than **Monday, February 7, 2022**. The objections  
8 shall not repeat merits arguments and shall be limited to arguments that Plaintiffs' proposed  
9 form of injunction is inconsistent with the terms of this Order.

10 Dated this 27th day of January, 2022.

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14 Michael T. Liburdi  
15 United States District Judge  
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