No. 21-14269

In the United States Court of Appeals for the Eleventh Circuit

STATE OF GEORGIA, ET AL.,
Plaintiffs-Appellees,
v.
PRESIDENT OF THE UNITED STATES, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia, Augusta Division

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING APPELLEES

Daryl Joseffer
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Steven P. Lehotsky
Scott A. Keller
Gabriela Gonzalez-Araiza
LEHOTSKY KELLER LLP
200 Massachusetts Avenue, NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

Matthew H. Frederick
LEHOTSKY KELLER LLP
919 Congress Avenue
Austin, TX 78701

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber. Counsel further certifies that, in addition to the persons listed in the briefs of Defendants-Appellants and Plaintiffs-Appellees, the following persons may have an interest in the outcome of this case:

Chamber of Commerce for the United States of America, amicus curiae

Frederick, Matthew H., attorney, Lehotsky Keller LLP, counsel for amicus curiae

Gonzalez-Araiza, Gabriela, attorney, Lehotsky Keller LLP, counsel for amicus curiae

Joseffer, Daryl, attorney, Chamber of Commerce for the United States of America, counsel for amicus curiae

Keller, Scott A., attorney, Lehotsky Keller LLP, counsel for amicus curiae

Lehotsky Keller LLP, counsel for amicus curiae

Lehotsky, Steven P., attorney, Lehotsky Keller LLP, counsel for amicus curiae

Maloney, Stephanie A., attorney, Chamber of Commerce for the United States of America, counsel for amicus curiae

Dated: February 15, 2022

Respectfully submitted,

/s Scott A. Keller
Scott A. Keller

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have contributed significantly to fighting COVID-19. Member businesses have undertaken efforts to make COVID-19 vaccines available and encouraged employees to protect themselves against this pandemic. The Chamber and its members represent an array of interests and industries and understand all too well the impact of COVID-19 on workers and on the economy. The Chamber's interest here is not in disputing vaccine efficacy—indeed, many members have distributed, incentivized, encouraged, and in some cases mandated the vaccine. Rather, the Chamber's

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for State Appellees and Counsel for Appellee Associated Builders and Contractors, Inc. do not oppose this motion. Counsel for Appellants did not state their position before the Chamber filed this Brief.

interest concerns the scope of the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq*., which has broad ramifications for federal contracting and businesses across many sectors that contract with the federal Government.

The district court's preliminary injunction correctly recognizes the limited scope of the Procurement Act. Executive Order 14,042 and its accompanying mandate that federal contractors be vaccinated against COVID-19 exceed the authority granted to the Executive Branch under the Procurement Act. The Chamber and its members have a substantial interest in ensuring that the Executive Branch remains within the bounds of congressional authorization when regulating pursuant to the Procurement Act.

STATEMENT OF THE ISSUES

1. Whether the President exceeded the scope of the powers delegated to him by Congress in the Procurement Act when he sought to impose the contractor mandate.

2. Whether the contractor mandate was neither reasonably related nor had a sufficient nexus to promoting efficiency and economy in federal procurement.

SUMMARY OF THE ARGUMENT

Since the passage of the Procurement Act in 1949, the President has enjoyed a considerable degree of deference over decisions to improve the "economy and efficiency" of federal contracting. But the contractor mandate moves far beyond previous Procurement Act cases and now ventures into

regulating healthcare for approximately one-fifth of the U.S. workforce. In the contractor mandate, generous interpretations of the President's authority under the Act have reached their breaking point. There is not a sufficient nexus between the contractor mandate and improvement of economy and efficiency in federal contracting. The district court's preliminary injunction should be affirmed for multiple reasons.

First, the text of the Procurement Act does not support the exercise of authority contained in Executive Order 14,042. Second, the contractor mandate is not reasonably related to the Procurement Act's goals of an economic and efficient system for procurement. The connection between the mandate and economy and efficiency is not a sufficient nexus to justify the regulation. Third, the contractor mandate goes beyond even previous extensions of presidential authority under the Procurement Act. Previous cases have read the President's authority broadly, but even those cases could demonstrate a more direct link between the order at issue and efficient operations related to procurement. Fourth, the Supreme Court's decision in the OSHA mandate case casts further doubt on the contractor mandate. And fifth, the major questions doctrine also counsels against the Government's position on the Procurement Act.

BACKGROUND

Through an executive order and related guidance, the President directed that all federal contracts and subcontracts must include a clause requiring contractors to comply with three COVID-related protocols. These include a

mandate that all employees working on a federal contract—or working at a facility where work on a federal contract is performed—be fully vaccinated against COVID-19 by a certain date.

On September 9, 2021, the President issued Executive Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021). The President's Executive Order directs federal agencies to include a clause in all federal contracts requiring compliance with guidance to be issued by the Safer Federal Workforce Task Force. *Id.* § 2(a). The Order specified that the clause "shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument." *Id.* The Order directs the Director of the Office of Management and Budget to approve the Task Force's Guidance before it issues and determine whether the Guidance "will promote economy and efficiency in Federal Contracting if adhered to by Government contractors and subcontractors." *Id.* § 2(c). The Order directs the Federal Acquisition Regulatory Council to amend its regulations to include the Task Force's Guidance in federal contracts. And following OMB approval and issuance of the Guidance, the Order states that "contractors and subcontractors working on or in connection with a Federal Government contract or contract-like instrument . . . shall adhere to the requirements of the newly published Guidance, in accordance with" the mandatory contractual clause described in section 2(a). *Id.*

On September 24, 2021, the Safer Federal Workforce Task Force issued the Guidance contemplated by the Executive Order. The most significant feature of the Guidance is the vaccine mandate, which provides: "Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* ("Guidance") 5 (Sept. 24, 2021), https://bit.ly/3Bw7vpW. The Guidance applies to all areas of a covered workplace, even if performance of the federal contract occurs only in part of the workplace (with a limited exception), and the Guidance also states that the vaccine mandate applies to "[a]n individual working on a covered contract from their residence." *Id.* at 10–11.

On September 28, 2021, the Director of the Office of Management and Budget made the determination required by the Executive Order. The Director's determination stated that "compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in that guidance will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." Office of Management and Budget, Notice: Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14,042, 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021).

The FAR Council then initiated rulemaking and issued interim guidance. Memorandum from Lesley A. Field et al., 1–2 (Sept. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf ("FAR Memorandum"). Finally, in November, the Task Force issued revised contractor guidance and the OMB Director issued a revised determination. Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418 (Nov. 16, 2021). The revised Guidance set the deadline for compliance with the vaccination mandate to January 18, 2022. 86 Fed. Reg. at 63,420.

Numerous challenges to the mandate ensued. These focused on the President's Order, the Task Force's guidance, and the Director's approval, all of which rely on the President's authority over government procurement and contracting. *See, e.g.*, *Brnovich v. Biden*, 2022 WL 252396 (D. Ariz. Jan. 27, 2022); *State v. Nelson*, 2021 WL 6108948 (M.D. Fla. Dec. 22, 2021); *Missouri v. Biden*, 2021 WL 5998204 (E.D. Mo. Dec. 20, 2021); *Louisiana v. Biden*, 2021 WL 598815 (W.D. La. Dec. 16, 2021); *Kentucky v. Biden*, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021).

One of those challenges was the case below. Georgia, joined by various states, governors of those states, and various state agencies sued challenging the mandate on October 29, 2021, and the district court granted Georgia's motion for a preliminary injunction on December 7, 2021.

ARGUMENT

I. The Procurement Act's text and context do not support the exercise of authority contained in Executive Order 14,042.

The government's authority to purchase is not a power to regulate. The text of the Procurement Act does not support the far-reaching measures contained in Executive Order 14,042. The Government points to two Procurement Act provisions in attempting to justify the contractor mandate. The first, 40 U.S.C. § 101, is the prefatory language of the Act. It reads, in relevant part:

> The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:
>
> (1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting . . . .
> (2) Using available property.
> (3) Disposing of surplus property.
> (4) Records management.

The second provision, 40 U.S.C. § 121(a), provides that the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle." *Accord Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330–31 (D.C. Cir. 1996) ("The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power.").

As the Sixth Circuit explained when addressing the contractor mandate, the Act's statement of purpose is just that, a statement of purpose, not a grant

of authority. *Kentucky v. Biden*, 2022 WL 43178, at *12 (6th Cir. Jan. 5, 2022); *see also Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) ("statements of purpose . . . by their nature cannot override a statute's operative language" (cleaned up) (citation omitted)); *Gundy v. United States*, 139 S. Ct. 2116, 2027 (2019) (plurality op.) (a declaration of purpose is "an appropriate guide to the meaning of the statute's operative provisions" (cleaned up) (citation omitted)). And while the statement of purpose "guides . . . the meaning of the statute's operative provisions," it does not confer powers. *Gundy*, 139 S. Ct. at 2127 (plurality op.) (cleaned up) (internal quotation marks omitted). In this case, the statute's reference to economy and efficiency provides context for the scope of the President's authority, but it does not affirmatively grant authority on every question that touches economy and efficiency.

Moreover, the Government's interpretation stitches these provisions together but reads out key language. The Government has taken these provisions together to mean that the Procurement Act authorizes essentially anything that the President "considers necessary" to make anything about federal contracting more "economical and efficient." Gov't Br. 14–20. But that is not what the text says. A more natural reading conveys that the Act "permits [the President] to employ an 'economical and efficient *system*' to '*procur*[*e*]' those nonpersonal services." *Kentucky v. Biden*, 2022 WL 43178 at *12 (emphasis and second alteration in original). Stated differently, the Act grants the President authority over the federal government's *mechanisms* for achieving goals such as "procuring and supplying property and nonpersonal

services," 40 U.S.C. § 101(1)—but not over every constituent part of those mechanisms, and not over the healthcare polices for the individuals that comprise those nonpersonal services.

This more natural reading of the Act is confirmed by the context in which it came about. The Procurement Act was intended to "streamline[] and modernize[]" the federal government's "method of doing business." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979). Congress intended to create "an efficient, businesslike system of property management." *Chamber of Commerce*, 74 F.3d at 1333 (internal quotation marks omitted). And the Act "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Kahn*, 618 F.2d at 787. As the Sixth Circuit explained, "the fear . . . was not that personnel executing duties under nonpersonal-services contracts were *themselves* performing in an uneconomical and inefficient manner, but instead that the manner in which federal agencies were entering into contracts to produce goods and services was not economical and efficient." *Kentucky v. Biden*, 2022 WL 43178, at *13 (emphasis in original). The Procurement Act was intended to centralize the federal government's procurement responsibility, not grant the Executive Branch a "latent well" of regulatory authority over every individual employed by federal contractors and subcontractors. *Id.* at *13.

This context frames the core issue in this case. There are many iterations of vaccine mandates and many cases challenging them. Here, the President

has attempted to regulate workplace health and safety under the guise of setting procurement policy. In the OSHA vaccine mandate case, by contrast, the question was whether OSHA had acted within the scope of its delegated authority to regulate workplace safety. *Nat'l Fed'n of Indep. Bus. v. Dept. of Labor, OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam). The Supreme Court held OSHA had not. *Id.* And here, Congress has circumscribed the President's power over procurement in an even more limited fashion than its delegation to OSHA. The Procurement Act was intended to facilitate the federal government's ability to contract for goods and services—*not*, as the Government argues, to regulate anything and everything arguably connected to the realm of procurement. No one contests the President's power to procure, or even the President's power to make regulations to govern the process of procurement. But this power is not one to regulate generally, and certainly not one to regulate healthcare policies for employees of a federal contractor who are not even "working on or in connection with a [federal contract]." Guidance at 4.

The contractor mandate is not unique among executive orders by Presidents—of both political parties—attempting to wield the federal Government's procurement largesse as a regulatory cudgel. The Executive Branch has repeatedly used regulations over government contractors to impose policy changes that no private entity making a purchase would ever impose on a contractor or a subcontractor.

For instance, a private business procuring goods and services in the marketplace from a private contractor would never insist upon that contractor paying a minimum wage of $15 per hour (or more). But the Executive Branch, under the guise of "efficiency" in contracting, insists that the Government should pay more for its goods and services. Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Jan. 30, 2022); Complaint of Arizona, Idaho, Indiana, Nebraska, and South Carolina, *Arizona v. Walsh*, No. 2:22-cv-00213-SPL (D. Ariz. Feb. 9, 2022), ECF No. 1; Complaint of Texas, Louisiana, and Mississippi, *Texas v. Biden*, No. 6:22-cv-00004 (S.D. Tex. Feb. 10, 2022), ECF No. 1. Likewise, no private business purchasing goods or services would insist that a contractor or subcontractor must provide notice of *Beck* rights to its employees, or else it would not do business with that contractor (or sub). *Comms. Workers v. Beck*, 487 U.S. 735 (1988). But the Executive Branch imposed those requirements on government contractors—and then rescinded them and reimposed them and rescinded them again in a fight over union policy, not procurement policy. *See, e.g.*, Exec. Order No. 12,800, Notification of Employee Rights Concerning Payment of Union Dues or Fees, 57 Fed. Reg. 12,985 (Apr. 13, 1992); revoked by Exec. Order No. 12,836, Revocation of Certain Executive Orders Concerning Federal Contracting, 58 Fed. Reg. 7,045 (Feb. 1, 1993); reimposed by Exec. Order. No. 13,201, Notification of Employee Rights Concerning Payment of Union Dues or Fees; 66 Fed. Reg. 11,221 (Feb. 17, 2001), revoked again by Exec.

Order No. 13,496, Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 6,107 (Jan. 30, 2009).

The Executive Branch insists these are "procurement" requirements, but they are nothing more than regulatory tools—to engineer employment policy that the President could not achieve through broader legislation or other statutory tools (such as the Fair Labor Standards Act or the National Labor Relations Act).

II. The contractor mandate is not reasonably related to the Procurement Act's goals of an economic and efficient system of contracting.

With this context in mind, courts ask whether challenged actions are "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). Courts sometimes articulate this reasonable-relation standard to require a "sufficiently close nexus" between the challenged order and the "criteria" of "economy" and "efficiency." *Kahn*, 618 F.2d at 792. Previous examinations of the Act have emphasized that this "nexus" requirement "does not write a blank check for the President to fill in at his will." *Id.* at 793. Rather, the nexus must tangibly relate to the systems used for procurement. The contractor mandate fails to satisfy that requirement.

The Government's stated nexus is that the contractor mandate would "improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection

with a Federal Government contract." Request for Information and Comment on Digital Assets and Related Technologies, 86 Fed. Reg. 53,692 (Sept. 28, 2021); *see also* 86 Fed. Reg. at 63,421 ("[T]he overall effect of enacting these protocols for Federal contractors and subcontractors will be to decrease the spread of COVID-19, which will in turn, decrease worker absence, save labor costs on net, and thereby improve efficiency in Federal contracting."). In other words, unvaccinated individuals employed by federal contractors might get sick and might slow down projects or increase costs for contractors and subcontractors.

But the Procurement Act does not provide such broad authority. If it did, the Procurement Act would essentially grant the President authority over any aspect of public health so long as it has some connection to individuals employed by federal contractors and subcontractors. The scope of such authority would be virtually limitless. Yet the Government offers no limiting principle, and it does nothing to assuage fears that the reach of the Procurement Act would continue to grow over the years. Gov't Br. 24–25.

III. The contractor mandate goes beyond previous extensions of presidential authority under the Procurement Act.

The Government's interpretation of the Procurement Act would elevate presidential authority to a new level, far beyond even the broadest understandings of the Act that courts have accepted in the past. The Court need not determine whether those prior interpretations are correct to decide this

case. Even assuming that they are, they cannot justify the level of presidential power that the Government asserts here.

In *AFL-CIO v. Kahn*, for example, the President signed an executive order authorizing denial of government contracts to companies that failed or refused to comply with voluntary wage and price standards. 618 F.2d at 785. There, the court recognized that the statutory language providing that the President may "prescribe" policies as he deems "necessary" was somewhat open-ended, but not unlimited. *Id.* at 788. The court went on to note that this language was guided by the statute's purpose, which was to further the federal government's aim of having a "economical and efficient system for . . . procurement and supply." *Id.* The words "economy" and "efficiency," the court noted, "encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789. In that case, the court upheld the use of the Procurement Act to implement the wage and price controls, but "emphasize[d] the importance to [its] ruling . . . of the nexus between the wage and price standards and likely savings to the Government." *Id.* at 793. For example, the court found it noteworthy that the wage and price control at issue "will likely have the direct and immediate effect of holding down the Government's procurement costs." *Id*. at 792. In contrast, the contractor mandate is premised on speculation that the mandate will have the "overall effect" of decreasing the spread of COVID-19 and in turn decrease worker absence. 86 Fed. Reg.

63,418. The lack of a "direct and immediate effect" is indicative of a lack of a nexus.

The Government also points to *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), in support of its position that the standard under the Procurement Act is a "lenient" one. Gov't Br. 17. There, the court upheld an executive order issued under the Procurement Act requiring federal contractors to post notices at all facilities that federal labor laws protected them from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities. *Id.* at 362–63. But in *Chao*, the primary question was whether the executive order was preempted by the *Garmon* preemption doctrine of the National Labor Relations Act (NLRA). *Id.* at 363 *and see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Under the *Garmon* preemption doctrine, an executive order of its kind would have been preempted if it involved regulation of an activity that was either protected or prohibited by the NLRA. *Id.* The court determined that the regulated activity was neither protected nor prohibited, and therefore the order was not preempted. *Id.* at 363–66.

The court's discussion of the Procurement Act comes almost as an afterthought to its primary holding regarding preemption. The district court had had not reached the Procurement Act question, but plaintiffs offered it as an "alternative ground for affirmance." *Id.* at 362, 366. The court spent about two paragraphs on the issue and failed to explain how a sufficient nexus existed. *Id.* at 366. The court merely gave a brief summary of *Kahn* and then

restated the nexus offered by the President's executive order regarding the alleged connection to economy and efficiency. *Id.* The court even acknowledged that the "link" between the order and the Act's requirements for economy and efficiency was "attenuated." *Id.* But the court dismissed its own (well-founded) skepticism and surmised that since a tenuous link had been permissible in *Kahn*, a tenuous link could be permissible there. *Id.* at 366–67.

Even if a sufficient nexus had existed in *Chao*, neither the result nor the court's reasoning could support the vaccine requirement at issue here. The order in *Chao* bore a more direct relationship to labor management than the contractor mandate. And the court's reliance on *Kahn* does not hold up where the link between the contractor mandate and economy and efficiency is even more "attenuated" than the orders were in both *Kahn* and *Chao*.

As a final example, in *Chamber of Commerce v. Napolitano*, the Chamber challenged an executive order requiring federal contractors to use "E-Verify," an electronic system used to check immigration status for employment eligibility. 648 F. Supp. 2d 726, 729 (D. Md. 2009). The Chamber challenged the order under the Procurement Act, arguing that there was not a sufficiently close nexus between the order and the Procurement Act's "criteria of efficiency and economy." *Id* at 737. Similar to *Chao*, however, the court required that the President must provide only a "reasonable and rational" explanation of how the measure was "necessary" to promote "efficiency and economy." *Id.* at 738. Even assuming for the sake of argument that this were the correct interpretation of the Procurement Act, the contractor mandate

here has an even more tenuous connection to hiring procedures. In *Chamber of Commerce v. Napolitano*, the executive order was aimed at improving contractors' employment eligibility determinations to reduce their immigration enforcement actions. *Id.* There, the order regulated a contractor's actual hiring operations to improve a contractor's efficiency, but here, the contractor mandate regulates employee health under the reasoning that down the road it will improve operations.

In each of these cases, the courts took a deferential approach to the president's exercise of authority under the Procurement Act. Whether that overarching approach was correct is not at issue here. But in each of these cases, the challenged order was at least related to "the ordinary hiring, firing, and management of labor." *Kentucky v. Biden*, 2022 WL 43178, at *14. Assuming for present purposes that those orders were sufficiently connected to the grant of authority under the Act, they cannot support the Government's claim of authority here. The contractor mandate goes beyond mere management issues all the way to regulating the health and safety of employees of contractors and subcontractors.

IV. The Supreme Court's decision in the OSHA mandate case casts doubts on the Government's assertion of authority here.

The Supreme Court's recent decision regarding OSHA's COVID-19 emergency temporary standard casts further doubt on the Government's assertion of authority under the Procurement Act. *See NFIB*, 142 S. Ct. 661. Just last month, the Supreme Court stayed OSHA's vaccine-or-testing mandate,

which would have generally applied to private companies with more than 100 employees. *Id.* at 662. OSHA's stated authority for such a broadly sweeping regulation was its statutory mandate to set emergency workplace safety standards. *Id.* at 665. The Court disagreed. Acknowledging that COVID-19 presents some threat to workers' health, it distinguished that threat as the "kind of universal risk [that] is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *Id.* at 665.

Just so here. Interpreting regulatory authority over issues regarding procurement and federal contracting to include the power to regulate anything related to day-to-day health risks would "significantly expand" the President's Authority under the Act. *Id.* The Court's decision emphasized that while OSHA has been delegated powers over workplace safety, OSHA could not enact a regulation so broad. Likewise here, granting the President that kind of authority under the Procurement Act would be a bridge too far.

V. The major questions doctrine also counsels against the Government's position on the Procurement Act.

Along those lines, the major questions doctrine bars the Government's interpretation of the Procurement Act. Under this doctrine, Congress must "speak clearly" to delegate "powers of vast economic and political significance." *NFIB*, 142 S. Ct. at 665. Courts therefore routinely reject statutory interpretations that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional

authorization." *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*"); *see, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468–69 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 645–46 (1980) (Stevens, J., controlling plurality op.)); *Interstate Commerce Comm'n v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U.S. 479, 505 (1897).

In this case, the Government's position would give the Executive Branch "enormous and transformative" power without clear congressional authorization. *UARG*, 573 U.S. at 324. The major questions doctrine thus bars the contractor mandate's vast claimed scope of authority. Similar to the OSHA case, the President here "claims the power to force" one-fifth of the U.S. private-sector workforce "to receive a vaccine." *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring). Moreover, the President claims the kind of "general governmental powers" over public health that are typically reserved to the states. *Id.* at 668. "By any measure, that is a claim of power to resolve a question of vast national significance. Yet Congress has nowhere clearly assigned so much power to [the President under the Procurement Act]." *Id.* As just one example, the contractor mandate includes "any full-time or part-time employee of a covered contractor working on or in connection with a covered

contract or working at a covered contractor workplace." Guidance at 3–4. The Guidance continues: "This includes employees of covered contractors who are not themselves working on or in connection with a covered contract." *Id.* at 4. The contractor mandate unabashedly reaches employees and even entire departments and divisions of a business that are *not connected* to a federal contract. This is precisely the type of claim of expanded authority that the major questions doctrine was designed to guard against.

Furthermore, the "fundamental policy decisions" are the "hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Indus. Union*, 448 U.S. at 687 (Rehnquist, J., concurring the in judgment); *accord id.* at 645–46 (Stevens, J., controlling op.); *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)). The contractor mandate is just such a "fundamental policy decision." But rather than acting on express congressional authorization, the President uses authority under the Procurement Act as a foot in the door to make a sweeping policy choice. The major questions doctrine bars this kind of veiled acquisition of authority by the Executive.

CONCLUSION

The district court's preliminary injunction should be affirmed.

Dated: February 15, 2022

Respectfully submitted,

/s Scott A. Keller

Steven P. Lehotsky
Scott A. Keller
Gabriela Gonzalez-Araiza
LEHOTSKY KELLER LLP
200 Massachusetts Avenue, NW
Washington, DC 20001
(512) 693-8350
scott@lehotskykeller.com

Matthew H. Frederick
LEHOTSKY KELLER LLP
919 Congress Avenue
Austin, TX 78701

Counsel for Amicus Curiae

Daryl Joseffer
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

CERTIFICATE OF SERVICE

On February 15, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Scott A. Keller
Scott A. Keller

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,878 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller