No. 22-15518

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BRNOVICH, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLANTS

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INTRODUCTION

The United States is in the midst of an ongoing pandemic that has caused tens of millions of Americans to become ill and over a million to die. Beyond this human toll, the pandemic has also substantially disrupted the American economy. One study estimates that the cost of lost work hours associated with COVID-19 exceeds $100 billion. To reduce further economic loss, many private companies have chosen to require that their employees receive a COVID-19 vaccine. Those vaccines substantially reduce the risk that an employee will become sick, miss work, or pass the illness along to others, including coworkers.

The principal question in this case is whether the President of the United States may require federal agencies to do business only with contractors that impose the same type of vaccination requirement on their employees. The Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. § 101 *et seq.*, authorizes the President to "prescribe policies and directives" that he "considers necessary" to "provide the Federal Government with an economical and efficient system" for federal contracting and procurement. *Id.* §§ 101, 121(a). These provisions have consistently been understood by all three branches of government to give the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies reasonably related to the statute's aims, *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (citation omitted), including policies that in the President's judgment will improve the economy and efficiency of

federal contractors' operations. The President exercised that authority by issuing an Executive Order directing federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, which include vaccination requirements.

That Executive Order falls well within the terms of the Procurement Act. Requiring entities that enter into federal contracts to have a vaccinated workforce enhances the efficiency of federal contractor operations because a workplace free from COVID-19 is more efficient than a workplace in which employees become infected, transmit their infections to others, and miss work. Ensuring that federal contracts are performed in a timely and cost-sensitive manner, in turn, advances the economy and efficiency of the overall federal procurement system by lowering contracting costs and protecting the public fisc.

The district court nevertheless enjoined the policy, concluding that the Executive Order constituted a public health measure not clearly authorized by Congress. That conclusion was mistaken: The Executive Order is merely an exercise of the federal government's procurement powers and does not regulate any area outside of federal contracting. Nor will sustaining the Executive Order permit the President to impose virtually any policy, "no matter how tenuous" the link to economy and efficiency. ER-41. Presidents face meaningful legal, practical, and political limitations when they exercise their Procurement Act authority to impose conditions on those who elect to business with the federal government. Those limits

are not breached by an Executive Order that imposes contracting requirements that are tailored to the unique threats a once-in-a-century pandemic poses to government operations and that have been imposed by entities of all types in analogous situations.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. §§ 702, 703. ER-75. The district court granted in part plaintiffs' motion for injunctive relief on January 27, 2022, ER-10, and entered a permanent injunction on February 10, 2022, ER-7. The federal government filed a timely notice of appeal on April 8, 2022. ER-259; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The district court permanently enjoined enforcement of the challenged Executive Order as to "any contract to which a contracting party is domiciled in or headquartered in the State of Arizona, including the State of Arizona or any of its agencies or political subdivisions" or where the contract is "to be performed principally in the State of Arizona." ER-7-8. This appeal presents three questions:

1. Whether the Executive Order is a lawful exercise of the President's authority under the Procurement Act.

2. Whether plaintiffs failed to establish the equitable requirements for injunctive relief.

3. Whether the scope of the injunction is overbroad.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Federal Contracting And The Procurement Act

Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101 *et seq.*—known as the Procurement Act—with the aim of "provid[ing] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting." *Id.* § 101. The Act empowers the President to "prescribe policies and directives that the President considers necessary to carry out" that objective. *Id.* § 121(a). Presidents have long used this power to issue a wide variety of executive orders relating to federal procurement and contracting. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319 (Sept. 28, 1965) (forbidding civilian contractors from discriminating on the basis of race, creed, color, or national origin); Exec. Order No. 12,800, 57 Fed. Reg. 12,985, 12,985 (Apr. 14, 1992) (requiring contractors to inform their employees that they have a right not to pay union dues).

Congress has also authorized the Office of Federal Procurement Policy, a subcomponent of the Office of Management and Budget (OMB), to "issue policy directives[] … for the purpose of promoting the development and implementation of the uniform procurement system." Office of Federal Procurement Policy Act

Amendments of 1979, Pub. L. No. 96-83, sec. 4(e), § 6(h)(1), 93 Stat. 648, 650. And Congress created the Federal Acquisition Regulatory Council (FAR Council), 41 U.S.C. § 1302, which is chaired by the administrator of the Office of Federal Procurement Policy and provides guidance on how agencies should obtain full and open competition in contracting. The FAR Council promulgates the Federal Acquisition Regulation (FAR), which contains standard clauses that are to be included in certain government contracts. *See* 48 C.F.R. pts. 1-53.

B. COVID-19 Safety Requirements For Federal Contractors

1. The COVID-19 pandemic

Since January 2020, the United States has been in a state of public health emergency because of COVID-19. U.S. Dep't of Health & Hum. Servs., *Determination That a Public Health Emergency Exists* (Jan. 31, 2020), https://perma.cc/VZ5X-CT5R. In the two-plus years since that emergency began, there have been more than 89 million confirmed cases of COVID-19 in America and more than one million Americans have died from the disease. Ctrs. for Disease Control & Prevention (CDC), *COVID Data Tracker*, https://perma.cc/V8E2-NY69 (last visited July 18, 2022). Beginning in July 2021, cases, deaths, and hospitalizations due to COVID-19 began to rise dramatically following the emergence of a "more infectious" strain of the virus known as the Delta variant. CDC, *Delta Variant* (Aug. 26, 2021), https://perma.cc/4RW6-7SGB. In December 2021, another strain, the Omicron variant, began to cause "a rapid increase in infections" due to its "increased

transmissibility and … ability … to evade immunity conferred by past infection or vaccination." CDC, *Potential Rapid Increase of Omicron Variant Infections in the United States* (Dec. 20, 2021), https://perma.cc/6CWF-QZQW.

Apart from the countless personal tragedies it has caused, COVID-19 has also led to massive economic disruptions in the public and private sectors. The global economy contracted by 3.5 percent in 2020. Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, at 1 (Brookings Inst., Brookings Global Working Paper #158, June 2021), https://perma.cc/4J2W-N83V. One study estimates that between March 2020 and February 2021 the pandemic cost $138 billion in lost work hours among U.S. full-time private-sector employees. Abay Asfaw, *Cost of Lost Work Hours Associated with the COVID-19 Pandemic—United States, March 2020 Through February 2021*, 65 Am. J. Indus. Med. 20 (2022). In the public sector, the Government Accountability Office (GAO) reports that in the first six months of the pandemic a single federal agency, the Department of Energy, spent more than $550 million reimbursing contractors for COVID-19-related paid leave. GAO, GAO-20662, *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance and Use* 11 (Sept. 2020), https://perma.cc/TPF7-9VN4.

Once vaccines against COVID-19 became widely available in the United States, many private companies chose to mitigate the costs of the pandemic by imposing vaccination requirements on their workers and, in some cases, on visitors to their premises. 86 Fed. Reg. 63,418, 63,422 & n.13 (Nov. 16, 2021) (citing Jessica Mathews,

The Major Companies Requiring Workers to Get COVID Vaccines, Fortune (Aug. 23, 2021), https://perma.cc/2WQZ-SUCA). Many companies have reported high rates of compliance with these requirements. For example, by October 2021, 99.7 percent of United Airlines' workforce had complied with its vaccination requirements, and Tyson Foods had reported that more than 96 percent of its workforce was vaccinated. *Id.* at 63,422; *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359 (5th Cir. 2022) (Higginson, J., dissenting) (citing evidence showing that "[i]mmunization requirements have proven extremely effective in the private sector").

2. The challenged federal actions

On September 9, 2021, President Biden issued Executive Order No. 14,042. 86 Fed. Reg. 50,985 (Sept. 14, 2021). The Executive Order instructs departments and agencies, "to the extent permitted by law," to incorporate a COVID-19 safety clause into certain future contracts and solicitations. *Id.* § 2(a), 86 Fed. Reg. at 50,985. That clause requires that contractors and subcontractors comply with guidance developed by a federal task force, upon the OMB Director's determination that adherence to the guidance "by contractors or subcontractors[] will promote economy and efficiency in Federal contracting." *Id.* The Executive Order further instructs the FAR Council to amend the FAR to include the same COVID-19 safety clause. *Id.* § 3(a), 86 Fed. Reg. at 50,986. It states that "agencies are strongly encouraged, to the extent permitted by law," to seek to modify existing contracts to include the COVID-19 safety clause. *Id.* § 6(c), 86 Fed. Reg. at 50,987. But the Executive Order by its terms does not apply to

existing contracts absent the contractor's consent. *See id.* § 2(a), 86 Fed. Reg. at 50,985.[1] Nor does it apply even prospectively to contractors' workplaces that are unconnected to work on a federal contract. *See id.* ("This clause shall apply to any workplace locations … in which an individual is working on or in connection with a Federal Government contract or contract-like instrument … .").

On November 10, 2021, the Acting OMB Director determined that the guidance prepared by the designated task force would promote economy and efficiency in federal contracting (OMB determination).[2] 86 Fed. Reg. at 63,418; *see* Exec. Order No. 14,042, § 2(c), 86 Fed. Reg. at 50,985-86. The approved guidance requires covered contractor employees to be fully vaccinated against COVID-19 unless they are legally entitled to an accommodation. 86 Fed. Reg. at 63,420. It also requires, among other things, that in some circumstances covered contractor employees wear masks and physically distance while at workplace locations where work on or in connection with federal contracts is being performed. *Id.* at 63,420-21. The Acting OMB Director explained that, "[j]ust as … private businesses have concluded that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market, … the Guidance will

[1] Contractors can agree to bilaterally modify existing contracts to include the COVID-19 safety clause. The Executive Order also applies to existing contracts upon extension, renewal, or exercise of an option. Exec. Order No. 14,042, § 5(a), 86 Fed. Reg. at 50,986-87.

[2] This OMB determination "rescind[ed] and supersede[d]" a prior determination by the Acting OMB Director. 86 Fed. Reg. at 63,418.

realize economy and efficiency in Federal contracting." *Id.* at 63,421. She further noted that the benefits achieved in reducing extended employee absences would outweigh any "cost associated with replacing" unvaccinated employees, as "the experience of private companies" indicated that the overwhelming majority of employees comply with vaccination requirements. *Id.* at 63,422 & n.13.

On September 30, 2021, the FAR Council issued guidance advising agencies on how to seek to include the COVID-19 safety clause in new contracts and solicitations (FAR Council guidance). Memorandum from FAR Council to Chief Acquisition Officers, et al., *re: Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021), https://perma.cc/9BQ8-XBT6. That guidance contains a sample clause that implements the Executive Order.

C. Prior Proceedings

In September 2021, the State of Arizona and Arizona Attorney General Mark Brnovich (collectively, Arizona)—subsequently joined as plaintiffs by a federal employee and two Arizona public sector unions—filed this suit asserting substantive and procedural challenges to the Executive Order, the OMB determination, and the FAR Council guidance.[3] In February 2022, the district court issued a permanent

[3] Arizona and the federal employee also challenged Executive Order No. 14,043, which requires COVID-19 vaccinations for federal employees. 86 Fed. Reg. 50,989 (Sept. 14, 2021). The district court dismissed those claims on jurisdictional grounds, holding that Arizona lacked standing and that the individual plaintiff's claims were unripe. ER-24, ER-33. Neither Arizona nor the individual employee appealed those holdings.

injunction, barring the federal government from enforcing the Executive Order within "the geographic boundaries of the State of Arizona." ER-63.

As a threshold matter, the court concluded that Arizona had established standing to sue. The court determined that Arizona had standing to assert its proprietary interests in its own contracts with the federal government. ER-27. The court further held that Arizona had standing to assert its sovereign interests in protecting its vaccination policies from federal interference. ER-32. But the court rejected Arizona's contention that it had "quasi-sovereign" standing to litigate as *parens patriae* on behalf of its citizens. ER-27.

On the merits, the district court concluded that the Executive Order exceeded the President's statutory authority under the Procurement Act. ER-41. The court recognized that "a broad range of executive branch policies issued under [the Procurement Act] have been upheld as valid." ER-39. The court nevertheless declined to uphold the Executive Order, suggesting that doing so would allow the President to enact any policy, "no matter how tenuous[ly]" connected to "the broad goals of achieving economy and efficiency in federal procurement." ER-41. The court also pointed to the proposition that "[w]e expect Congress to speak clearly when authorizing [the executive branch] to exercise powers of 'vast economic and political significance,'" ER-42 (second alteration in original) (quoting *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)), and concluded that the Procurement Act does not clearly authorize the

Executive Order because the Executive Order is a public health measure, not a procurement policy, ER-42. Finally, the court raised nondelegation and federalism concerns that, in its view, counseled in favor of Arizona's reading of the Procurement Act.[4] ER-45-48.

The court also determined that Arizona satisfied the equitable requirements for injunctive relief. The court concluded that as a federal contractor, Arizona would suffer irreparable harm from implementing the Executive Order in the form of lost contracts and employees as well as "compliance and monitoring costs." ER-60. The court also held that the purported conflict between the Executive Order and Arizona's vaccination laws "infring[ed] on Arizona's sovereign interests [which] constitute[d] irreparable harm." ER-60. The court further concluded that the balance of harms and public interest weighed in favor of an injunction. Although the court recognized that "slowing the spread of the virus is in the public's interest," ER-61, it reasoned that "issuing an injunction here would do [the government] little harm" as the President could "recommend vaccination among contractors" instead of mandating it, ER-61-62.

As to the injunction's scope, the district court rejected Arizona's proposed nationwide injunction, recognizing that "[e]quitable remedies should redress only the

[4] The district court rejected Arizona's other substantive challenges to the Executive Order based on the Emergency Use Authorization Statute and the Due Process Clause. ER-54, ER-56. It also rejected Arizona's procedural challenges based on the Procurement Policy Act. ER-50-53.

injuries sustained by a particular plaintiff in a particular case." ER-63. The court nevertheless enjoined enforcement of the Executive Order as to "any contract to which a contracting party is domiciled in or headquartered in the State of Arizona, including the State of Arizona or any of its agencies or political subdivisions" or where the contract is "to be performed principally in the State of Arizona." ER-7-8. The government appealed. ER-259.

SUMMARY OF ARGUMENT

I. The Procurement Act authorizes the President to "prescribe policies and directives" that he "considers necessary" to ensure "an economical and efficient system" for procurement and contracting. For decades, Presidents, courts of appeals, and Congress have understood this broad language to give the President flexibility to impose contracting requirements that have a sufficiently close nexus to the statutory objectives, including policies which ensure that federal contractors deliver services in an economical and efficient manner.

That nexus is evident here. The Executive Order responds to the exigencies of the COVID-19 pandemic, which has caused significant disruption in many sectors of the economy. As the President explained in issuing the Executive Order, requiring contractors' employees to become vaccinated decreases the likelihood that those employees will miss work or transmit the virus to their coworkers. The requirement therefore advances the economy and efficiency of contractor operations, as private companies have recognized in imposing their own vaccination requirements. And

ensuring that federal contractor performance is more efficient in turn enhances the economy and efficiency of the overall federal procurement system.

The district court did not seriously dispute that the vaccination requirement would promote an economical and efficient system for federal contracting. Instead, the court expressed concern that the Executive Order "relate[s] to … public health," not procurement, and would open the door for the President to enact virtually any measure "[a]s long as the federal government could articulate *some* connection—no matter how tenuous[] … [to] the broad goals of achieving economy and efficiency." ER-41-42. Those concerns lack foundation. Any executive order must bear a close nexus to the Procurement Act's statutory goals, and the President, as a market participant and the most accountable elected official, has strong incentives to refrain from imposing conditions that contractors and the public would view as unacceptable. The President does not cast doubt on the effectiveness of those limits when he imposes a condition on federal contractors that is aimed at addressing the distinct and real threats of a pandemic to government operations and that has been imposed by analogous private and public entities. And courts routinely uphold similar exercises of proprietary authority under the Procurement Act, even though they have effects in addition to the promotion of economy and efficiency.

The district court also erred in holding that Congress was required to more clearly authorize the Executive Order as an exercise of a power of "vast economic and political significance." ER-42 (citation omitted). The cases cited for that proposition

involve exercises of regulatory authority, not the Executive Order's exercise of the federal government's proprietary authority to impose new conditions in government contracts. Those cases also reflect concerns about the risk of diminished accountability associated with regulatory action by agencies. No such risk exists here. The Procurement Act vests authority in the President, who has inherent power to direct the operations of the Executive Branch and is directly accountable to the people.

The district court was similarly incorrect to invoke nondelegation and federalism principles. As every appellate court to consider the question has held, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle to guide the President's discretion. And because federal contracting is a matter reserved to the federal government, not the States, the Executive Order does not raise federalism concerns.

II. Arizona failed to establish that it faces irreparable injury in the absence of an injunction and that the balance of the equities favors injunctive relief. Arizona provided no evidence to substantiate its claim that it would suffer irreparable harm from "compliance and monitoring costs" or disruptions to its labor force. ER-60. Arizona's fears about the potential loss of future federal contracting opportunities are similarly too speculative to warrant injunctive relief. And any injury arising from a conflict between the Executive Order and Arizona law is limited, as nothing in state law prevents private contractors from requiring that their employees be vaccinated.

The pandemic's effects on the contractor workforce, by contrast, are anything but conjectural. Enjoining the Executive Order will cause concrete and irreparable harm to the federal government and American taxpayers stemming from significant productivity losses in the performance of federal contracts. In accepting Arizona's assertions without scrutiny, and in dismissing the impact of an executive order designed to minimize disruption of federal contracts, the district court improperly substituted its policy judgment for that of the President.

III. The district court independently erred by issuing an overbroad injunction. Article III and principles of equity require that an injunction sweep no further than necessary to address the injuries identified to the court. The district court correctly concluded that Arizona could assert only its own injuries in challenging the Executive Order. The court nonetheless enjoined the vaccination requirement as to all contractors headquartered or principally performing a contract within Arizona, including countless private contractors who were not parties to this action and who, consistent with Arizona law, may require their employees be vaccinated. At a minimum, then, the district court's injunction should be narrowed to apply only to Arizona public entities' own contracts with the federal government.

STANDARD OF REVIEW

This Court reviews the district court's grant of a permanent injunction for abuse of discretion, but questions of law are reviewed de novo. *See Columbia Pictures Indus., Inc. v. Fung*, 710 F. 3d 1020, 1030 (9th Cir. 2013).

ARGUMENT

I. THE EXECUTIVE ORDER IS LAWFUL

A. The Executive Order Is A Proper Exercise Of Authority Under The Procurement Act

1. The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Act, as long as those policies are "consistent" with the remainder of the statute. 40 U.S.C. § 121(a). In determining what policies are consistent with the statute, the Act states that its "purpose … is to provide the Federal Government with an economical and efficient system for," among other things, "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." *Id.* § 101. The link between that statement of purpose and the operative provision is clear: The statement of purpose in § 101 "is 'an appropriate guide' to the 'meaning of the … operative provision[]'" in § 121(a). *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012)). The Procurement Act thus empowers the President to "prescribe policies and directives that the President considers necessary" to "provide the Federal Government with an economical and efficient system" for "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. §§ 101, 121.

That express grant of statutory authority permits the President to issue, among others, orders that ensure that executive agencies contract with contractors who will perform economically and efficiently. Establishing a "system"—i.e., a "formal scheme or method," *System*, Webster's New International Dictionary 2562 (2d ed. 1959))—for "procuring … nonpersonal services" and "performing related functions including contracting" necessarily includes setting the terms on which those services are to be acquired and contracts are to be performed. Indeed, it is impossible even to enter into a contract without agreement on its terms. *See* 1 Williston on Contracts § 3.2 (4th ed. 2021) (noting that, for a contract to be enforceable, there must be agreement on essential terms); *cf. Bilski v. Kappos*, 561 U.S. 593, 607 (2010) (explaining that term "'method[]' … include[s] at least some methods of doing business"). Thus, one primary way to ensure that a "system" of procurement and contracting is "economical and efficient" is to ensure that the system purchases services that are performed in a cost-efficient and timely manner.

2. That plain text interpretation of the Procurement Act is confirmed by "the government's early, longstanding, and consistent interpretation of [the] statute"—without any concerns from Congress over many decades—all of which is "powerful evidence of its original public meaning." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) (emphasis omitted).

a. Presidents regularly have used their Procurement Act authority to issue orders that ensure the economy and efficiency of federal contractors' operations. In

the first decades after the Procurement Act's enactment, for example, "the most prominent use of the President's authority under the [statute]" was "a series of anti-discrimination requirements for Government contractors." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc). Presidents Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson each issued orders forbidding contractors from discriminating on the basis of race, creed, color, or national origin, *id.* at 790-91, 791 n.33 (citing orders)—all in an effort to prevent the federal government's suppliers from "increasing its costs and delaying its programs by excluding from the labor pool available minority workmen," *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir. 1971).

More recently, Presidents have continued to exercise their Procurement Act authority to impose contract requirements that they determined enhanced the economy and efficiency of federal contractor operations. President George W. Bush, for example, issued an order requiring federal contractors to use the E-Verify system to verify the lawful immigration status of employees, reasoning that "[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions" and thus are "generally more efficient and dependable procurement sources." Exec. Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 11, 2008). And President Barack Obama issued an order requiring federal contractors to provide their employees with paid sick leave based on his determination that doing so would "improve the health and performance of

employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees." Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 10, 2015).

b. For decades, the courts of appeals have endorsed this view of the Procurement Act as affording the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies. *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *Kahn*, 618 F.2d at 789). Courts have accordingly recognized that an order issued by the President is a proper exercise of his Procurement Act authority if there exists a "sufficiently close nexus" between the order and the statutory goals of economy and efficiency, *Kahn*, 618 F.2d at 792; *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 169-70 (4th Cir. 1981) ("[A]ny application of the Order must be reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement … ." (citing *Contractors Ass'n*, 442 F.2d at 170)), and the order is otherwise consistent with the law, *cf. Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (enjoining Procurement Act order because it conflicted with the National Labor Relations Act).

That standard is a "lenient" one, *Chao*, 325 F.3d at 367, and courts have respected the President's judgment that policies will enhance economy and efficiency in federal procurement, including by increasing the efficiency and productivity of federal contractor operations. In *Chao*, for example, the D.C. Circuit upheld an order

requiring government contractors to post notices of certain labor rights based on President Bush's judgment that "[w]hen workers are better informed of their rights, … their productivity is enhanced" and that "[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Id.* at 366 (quoting Exec. Order No. 13,201, 66 Fed. Reg. 11,221, 11,221 (Feb. 22, 2001)). Similarly, in *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), a district court upheld President Bush's order requiring federal contractors to use the E-Verify system based on his judgment that contractors with "rigorous employment eligibility confirmation policies" would be "more efficient and dependable procurement sources." *Id.* at 738 (quoting 73 Fed. Reg. at 33,285). And courts have upheld antidiscrimination orders, observing that they are not "so unrelated to the establishment of 'an economical and efficient system for … the procurement and supply' of property and services that [they] should be treated as issued without statutory authority." *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (first alteration in original) (citation omitted); *see Contractors Ass'n*, 442 F.2d at 170-71 (agreeing that antidiscrimination orders were "authorized by the broad grant of procurement authority" because "the *federal government* has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects" (emphasis added)).

c. Congress has repeatedly revised the Procurement Act against the background of this longstanding consensus among the courts of appeals, and it has never modified or restricted the President's power. *See, e.g.*, Pub. L. No. 99-500, 100 Stat. 1783, 1783-345 (1986); Pub. L. No. 99-591, 100 Stat. 3341, 3341-345 (1986); Pub. L. No. 104-208, 110 Stat. 3009, 3009-337 (1996). Indeed, Congress recodified—without substantive change—both the Procurement Act's statement of purpose and the operative provision authorizing the President to set procurement policies to achieve the statute's goals. *See* Pub. L. No. 107-217, 116 Stat. 1062, 1063 (2002) (recodifying statement of purpose at 40 U.S.C. § 101); *id.* at 1068 (recodifying grant of authority at 40 U.S.C. § 121(a)); *id.* at 1303 ("[T]his Act makes no substantive change in existing law[] … .").

As the en banc D.C. Circuit explained in *Kahn*, in sustaining the order there, when "the President's view of his own authority under a statute … has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect'" and "should be followed unless there are compelling indications that it is wrong." 618 F.2d at 790 (first quoting *Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); and then quoting *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979)). And as this Court has emphasized, "Congress is presumed to be aware of a[] … judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168, 1174 (9th Cir. 2017) (quoting *Lorillard v. Pons*, 434 U.S.

575, 580 (1978)); *see also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) ("If a word or phrase has been … given a uniform interpretation by inferior courts …, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (alterations in original) (quoting Scalia & Garner, *supra*, at 322)); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 n.11 (2009) (holding that Congress "implicitly adopted" the Supreme Court's "construction of the statute" when it amended the statute "without altering the text of" the provision in question).

d. The Supreme Court recently emphasized the importance of an agency's "longstanding practice" in concluding that the government was likely to succeed in defending a vaccination requirement "impose[d]" as a "condition[] of participation" on recipients of Medicare and Medicaid funds. *Biden v. Missouri*, 142 S. Ct. 647, 652-53 (2022) (per curiam). The governing statute there "authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)). The Court rejected a "narrower view" of that "seemingly broad language" that would "authorize[] the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid." *Id.* In doing so, the Court explained that "the longstanding practice of [the agency] in implementing the relevant statutory authorities tells a different story." *Id.* That is equally the case here, where the

"longstanding practice" encompasses decades of Executive Branch practice and courts of appeals decisions interpreting the statute—without concerns from Congress—to authorize a variety of orders improving the economy and efficiency of contractors' operations.[5]

B. The Executive Order Reflects The Required Nexus To Economy And Efficiency In Federal Procurement

1. The Executive Order manifestly reflects the required nexus to the statutory objective of "an economical and efficient system" for contracting and procurement, 40 U.S.C. § 101. The Executive Order directs departments and agencies to include in certain future contracts and solicitations a clause requiring contractors to provide adequate COVID-19 safeguards to their workers. Those safeguards, the Executive Order explains, "will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." Exec. Order No. 14,042, § 1, 86 Fed. Reg. at 50,985. Those efforts, in turn, help to avoid schedule delays and reduced performance quality in critical federal contracts. The safeguards also minimize the leave and health care costs that, in some contracts, might be passed along to the

[5] In denying the government's motion for a stay pending appeal in another challenge to the Executive Order at issue here, a motions panel of the Sixth Circuit announced a highly constricted understanding of Procurement Act authority at odds with this longstanding practice and the otherwise uniform view of the courts. *See Kentucky v. Biden*, 23 F.4th 585, 603-10 (6th Cir. 2022). That decision is mistaken on several grounds, including its misunderstanding of the principles discussed here.

federal government. By ensuring that the federal government is entering into contracts that will be performed efficiently—where the services are delivered on time and at cost—the Executive Order contributes directly to establishing "an economical and efficient system," 40 U.S.C. § 101, for "[p]rocuring … property and nonpersonal services" and "performing related functions including contracting," *id.* § 101(1).

As the Acting OMB Director noted, the extent to which the contract requirements will further those statutory goals is confirmed by measures taken by private employers in the interests of their own economy and efficiency. The pandemic has had devastating effects on employers and their employees. As explained above, one study estimates that between March 2020 and February 2021, the pandemic cost $138 billion worth of lost work hours among U.S. full-time workers. Asfaw, *supra*. And in many cases, the effects of employees' COVID-19 infections are not limited to the absences of those employees; infected employees pose an increased risk of transmitting the virus to the coworkers, customers, and clients with whom they interact. To address those concerns, large numbers of private employers—including AT&T, Johnson & Johnson, and Microsoft—have established vaccination requirements for their workforces, recognizing "that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market." 86 Fed. Reg. at 63,421-22, 63,422 n.13. The Procurement Act empowers the President to use the same means as private

enterprises in making a judgment about how best to promote economy and efficiency in the federal government's contracting and procurement.

The nexus to an "economical and efficient system" for procurement is not diminished because Presidents have not previously directed inclusion of a vaccination requirement in federal contracts. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2261 (2021) ("[T]he non-use[] of a power does not disprove its existence." (citation omitted)); *contra* ER-43. As the Supreme Court noted, Presidents have "never had to address an infection problem of this scale and scope before." *Missouri*, 142 S. Ct. at 653. The virus is readily transmitted and is particularly insidious because it can be communicated by asymptomatic carriers. And while the impact of the virus varies, it is often debilitating for extended periods and has been fatal in more than one million cases to date. "[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Id.* at 654; *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[T]he fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." (cleaned up)).

It is likewise immaterial that "Congress has passed no legislation mandating vaccination" during the COVID-19 pandemic. ER-43. "[C]ongressional silence," as the district court recognized, is never "dispositive." ER-43. Indeed, attempts to speculate about why this Congress "declined to adopt new legislation offers a

'particularly dangerous' basis on which to rest an interpretation of" the Procurement Act, which "a different and earlier Congress did adopt." *Bostock*, 140 S. Ct. at 1747 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). The best indication of the Procurement Act's reach comes instead from "the words on the page … adopted by Congress and approved by the President," *id.* at 1738, which afford the President both "necessary flexibility and 'broad-ranging authority'" in setting policies that have a nexus to the statutory goals of economy and efficiency in federal procurement, *Chao*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 789).

2. The district court acknowledged that courts, "[i]n conducting this 'nexus' inquiry, … have defined 'economy' and 'efficiency' broadly." ER-39. And the district court did not dispute that measures that reduce schedule delays and improve productivity in the performance of federal contracts will enhance the "economy" and "efficiency" of the federal contracting system. The court nevertheless concluded that the Executive Order lacked the requisite nexus because it "relate[s] to … public health," and if sustained, would permit Presidents to enact virtually any measure so long "as the federal government could articulate *some* connection[] … between the enacted policy and the [statute's] broad goals." ER-41-42. That reasoning suffers from two fundamental flaws.

First, by suggesting that the Executive Order is not a procurement policy because it affects public health, the district court misperceived the nature of both the Executive Order and the President's authority under the Procurement Act.

The Executive Order is plainly directed at federal procurement. It sets the terms under which executive departments and agencies should pay for services, by setting criteria for the contractors eligible to bid on certain federal contracts. Those criteria, in turn, promote the safety and efficiency of the workplaces where the services being procured by the federal government will be performed. The Executive Order operates solely by altering the government's negotiating position to include these requirements in voluntary commercial agreements.

The Executive Order does not lose its status as a procurement policy simply because it also affects public health. Executive orders under the Procurement Act and related statutes have often had effects in addition to the promotion of economy and efficiency. For example, in *American Federation of Government Employees v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (R.B. Ginsburg, J.), the D.C. Circuit observed that the Executive Order sustained in *Kahn*—which had the principal purpose of lowering the government's procurement costs by requiring adherence to price and wage guidelines—had the "additional goal of slowing inflation in the economy as a whole." *Id.* at 821 (citing *Kahn*, 618 F.2d at 792-93). Much the same was true of the antidiscrimination requirements addressed in cases like *Contractors Ass'n*. As the D.C. Circuit noted, these requirements had the "additional goal of promoting enhanced employment opportunities for minorities." *Id.* (citing *Contractors Ass'n*, 442 F.2d at 171). And it was equally true of the order at issue in *Chamber of Commerce v. Napolitano*, in which President Bush required federal contractors to use the E-Verify system to

verify the lawful immigration status of their employees; that order had significant effects on the implementation of immigration laws in addition to its impact on the economy and efficiency of federal procurement. *See supra* p. 20. Different statutes might limit agencies' authority to implement policies with broader effects. *See, e.g.*, *National Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam) (observing that the Occupational Safety and Health Act authorizes the Occupational Safety and Health Administration (OSHA) to regulate only "*occupational* hazard[s]," not universal "hazards of daily life"). But it is clear that under the *Procurement Act*, the President's determination of how best to achieve economy and efficiency in federal operations does not "become[] illegitimate" solely because, "in addition to" advancing those goals, it "serves other, not impermissible, ends as well." *Carmen*, 669 F.2d at 821.

Second, the district court was mistaken when it predicted that sustaining the Executive Order would permit the President to enact any executive order, "no matter how tenuous" the connection to economy and efficiency. ER-41. The government has always acknowledged that presidential authority under the Procurement Act is constrained by the statute's text, which requires that any executive order bear a close nexus to the statutory goals of establishing "an economical and efficient system" for federal procurement and contracting. 40 U.S.C. § 101. The President's status as "the most singularly accountable elected official in the country," *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 357 (5th Cir. 2022) (Higginson, J., dissenting), also serves as a

check on extreme actions that would offend the popular will. And, like any market participant, the President, as CEO of the Executive Branch, has a strong interest in doing business with qualified contractors. The President thus has additional incentives not to impose conditions that do not promote efficiency and that contractors—who are free to seek other contracts—might view as unacceptable. The conditions here, however, parallel conditions that many employers have voluntarily imposed on their own workforces after concluding that vaccination requirements advance their economic and other interests.

History confirms that these limits have effectively constrained the President's power. Since the Procurement's Act enactment, even though "a broad range of executive branch policies issued under [the Procurement Act] have been upheld as valid," ER-39, the President has never issued the far-fetched orders that the district court contemplates, *see* ER-41 (speculating about hypothetical orders "requiring all federal contractor employees to refrain from consuming soda or eating fast food"). The effectiveness of those limits is not diminished because the President has chosen now—in the midst of a pandemic of a "scale and scope" never before seen, *Missouri*, 142 S. Ct. at 653—to require contractors performing services for the federal government to adhere to workplace requirements that address the unique, and very real, threats that the pandemic poses to government operations.

C. The Procurement Act Is Clear And Broad Enough To Authorize The Executive Order

Congress did not need to speak with special clarity to give the President the power to issue the Executive Order. The Procurement Act does not list the types of concerns that a President may determine are relevant to economy and efficiency, nor the types of measures to be employed in pursuing those ends. To insist that Congress specifically address a vaccination requirement in these circumstances would require it to have oracular powers. "Economical" and "efficient" are terms of great breadth, *see Kahn*, 618 F.2d at 789, and in using them, Congress gave the President authority to deal with unforeseen contingencies as well as familiar concerns. "[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." Scalia & Garner, *supra*, at 101.

1. The district court suggested that clearer congressional authorization was required because the Executive Order purportedly touches on an area of "vast economic and political significance." ER-42 (citation omitted). But the economic and political significance of an issue can be relevant only when agency action threatens a "transformative expansion in … regulatory authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see National Fed'n of Indep. Bus.*, 142 S. Ct. at 665. That principle has no application here.

The Executive Order does not exercise "regulatory authority" at all. Instead, it is an exercise of the federal government's proprietary authority, as the purchaser of services from federal contractors and subcontractors—and one that applies only to those workplaces where work on federal contracts is taking place. As the Supreme Court recognized eighty years ago, "[l]ike private individuals and businesses, the Government enjoys the unrestricted power … to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). The Executive Order thus does not regulate employers generally (or even federal contractors generally because it does not reach workplaces that are unrelated to federal contracting work); instead, it reflects a management decision to insist on, from companies that elect to do business with the federal government, contract terms that reflect the same type of requirements that private sector employers impose on their employees.

The contract conditions addressed by the Executive Order thus stand on a very different footing from the COVID-19 vaccination-or-testing standard promulgated by OSHA. *See National Fed'n of Indep. Bus.*, 142 S. Ct. at 662 (concluding that the plaintiffs were likely to succeed on the merits of their challenge to OSHA's standard). The standard there directly regulated employers, pursuant to authority granted by Congress under the Commerce Clause. *See id.* at 662-63. In contrast, the Procurement Act is an exercise of Congress's powers under distinct constitutional provisions, including the Spending Clause, and the Executive Order challenged here invokes only the

President's power to impose conditions in workplaces involved in performing federal contracts. When the government acts "in its capacity 'as proprietor'" and "manager of its 'internal operation,'" it "has a much freer hand" than when it "exercise[s] its sovereign power 'to regulate.'" *NASA v. Nelson*, 562 U.S. 134, 148 (2011) (citation omitted). Congress, moreover, routinely employs general terms when authorizing the Executive to manage and expend public funds in that role. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."). And the legality of those general authorizations "has never seriously been questioned." *Clinton v. City of New York*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part). In short, Congress was not required to specify the precise means appropriate for the Executive to improve the efficiency of federal contracts in the midst of a global pandemic, even if it would be required to do so in certain contexts involving direct regulation.

The district court did not seriously dispute these principles. And although the court suggested that the Executive Order is "regulatory … in character," it did so in discussing standing, not in construing the scope of the Procurement Act. ER-30. In any event, the case the district court cited for that proposition—*Chamber of Commerce v. Reich*—reveals the court's misunderstanding of the authority exercised here. In *Reich*, the D.C. Circuit considered whether orders precluding the use of replacement

workers for striking employees and requiring employers to post notices of employee rights violated principles of preemption under the National Labor Relations Act (NLRA). To the extent that court discussed the distinction between regulatory and proprietary orders, it did so only in the context of "labor relations policy"—a context that "is different because of the NLRA and its broad field of pre-emption." *Reich*, 74 F.3d at 1337. Even in that context, moreover, the D.C. Circuit has rejected the theory that the government exercises regulatory authority whenever it "acts through blanket, across-the-board rules." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002) (citation omitted). What matters instead is whether the government disqualifies contractors "on the basis of conduct unrelated to any work they were doing for the Government." *Id.* That is not the case here, where the requirements apply only to workers and workplaces associated with the performance of federal contracts.

2. Even assuming the district court's mistaken premise that the Executive Order is an exercise of "regulatory authority," the cases cited suggest a need for special clarity only when a court must determine whether Congress has "assign[ed] to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)), *quoted in Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam)); *see West Virginia*, 142 S. Ct. at 2609 (considering whether "Congress would have been likely to delegate such power to the agency at

issue" (cleaned up)). Those considerations cast no doubt on the validity of the Executive Order.

In *Brown & Williamson*, for example, the Supreme Court held that a "cryptic" statutory provision should not be understood as "delegat[ing]" to the FDA the authority to resolve the question whether cigarettes and smokeless tobacco should be banned; that was a question for Congress, not the FDA, the Court concluded. 529 U.S. at 159-61; *see id.* at 141, 156 (explaining that the agency's interpretation would be "incompatible" with other aspects of the statute). Likewise, the Court in *Utility Air* rejected the EPA's interpretation of ambiguous provisions of the Clean Air Act—which would have allowed the agency to set standards for emissions of greenhouse gases from new motor vehicles—on the ground that "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 573 U.S. at 324; *see id.* at 321 (explaining that the agency's position was "inconsistent with—in fact, would overthrow—the Act's structure and design"). In *Alabama Ass'n of Realtors*, the Supreme Court held that a provision of the Public Health Service Act did not delegate to the CDC the authority to institute a moratorium on evictions. 141 S. Ct. at 2489. In *National Federation of Independent Business*, the Supreme Court concluded that the Occupational Safety and Health Act authorizes OSHA to regulate only "*occupational* hazard[s]" and that therefore it was not "clear" that Congress had given OSHA the authority "to regulate the hazards of daily life[ ]simply because most Americans have jobs and face those

same risks while on the clock." 142 S. Ct. at 665. And most recently, in *West Virginia v. EPA*, the Supreme Court rejected the idea that Congress had used "vague language" contained in "an ancillary provision[]" of the Clean Air Act, 142 S. Ct. at 2610 (citation omitted), to "assign[] … to the [EPA]" the authority to regulate greenhouse gas emissions from power plants on a sector-wide basis, *id.* at 2612.

The Executive Order—and its cited source of authority, the Procurement Act—differs in crucial respects.

First, the text of the Procurement Act makes plain that Congress assigned the President the authority to determine what "policies and directives" are "necessary to carry out" the Procurement Act's objective of ensuring "an economical and efficient system" for federal contracting and procurement, 40 U.S.C. §§ 101, 121. That authority is stated in unquestionably broad terms. *See Kahn*, 618 F.2d at 789 (noting that "econom[ical]" and "efficien[t]" are terms of great breadth). If an Executive Order bears a reasonable nexus to that objective, there is no question that Congress authorized its issuance. *Cf. Missouri*, 142 S. Ct. at 652 (concluding that the rule fell "within the authorit[y] that Congress … conferred" where definitional provisions authorized the Secretary to impose conditions he "finds necessary in the interest of the health and safety" (citation omitted)). Indeed, courts for decades have upheld Procurement Act orders involving issues of great "economic and political significance"—like inflation, discrimination, energy, and immigration—without demanding special clarity from Congress. *See Contractors Ass'n*, 442 F.2d at 170-71

(1960s discrimination); *Kahn*, 618 F.2d at 790-91, 790 n.32 (1970s inflation); *Carmen*, 669 F.2d at 817-23 (1979 oil crisis); *Chamber of Commerce*, 648 F. Supp. 2d at 738 (2000s immigration policy). The President's Procurement Act authority thus differs considerably from the "vague," "modest," "ancillary," and "rarely … used" provisions at issue in the cases the district court and Arizona have relied on. *West Virginia*, 142 S. Ct. at 2609-10 (citations omitted).

Second, the fact that the authority here is delegated to the President himself distinguishes this case from those where courts have questioned whether Congress intended to delegate authority over a "major question" to an administrative agency. Whereas courts have expressed the concern that agencies lack political accountability, *West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring) (expressing concern with the idea of "a regime administered by a ruling class of largely unaccountable 'ministers'" (citation omitted)), the President is unquestionably "accountable to the people," *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010). There is little chance that the President will not be held accountable for actions he directs in an executive order.

Third, one of the other concerns animating these cases is the prospect of agencies overreaching their authority. *See West Virginia*, 142 S. Ct. at 2609 ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" (alteration in original) (citation omitted)); *National Fed'n of Indep. Bus.*, 142 S. Ct.

at 666 (expressing concern that OSHA standard "extend[ed] beyond the agency's legitimate reach"). That concern applies here with diminished force in light of the President's inherent power under Article II to exercise general administrative control "throughout the Executive Branch of government, of which he is the head," *Building & Constr. Trades*, 295 F.3d at 32, including by managing the performance of employees and contractors alike, *see Nelson*, 562 U.S. at 150 (rejecting argument that, "because they are contract employees and not civil servants, the Government's broad authority in managing its affairs should apply with diminished force"). Congress would have understood that it was legislating in an area in which the President already exercises powers pursuant to his constitutional responsibilities.

D. The Executive Order Does Not Raise Nondelegation Or State Sovereignty Concerns

The district court also expressed concern that policies requiring vaccination might run afoul of the nondelegation doctrine and "intrude[] into an area traditionally and principally reserved to the states." ER-46. Those concerns betray a fundamental misunderstanding of the Procurement Act and the Executive Order.

1. The district court's speculation regarding nondelegation principles rests on many of the same errors underlying its discussion of the Executive Order's economic and political significance. The nondelegation doctrine recognizes that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2123 (plurality op.) (quoting *Wayman v.*

Southard, 23 U.S. (10 Wheat.) 1, 42 (1825)). But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944) (citation omitted). On the contrary, "in our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Thus, as the district court noted, ER-45, the Court has only twice held statutes invalid on nondelegation grounds and has concluded that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Mistretta*, 488 U.S. at 372 (second alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

That bar—which the district court conceded has been "historically … undemanding," ER-45—is easily met here. The Procurement Act sets forth specific statutory goals—the promotion of "an economical and efficient system" for federal procurement of property and services, 40 U.S.C. § 101—and authorizes the President to issue orders reasonably related to those statutory goals in the particular context of federal procurement, *see id.* § 121(a). As every court of appeals to consider the question has recognized, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that "can be applied generally to the President's

actions to determine whether those actions are within the legislative delegation." *Kahn*, 618 F.2d at 793 n.51; *see City of Albuquerque v. Department of Interior*, 379 F.3d 901, 914-15 (10th Cir. 2004). That is unsurprising, as the Supreme Court has "over and over upheld" delegations with standards considerably broader than that set forth in Procurement Act, *Gundy*, 139 S. Ct. at 2129 (plurality op.), including delegations to agencies to "regulate in the 'public interest,'" *id.* (first citing *National Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); and then citing *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)), "to set 'fair and equitable' prices and 'just and reasonable' rates," *id.* (quoting *Yakus*, 321 U.S. at 422), and "to issue … standards … 'requisite to protect the public health,'" *id.* (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001)).

While the district court suggested a more exacting nondelegation standard should apply, it is telling that the court principally cited a dissent for that proposition. ER-45-46 (first citing *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); and then citing *id.* at 2131 (Alito, J., concurring in the judgment) (expressing a willingness to "reconsider" nondelegation doctrine)). Only under this novel reading, which is contrary to decades of Supreme Court precedent that remains binding on lower courts, did the district court conclude that the Procurement Act would be "perhaps unconstitutional" if it permitted the Executive Order. ER-46.

In any event, the Procurement Act would pass muster even under the logic of the dissent the district court cited. That dissent expresses doubt that Congress can, in

a manner consistent with the Constitution, "pass off its legislative power to the executive branch." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting); *see also National Fed'n of Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (arguing that "[t]he nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its *legislative* powers to unelected officials" (emphasis added)). The Procurement Act, however, does not delegate strictly legislative power. Instead, it authorizes the President to exercise proprietary authority to manage public funds by imposing conditions on those who seek and obtain government contracts that are reasonably related to the performance of such contracts. Powers granted to manage government property and enter into contracts relate to the President's inherent authority to manage the Executive Branch, and thus generally do not involve "an abdication of the 'law-making' function." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance*?, 83 Mich. L. Rev. 1223, 1266-67 (1985) (citation omitted); *cf. Jessup v. United States*, 106 U.S. 147, 151-52 (1882) (collecting cases for the proposition that "the United States can, without the authority of any statute, make a valid contract"). Even under the dissent's logic, in other words, broad delegations of powers like those the President employed in issuing the Executive Order do not raise nondelegation concerns. *See Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) ("Congress may assign the President broad authority regarding … matters where he enjoys his own inherent Article II powers.").

2. The Executive Order also does not intrude on an area that is traditionally reserved to the States. Federalism concerns may be relevant in interpreting the reach of a federal statute, but it is settled law that the federal government does not "invade[]" areas of state sovereignty "simply because it exercises its authority … in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981).

In any event, federal contracts are not an area traditionally reserved to the States. On the contrary, the Constitution expressly provides that "*Congress* has authority under the Spending Clause to appropriate federal moneys to promote the general welfare" and "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605 (2004) (emphasis added). And when it comes specifically to the federal government's power to regulate the performance of federal contracts, the Supreme Court and courts of appeals have repeatedly held that "federal contractors cannot be required to satisfy state 'qualifications in addition to those that the [Federal] Government has pronounced sufficient.'" *United States v. Virginia*, 139 F.3d 984, 990 (4th Cir. 1998) (alteration in original) (quoting *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956)); *see also Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (invalidating state licensing requirements imposed on federal contractors).

The President's exercise of Procurement Act authority does not invade state sovereignty simply because "in addition to promoting economy and efficiency," it may

also protect the health and safety of some Arizona citizens. *Carmen*, 669 F.2d at 821. Courts have routinely upheld under the Procurement Act executive orders that advance non-economic policy interests—preventing workplace discrimination, deterring illegal immigration, and so on—as well as promote economy and efficiency in federal procurement. *See supra* pp. 27-28. And Presidents have previously exercised Procurement Act authority in ways that affect areas traditionally regulated by States, like public health. *See, e.g.*, 80 Fed. Reg. at 54,697 (requiring federal contractors to allow employees to earn up to seven days or more of paid sick leave annually in order to "improve the health and performance of employees of Federal contractors"). Effects on public health and safety do not render impermissible an otherwise valid exercise of federal contracting authority. *Cf. Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (invalidating state hazardous waste law aimed at protecting "public health and safety" because it "regulate[d] not only the federal contractor but the effective terms of federal contract itself" (citation omitted)).

II. PLAINTIFFS HAVE NOT ESTABLISHED THE EQUITABLE FACTORS FOR INJUNCTIVE RELIEF

The injunction should be vacated for the independent reason that Arizona has not shown that the remaining equitable factors warrant the "extraordinary relief of an injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165-66 (2010); *see eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Arizona has not established that it will suffer immediate and irreparable harm absent the injunction. Nor has it

demonstrated that the balance of harms and public interest—factors that merge where, as here, the federal government is the opposing party, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh in favor of relief.

A. Arizona Has Not Established Irreparable Harm

It is well established that "the plaintiff must establish irreparable injury in seeking a permanent injunction." *Herb Reed Enters., LLC v. Florida Entm't. Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013). That showing must be "grounded in … evidence," not "cursory and conclusory" "platitudes." *Id.* at 1250. Arizona in no way satisfied that burden here.

Arizona failed to establish that it will incur "significant compliance and monitoring costs" as a result of the Executive Order. ER-60. Apart from a single "cursory and conclusory" paragraph concerning certain public universities, *Herb Reed*, 736 F.3d at 1250; ER-184, Arizona introduced no evidence detailing the specific steps it and its agencies have taken to comply with the vaccination requirement or the costs associated with those measures. Any claimed compliance harms are thus not "grounded in … evidence" and entirely speculative. *Herb Reed*, 736 F.3d at 1250. In any event, "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). A contrary rule would encompass every case in which a litigant complains of a new contract

requirement, thereby transforming the "drastic and extraordinary remedy" of a permanent injunction, *Monsanto*, 561 U.S. at 165, from the exception to the rule.

Nor has Arizona shown that it will suffer irreparable harm from employees leaving their roles rather than becoming vaccinated. ER-60. Arizona introduced no evidence of how the vaccination requirement would impact its workforce, or how those effects would cause it irreparable harm. Instead, it offered a handful of general studies suggesting, at most, that some unspecified number of employees of some private companies would quit their jobs to avoid being vaccinated. Evidence establishing "nothing more than that 'some employees' may resign rather than be vaccinated" is "entirely speculative" and does not "show[] an irreparable injury is likely." *Florida v. Department of Health & Human Servs.*, 19 F.4th 1271, 1292 (11th Cir. 2021). And as the Acting OMB Director found, there is "no systematic evidence" that "vaccine mandates may lead some workers to quit their jobs rather than comply[] … or that it would be likely to occur among employees of Federal contractors." 86 Fed. Reg. at 63,422. In fact, the experience of private companies confirms the effectiveness of immunization requirements, *see Feds for Med. Freedom*, 25 F.4th at 359 (Higginson, J., dissenting); *see also* Mathews, *supra,* with one recent study noting that only "1% of all adults[] … say they left a job because an employer required them to get vaccinated," Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE.

Equally unavailing is Arizona's claim that the Executive Order imminently and irreparably imperils its future contracting opportunities. Any claim of irreparable harm premised on some future contract solicitation for which Arizona may (or may not) be eligible because it may (or may not) meet all bid requirements is precisely the type of "[s]peculative injury [that] cannot be the basis for a finding of irreparable harm," *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007).[6]

Finally, Arizona suffered no harm to its sovereign interests (irreparable or otherwise) because, as discussed, the President can exercise his authority to displace States' police powers and has lawfully done so here, *see supra* pp. 41-42. In any event, to the extent a potential conflict exists between the Executive Order and Arizona law, it is limited solely to Arizona government entities' own contracts with the federal government, as Arizona law prohibits enforcement of COVID-19 vaccination requirements only by "this state and any city, town or county of this state." Ariz. Exec. Order 2021-19 (Oct. 8, 2021). Private employers, by contrast, are free to impose such requirements, provided that they allow religious exemptions, *see* Ariz. Rev. Stat. § 23-206, as the Executive Order does, 86 Fed. Reg. at 63,420.

[6] To the extent that a dispute arises over a provision in an existing contract, Arizona, like federal contractors generally, may seek monetary redress under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.* The availability of that relief negates Arizona's irreparable harm claims related to its existing contracts. *See Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998) ("Injunctive relief is proper only if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries.").

B. The Balance Of Harms And The Public Interest Weigh Heavily Against An Injunction

The district court also abused its discretion in holding that the balance of harms and public interest weighed in favor of an injunction. ER-60-62. Preventing implementation of the Executive Order will lead to productivity losses in the performance of federal contracts from schedule delays as well as leave and health care costs for workers who are sick, isolating, or quarantined. *See* 86 Fed. Reg. at 63,421-22; *Observations on Contractor Paid Leave Reimbursement Guidance and Use*, *supra*. These productivity losses will jeopardize the economy and efficiency of significant federal contracts performed within Arizona's borders. *See* ER-28-29 (noting examples of such contracts).

The district court, believing that enjoining the Executive Order would do "little harm," ER-61-62, gave insufficient weight to these concerns. The court recognized that it is "of course correct that slowing the spread of the virus is in the public's interest." ER-61. But the court suggested that the federal government could minimize disruptions by "recommend[ing] vaccination" instead. ER-62. Congress left to the President, not unelected judges, the question of how best to address the complex and dynamic challenges that COVID-19 continues to pose to the government's ability to deliver essential services to the American people. The equities thus weigh strongly in favor of vacating the injunction.

III. THE SCOPE OF THE INJUNCTION IS OVERBROAD

The district court independently erred in issuing an injunction that extends to private contractors who were not parties to this action. Even assuming that the injunction could otherwise be sustained, it should be narrowed to cover only qualifying contracts between the federal government and Arizona public entities—that is, those entities covered by Arizona's prohibition on enforcing vaccination requirements, Ariz. Exec. Order 2021-19.

Article III of the Constitution limits the exercise of the judicial power to "'Cases' and 'Controversies.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). A federal court may entertain a suit only by a plaintiff who has suffered a concrete "injury in fact," and the court may grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1929-30 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations. A court's authority to award relief is generally confined to relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And it is settled that injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (explaining that English and early American "courts of equity" typically "did not provide relief beyond the parties to the case"). Accordingly, the Supreme Court has

narrowed injunctions that extended relief beyond the harms to "any plaintiff in th[e] lawsuit." *Lewis*, 518 U.S. at 358.

The district court acknowledged that "[e]quitable remedies should redress only the injuries sustained by a particular plaintiff in a particular case." ER-63. The court thus properly rejected Arizona's request for a nationwide injunction. ER-62. And the court correctly concluded that Arizona could not seek redress on behalf of its citizens by asserting *parens patriae* claims against the federal government. ER-27; *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

But those statements cannot be reconciled with the scope of the district court's injunction, which enjoined enforcement of the Executive Order with regard to "any contract to which a contracting party is domiciled in or headquartered in the State of Arizona" or where the contract is "to be performed principally in the State of Arizona." ER-7-8. The injunction thus covers countless private entities who were not parties to this action and who are not a "city, town or county" prohibited from requiring vaccination by state law. Ariz. Exec. Order 2021-19.[7] Non-party private contractors are "not the proper object of th[e court's] remediation," *Lewis*, 518 U.S. at 358, and extending them relief subverts the rule that the remedy should be "no more burdensome to the defendant than necessary to provide complete relief to the

[7] Although the district court stated that the injunction's scope would be "limited to the geographic boundaries of the State of Arizona," ER-63, the injunction, in fact, extends to out-of-state contractors with significant in-state work as well as employees of Arizona contractors working elsewhere.

plaintiffs," *Califano*, 442 U.S. at 702. Nor is the injunction's scope necessary to protect Arizona's sovereign interests because state law permits private contractors—like those covered by the injunction—to implement and enforce their own vaccination requirements. At a minimum, then, the district court's injunction should be narrowed to cover only qualifying contracts between the federal government and Arizona public entities.

CONCLUSION

The permanent injunction should be vacated in full or, at a minimum, to the extent it extends beyond Arizona public entities' own contracts with the federal government.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of two related cases challenging Executive Order 14,402 pending in this Court: *Donovan v. Vance*, No. 22-35474 and *Cano v. Biden*, No. 22-55544.

s/ David L. Peters
David L. Peters

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,018 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ David L. Peters
David L. Peters

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

s/ David L. Peters
David L. Peters

ADDENDUM

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40 U.S.C. § 101

§ 101. Purpose

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, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.

(2) Using available property.

(3) Disposing of surplus property.

(4) Records management.

40 U.S.C. § 121

§ 121. Administrative

(a) Policies prescribed by the President.--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.

(b) Accounting principles and standards.--

(1) Prescription.--The Comptroller General, after considering the needs and requirements of executive agencies, shall prescribe principles and standards of accounting for property.

(2) Property accounting systems.--The Comptroller General shall cooperate with the Administrator of General Services and with executive agencies in the development of property accounting systems and approve the systems when they are adequate and in conformity with prescribed principles and standards.

(3) Compliance review.--From time to time the Comptroller General shall examine the property accounting systems established by executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems. The Comptroller General shall report to Congress any failure to comply with the principles and standards or to adequately account for property.

(c) Regulations by Administrator.--

(1) General authority.--The Administrator may prescribe regulations to carry out this subtitle.

(2) Required regulations and orders.--The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

(d) Delegation of authority by Administrator.--

(1) In general.--Except as provided in paragraph (2), the Administrator may delegate authority conferred on the Administrator by this subtitle to an official in the General Services Administration or to the head of another federal agency. The Administrator may authorize successive redelegation of authority conferred by this subtitle.

(2) Exceptions.--The Administrator may not delegate--

(A) the authority to prescribe regulations on matters of policy applying to executive agencies;

(B) the authority to transfer functions and related allocated amounts from one component of the Administration to another under paragraphs (1)(C) and (2)(A) of subsection (e); or

(C) other authority for which delegation is prohibited by this subtitle.

(3) Retention and use of rental payments.--A department or agency to which the Administrator has delegated authority to operate, maintain or repair a building or facility under this subsection shall retain the portion of the rental payment that the Administrator determines is available to operate, maintain or repair the building or facility. The department or agency shall directly expend the retained amounts to operate, maintain, or repair the building or facility. Any amounts retained under this paragraph shall remain available until expended for these purposes.

(e) Assignment of functions by Administrator.--

(1) In general.--The Administrator may provide for the performance of a function assigned under this subtitle by any of the following methods:

(A) The Administrator may direct the Administration to perform the function.

(B) The Administrator may designate or establish a component of the Administration and direct the component to perform the function.

(C) The Administrator may transfer the function from one component of the Administration to another.

(D) The Administrator may direct an executive agency to perform the function for itself, with the consent of the agency or by direction of the President.

(E) The Administrator may direct one executive agency to perform the function for another executive agency, with the consent of the agencies concerned or by direction of the President.

(F) The Administrator may provide for performance of a function by a combination of the methods described in this paragraph.

(2) Transfer of resources.--

(A) Within Administration.--If the Administrator transfers a function from one component of the Administration to another, the Administrator may also provide for the transfer of appropriate allocated amounts from the component that previously carried out the function to the component being directed to carry out the function. A transfer under this subparagraph must be reported to the Director of the Office of Management and Budget.

(B) Between agencies.--If the Administrator transfers a function from one executive agency to another (including a transfer to or from the Administration), the Administrator may also provide for the transfer of appropriate personnel, records, property, and allocated amounts from the executive agency that previously carried out the function to the executive agency being directed to carry out the function. A transfer under this subparagraph is subject to approval by the Director.

(f) Advisory committees.--The Administrator may establish advisory committees to provide advice on any function of the Administrator under this subtitle. Members of the advisory committees shall serve without compensation but are entitled to transportation and not more than $25 a day instead of expenses under section 5703 of title 5.

(g) Consultation with federal agencies.--The Administrator shall advise and consult with interested federal agencies and seek their advice and assistance to accomplish the purposes of this subtitle.

(h) Administering oaths.--In carrying out investigative duties, an officer or employee of the Administration, if authorized by the Administrator, may administer an oath to an individual.