No. 21-14269

In the

United States Court of Appeals

for the Eleventh Circuit

The State of Georgia, et al.,

Plaintiffs-Appellees,

v.

Joseph R. Biden, in his official capacity as 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.
No. 21-cv-00163 — R. Stan Baker, *Judge*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case, besides those listed in Defendants-Appellants' certificate of interested persons:

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STATEMENT REGARDING ORAL ARGUMENT

The Court has already set this matter for oral argument.

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INTRODUCTION

The President would arrogate to himself the authority to impose nearly any imaginable regulation on federal contractors and their employees—including a public-health mandate to undergo vaccination. But Congress "has not given [the President] the power to regulate public health," precisely the type of "power[] of vast economic and political significance" that requires a clear statutory grant of authority. *NFIB v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022).

The efficacy and value of COVID-19 vaccines are not at issue; instead, the question is "Who decides?"—Congress, the States, or the President and the OMB director? *Id.* at 667 (Gorsuch, J., concurring). Even a mere six months ago, the executive branch recognized that vaccine mandates are "not the role of the federal government," Office of Public Engagement, Transcript, *Press Briefing by Press Secretary Jen Psaki* (July 23, 2021), https://perma.cc/7DQR-W6KW. Only after President Biden declared that his "patience" with the "unvaccinated" was "wearing thin," Joseph R. Biden, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, The White House (Sept. 9, 2021), https://perma.cc/GQG5-YBXK (cited *infra* and in the supplemental appendix as "P-26"), did he decide to "work-around" his lack of any

general authority to issue vaccine mandates, *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.,* 17 F.4th 604, 612 (5th Cir. 2021).

At issue here is the President's Executive Order 14042, directing that federal contractors and subcontractors vaccinate virtually all of their employees or lose eligibility for federal contracts worth hundreds of billions of dollars. *See* 86 Fed. Reg. 50,985 ("EO 14042" or "the EO"). The order covers about one-fifth of the country's workforce, and it is staggeringly broad. There are no exceptions for employees who work alone, outdoors, or exclusively remotely. Even employees who do not *work* on federal contracts must vaccinate if there is the slightest chance they will walk past an employee who does.

To support this unprecedented claim of authority, the President relied on the Procurement Act, 40 U.S.C. §§ 101, 121, a post-World War II statute designed to establish "an efficient system of property management" for the federal government, *Kentucky v. Biden*, No. 21-6147, 2022 WL 43178, at *1 (6th Cir. Jan. 5, 2022). From the Act's innocuous text, the government extracts an awesome power for the President to unilaterally demand of federal contractors—and their millions of employees—

any requirement he believes would make *their* operations more "efficient," including a major public health regulation.

This is wrong, from top to bottom. The text of the Procurement Act provides the President the uncontroversial authority to internally organize the process of federal procurement. The President can direct policies to provide "the Federal Government with an efficient system *for*" procuring goods and services. 40 U.S.C. §§ 101, 121 (emphasis added). So the President can, for instance, standardize contracting methods to prevent different government agencies from duplicating their efforts, or require best practices across agencies. The text does not purport to grant the President freewheeling, unilateral power to issue public health regulations.

The major questions doctrine and other canons of interpretation confirm that Congress did not surreptitiously include such power in a statute that centralizes and streamlines the federal government's purchasing of goods and services. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

Even under a broader theory of the President's authority, assuming that the President can unilaterally impose conditions on contractors if there is a "close nexus" to efficiency concerns, this

mandate is still illegal. The President has *never* tried to issue a public health regulation under the Procurement Act, and the government has not established that its sledgehammer approach has a "close nexus" to economic efficiency. Instead, the "federal government's actions are, of course, simply a pretext to increase vaccination, as its own documents confirm." *Kentucky*, 2022 WL 43178, at *16 n.15. This is not even a case where the courts must avoid a "naiveté" about the government's purported goals. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). There is simply no close link between this admitted public health measure and savings to the government.

The district court correctly recognized this executive overreach for what it is and did not abuse its discretion in issuing a preliminary injunction against the President's EO 14042. Plaintiffs will "succeed on the merits of their argument." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021). The mandate imposes tremendous, irrecoverable costs. And the government can point to no particular reason for upending the status quo. This Court should affirm.

STATEMENT OF THE CASE

A. The President initially acknowledges that he lacks power to issue vaccine mandates.

When President Biden took office, he established the Safer Federal Workforce Taskforce. As the name suggests, this was an internally directed program, designed to "provide ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic." Exec. Order No. 13991, *Executive Order on Protecting the Federal Workforce and Requiring Mask-Wearing*, 86 Fed. Reg. 7045, 7046 (Jan. 20, 2021). The President also issued various requirements for federal land, federal buildings, and federal employees. *Id.* at 7045, 7047.

But the President did not attempt to mandate vaccines for private entities or the general public. Indeed, through the summer, the Administration still recognized that vaccine mandates are "not the role of the federal government," *Press Briefing by Press Secretary Jen Psaki*, *supra*. The President made clear that he wanted to "work with states to encourage unvaccinated people to get vaccinated." The White House, *Remarks by President Biden Laying Out the Next Steps in Our*

Effort to Get More Americans Vaccinated and Combat the Spread of the Delta Variant (July 29, 2021), https://perma.cc/8SV8-GUED. President Biden praised political opponents, like "Alabama Republican Governor Kay Ivey" and Senator McConnell, who "spoke out to encourage vaccination." *Id.*

B. The President abruptly issues a slew of vaccine mandates.

Then, on September 9, the President changed course. P-26. He announced that his "patience" with the "unvaccinated" was "wearing thin." *Id.* at 5. Shifting from unity to confrontation, the President declared that the "time for waiting [to get vaccinated] [was] over," and it was "not about freedom or personal choice." *Id.* at 3–4. Accordingly, he would "take[] on elected officials and states" and "get them out of the way." *Id.* at 8.

To do so, the President "announc[ed] … a new plan to require more Americans to be vaccinated, to combat those blocking public health." *Id.* at 3. The "new plan" was, essentially, a group of vaccine mandates to cover as many Americans as plausible: about "100 million Americans—two thirds of all workers"—by the President's accounting. *Id.* at 5. The President declared that these measures would "reduce the spread of COVID-19." *Id.* at 4.

Accordingly, the President went "agency by agency" to mandate as many vaccines as possible. Transcript of Oral

Argument at 79, *NFIB*, 142 S. Ct. 661 (No. 21A244), https://perma.cc/Y272-JU3L. This included:

- The President directed OSHA to issue an emergency rule requiring most employers to fully vaccinate their workforce or show a negative test once a week. *See* 86 Fed. Reg. 61,402. That mandate has been withdrawn, *see* 87 Fed. Reg. 3,928, after the Supreme Court held that it went beyond OSHA's authority, *see NFIB*, 142 S. Ct. 661.

- The President also ordered HHS to create a rule that broadly required participants in Head Start—a federally funded school readiness program—to be masked and vaccinated. 86 Fed. Reg. 68,052. That mandate, too, has been enjoined. *Louisiana v. Becerra*, No. 3:21-CV-03970, 2021 WL 5609846 (W.D. La. Nov. 30, 2021).

- And the President ordered CMS to publish a rule mandating that employees at most Medicare or Medicaid providers be vaccinated. 86 Fed. Reg. 61,555. The litigation against that rule is ongoing, although the Supreme Court, in a 5-4 ruling, allowed it to go into effect because the rule fit "within the language of the [authorizing] statute," which was specifically directed at "health and safety." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022).

Finally, at issue here is the President's decision to mandate vaccinations for "federal contractors." P-26.

C. The President issues Executive Order 14042, mandating vaccinations for employees of federal contractors.

On the same day the President announced his new plan to mandate as many vaccinations as possible, he issued Executive Order 14042. *See* 86 Fed. Reg. 50,985. Unlike the other mandates—which required only orders issued to single agencies—the President's approach with federal contractors was more complicated.

Ordinarily, federal contracting is a standardized process, dependent on the Federal Acquisition Regulation ("FAR"), which is promulgated by the FAR Council, a combination of the heads of various agencies, 41 U.S.C. § 1303. The FAR is a set of standardized requirements that "govern[] acquisitions of goods and services by executive branch agencies." Congressional Research Service, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions* at 2 (Feb. 3, 2015), available at https://perma.cc/GHQ6-CD2Y. And to deviate from the FAR, agencies generally have to comply with certain procedures (especially if they deviate across the board, as opposed to for a single contract). *See, e.g.*, 48 C.F.R. §§ 1.400–05. Likewise, to make a substantial change to the FAR itself, the FAR Council must ordinarily go through a rulemaking process. *Navajo Ref. Co.,*

L.P. v. United States, 58 Fed. Cl. 200, 207–08 (2003); 48 C.F.R. §§ 1.501–2(b); 41 U.S.C. § 1707.

The President tried to cut through the ordinary process—by which individual agencies propose contract deviations as necessary—with a brute-force, top-down approach. Relying on the Procurement Act, 40 U.S.C. § 101, *et seq.*, the President directed "[e]xecutive departments and agencies" to include a clause in almost all[1] new procurement contracts, contract extensions, and renewals, requiring the contractor (and subcontractors) to "comply with all guidance … published by the" Task Force, for "the duration of the contract." EO 14042, §§ 2, 5. The President also "strongly encouraged" agencies to amend *existing* contracts to include the same COVID-19 clause. *Id.* § 6(c). The President then directed the Task Force to publish the "guidance" that would mandate vaccines for employees of federal contractors. *Id.* § 2(b).

The President also ordered the Director of the Office of Management and Budget (OMB) to "determine whether the [not yet existing] Guidance will promote economy and efficiency in Federal contracting." *Id.* § 2(c). Of course, there was no suspense:

[1] The EO broadly defines contract, but it exempts "grants," contracts with "Indian Tribes," contracts of minimal value, and "subcontracts solely for the provision of products." EO 14042, § 5.

the President had already declared that his Executive Order "promote[d] economy and efficiency in Federal procurement." *Id.* § 1.

Finally, in a bare nod to the FAR Council and the ordinary methods for amending federal contracts, the President directed the Council to take "initial steps to implement appropriate policy direction to acquisition offices for use of the clause by recommending that agencies exercise their authority" to incorporate the clause in contracts, while the Council "amend[ed] the [FAR]" to formally include the clause. *Id.* § 3.

D. The agencies implement EO 14042

The agencies then did as the President commanded.

The Task Force Guidance. On September 24, 2021, the Task Force issued *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*. Doc. 55-11, Ex. B. Under that guidance, all "covered contractor employees" had to be fully vaccinated by December 8, 2021. *Id.* at 15.

The breadth of the Guidance is stunning. Covered employees include all "full-time or part-time employee[s]" working at a "covered contractor workplace," which is a location where "*any* employee … working on or in connection with a covered contract is likely to be present." *Id.* at 13–14 (emphasis added). A covered

contractor workplace includes all floors and areas of a building where *any* work on federal contracts is done, "unless a covered contractor can *affirmatively determine* that none of its employees on another floor or in separate areas of the building will come into contact with a covered contractor employee." *Id.* at 20 (emphasis added).

Similarly, unless the contractor can "affirmatively determine" that none of its employees will come into contact with a covered employee (including "interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages"), *all* of its employees are subject to the mandate. *Id.* at 20–21. The Guidance also applies to outdoor workplaces, and employees who work *from their home* must still vaccinate, even if they never appear in covered workplaces. *See id.* at 21.[2]

FAR Council Order. In late September, the FAR Council took the "initial steps" that the President had ordered by issuing "Class

[2] EO 14042 requires compliance with all future amendments to the Guidance. The Task Force has repeatedly updated the Guidance via its FAQs, amending them (so far) on September 30, October 21, November 1, and November 19. *See* Safer Federal Workforce, *What's New* (visited January 25, 2022), https://perma.cc/WW2E-SKPV.

Deviation Clause 52.223-99," to be included in all agency contracts. *Issuance of Agency Deviations to Implement Executive Order 14042* (September 30, 2021), https://perma.cc/UF3K-CC3Z. The operative language of the new clause reads: "The Contractor shall comply with all guidance, including guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract, … published by the" Task Force. *Id.* at 5. The FAR Council listed EO 14042 as the sole authority for the imposition of the clause. *Id.* at 4. The Council also reminded the federal agencies that they were "required" to include the clause in their contacts. *Id.* at 2. And the Council purported to suspend the normal requirement that agencies seek approval of deviations from the FAR. *Id.* at 3.

OMB Review. Meanwhile, on September 28, OMB issued its approval of the Task Force guidance, as the President had directed. The "analysis" was a sentence in length. 86 Fed. Reg. 53,691, 53,692.

Perhaps recognizing that its determination was lacking, OMB published a revised determination on November 10, after dozens of states and private entities had sued. 86 Fed. Reg. 63,418. That finding includes additional, boilerplate language asserting that the mandate promotes economy and efficiency in federal

contracting, including the notion that a few private employers voluntarily imposed vaccine mandates. *Id.* at 63,421–22. But the determination focuses mainly on the general dangers posed by "a once in a generation pandemic" that threatens the "health and safety of the American people," and reaches "all Americans." *Id.* at 63,423. OMB did not undergo notice-and-comment procedures, asserting that the case for a vaccine mandate was "urgent," even as OMB rubberstamped a *delay* in the deadline for employees to be fully vaccinated, pushing the deadline past the holiday shopping season to January 18. *Id.* at 63,420; *see also* Jordan Williams, *Business groups ask Biden administration to delay vaccine mandate*, The Hill (Oct. 26, 2021), https://perma.cc/WAW7-XE5F.

E. Impact on State Plaintiffs

State Plaintiffs—Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, West Virginia, and certain state officials and constituent entities—constantly bid on and renew federal contracts, and they are currently parties to thousands of such contracts. Doc. 94, Preliminary Injunction Order ("Order"), at 15–16; Preliminary Injunction Hearing Tr. ("Tr.") at 22. In Georgia, three research universities *alone* "collectively provide or maintain

services to" over 2,000 federal contracts and subcontracts. Doc. 55-12, ¶¶ 18–19.

These contracts involve huge sums of money. For instance, those same three research universities generated just shy of $737 million in revenue from federal contracts in 2021. Order at 7. The University of Alabama system received $663 million in federal contract funds in 2021. *See* Doc. 55-9, ¶ 6. Idaho's university system holds contracts worth over $50 million. *See* Doc. 55-6, ¶ 5; Doc. 55-7, ¶ 5; Doc. 55-8, ¶ 5. And these funds make up large portions of many employers' budgets. Georgia Tech, as one example, derived roughly 33% of its budget from federal contracts in 2021. *See* Tr. at 41–42. Augusta University derives 10% of its program funding from federal contracts. Tr. at 68. The government has already used the "strongly encouraged" language in the Executive Order as the sole grounds to forcibly insert the vaccine mandate in many of these existing contracts. Doc. 76-3, Exs. A–H.

State entities cannot simply close up shop, nor can they spare hundreds of millions in revenue. So when the mandate was issued, State Plaintiffs began the "laborious undertaking[]" of compliance. Order at 8. Georgia's research universities, for instance, began developing systems to ensure compliance by: (1) identifying

impacted employees and locations; (2) tracking employee vaccination status; (3) creating a process to review requests for accommodation; and (4) tracking the same data for their subcontractors to ensure that they are likewise complying with the mandate. *See* Tr. at 27–28; Doc. 55-12, ¶ 21. These measures are expensive and time-consuming, and they would resume if the injunction is lifted. *Id.*, ¶¶ 12, 21, 25, 27. *See also* Doc. 55-1, ¶ 13.

Despite these intensive efforts, compliance will not be easily achieved. Together, State Plaintiffs have over forty-thousand employees covered by the mandate. *See* Tr. at 27; *see also* Docs. 55-1, 55-2, 55-4, 55-5, 55-6, 55-7, 55-8, 55-10, 55-12, 55-14. Many of these employees are not vaccinated. For instance, about 20% of Georgia Tech's covered contractor employees have not provided proof of vaccination. Order at 9. At Augusta State University, that number is 39%. *Id.* For the University of Georgia, "fewer than half of … employees who may be covered have provided proof of vaccination." *Id.* That means that State Plaintiffs may easily have thousands of unvaccinated employees who would be covered by the mandate. *See id.* at 9.

Many of those employees have already expressed an intention to quit rather than vaccinate, and State Plaintiffs expect there to be many more. *See* Doc. 55-7, ¶ 10; Doc. 55-2, ¶ 12; Doc. 55-4,

¶¶ 9–10; Doc. 55-6, ¶¶ 12–13; Doc. 55-10, ¶¶ 11–12; Doc. 55-14, ¶ 13. University representatives testified that thousands of covered employees had declined to engage with compliance efforts. Tr. at 32 (over 3,000 employees at Georgia Tech); Tr. at 71–72 ("about 2,400" employees at Augusta University); Tr. at 93 (8,394 employees at the University of Georgia). A university administrator testified there would be "many" employees who would rather lose their job than vaccinate. Tr. at 49.

F. Procedural History

To avoid this choice between two virtually impossible outcomes, on October 29, 2021, State Plaintiffs sued various government entities and personnel to enjoin the mandate. Doc. 1. State Plaintiffs also moved for a preliminary injunction. Doc. 19, 23. When OMB announced its revised determination—pushing the deadline for full vaccination back to January—State Plaintiffs filed amended papers, the briefing schedule was altered, and the district court set a hearing for December 3. Docs. 51, 54, 55.

At the hearing, Doc. 91, the district court heard extensive testimony from three witness for State Plaintiffs, who explained the impracticable situation the mandate places them in. The district court found these witnesses "credible." Order at 9. The

parties also submitted dozens of declarations and other evidence. Docs. 83, 84. And the court heard legal argument from all parties.[3]

On December 7, the district court preliminarily enjoined the government from enforcing EO 14042's mandate anywhere in the country. Order at 27. The court first held that State Plaintiffs likely had standing. The court found that the Georgia Board of Regents was a finalist for a federal contract that, if awarded, would include the challenged clause. Order at 13. And the court found that State Plaintiffs "routinely enter into contracts that would be covered by EO 14042, have current contracts that could easily fall under the requirements of EO 14042 (if, for instance, they are renewed, modified, or have options that are exercised), and have shown that they would typically continue to seek out contract opportunities with the federal government." *Id.* at 15–16.

The court held that Plaintiffs were also likely to succeed on the merits because the Procurement Act does not "authorize[] the President to issue the directives contained in EO 14042." *Id.* at 19. "Congress is expected to 'speak clearly' when authorizing the exercise of powers of 'vast economic and political significance.'" *Id.*

[3] On November 18, the Association of Builders and Contractors, along with its Georgia chapter, moved to intervene, and they also participated in the hearing. Doc. 48.

(citation omitted). But "EO 14042 goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting, and instead … works as a regulation of public health, which is not clearly authorized under the Procurement Act." *Id.* at 20.

The court found an imminent risk of irreparable harm—State Plaintiffs had to engage in "incredibly time-consuming" efforts to comply, *id.* at 24—and the balance of equities favored an injunction, too. "Enjoining EO 14042 would, essentially, do nothing more than maintain the status quo." *Id.* at 25. But allowing the mandate to take effect would "force Plaintiffs to comply with the mandate, requiring them to make decisions which would significantly alter their ability to perform federal contract work which is critical to their operations." *Id.* at 25.

Because Intervenor-Plaintiffs include a national organization, and because "limiting the relief to only those before the Court would prove unwieldy and would only cause more confusion," the court enjoined the government from enforcing the mandate anywhere in the country. *Id.* at 27.

The government appealed to this Court. Doc. 96. It also moved to stay the injunction in this Court; the Court denied the motion because the government did not establish it would "be

irreparably injured absent a stay." The Court then expedited briefing and set the matter for oral argument.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion, "reviewing any underlying legal conclusions *de novo* and any findings of fact for clear error." *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270 (11th Cir. 2020).

SUMMARY OF ARGUMENT

This Court should affirm the district court's order preliminarily enjoining the contractor mandate. Nothing suggests that the district court erred, much less "abuse[d] its discretion" in granting the injunction. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016).

I. State Plaintiffs are likely to succeed on the merits of their claims for at least three reasons. *First*, the President lacks authority to impose the contractor mandate. He relies on the Procurement Act, but that statute grants him only the modest power to "prescribe" policies that create an "economical and efficient system for" the federal government to enter into contracts. 40 U.S.C. §§ 101, 121(a). It does not grant the limitless power to impose conditions on the internal operations of private

companies *performing* federal contracts. In other words, it is a power to organize the federal government's internal operations, not a power to take control of *contractors*' internal operations.

Canons of interpretation confirm this reading. Congress must speak "clearly" when it authorizes powers of "vast economic and political significance," yet it did not do so here. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The mandate also usurps traditional state police power over public health, which must be authorized by "exceedingly clear language" from Congress. *Id.* And the statute should be interpreted narrowly to avoid constitutional doubt about whether it delegates legislative authority. The government's preferred reading grants the President immense power with no meaningful limiting principle. Unless this were the only plausible reading of the text, it should be rejected. Because it is not remotely the former, this Court should do the latter.

The government's counterarguments are unavailing. It relies on a few out-of-circuit cases that upheld executive orders with a "close nexus" to efficiency in contracting and argues that Congress acquiesced in that view of the statute. But those cases (which barely analyze the text) do not even support the government's view, as they involved modest executive orders with a close relation to "the ordinary hiring, firing, and management of labor,"

Kentucky, 2022 WL 43178, at *14, not public health regulations. And there is no reason to think Congress has paid any attention to, much less acquiesced to, the few lower-court cases that approved *much* more modest uses of power.

Second, even assuming that a "close nexus" is sufficient, there must be a genuinely *close* nexus between the executive order and efficiency, which is lacking here. Unless the President's authority is wholly limitless, the Procurement Act must be read to authorize only "modest, 'work-anchored' measure[s] with [] inbuilt limiting principle[s]." *Id.* at *15. A massive public health regulation is not the sort of "wages and hours" regulation that fits within even a broad understanding of the statute. *Id.* And even if it were, the government offers only a pretextual, barebones conclusion that the mandate will improve contractor efficiency.

Third, the mandate is unlawful because none of it was submitted for notice and comment before going into effect. New "procurement polic[ies]" and "regulation[s]" must undergo notice and comment if they will impose "a significant cost" on contractors, which the mandate undeniably will. 41 U.S.C. § 1707. But Defendants-Appellants never submitted the Task Force Guidance or COVID-19 deviation clause for public comment. Likewise, the revised OMB determination was submitted for

public comment weeks after the mandate was issued and enforced before the comment procedures were completed. No "urgent and compelling" circumstances excuse this noncompliance with § 1707.

II. As the district court found, the mandate will cause State Plaintiffs irreparable harm. Collectively, State Plaintiffs are parties to thousands of federal contracts worth billions of dollars. The mandate covers tens of thousands of state employees, many of whom are unvaccinated. To comply, State Plaintiffs would have to expend tremendous resources and yet would still face a choice between losing hundreds of millions of dollars or firing employees who cannot be replaced.

III. The public interest does not favor enforcing an unlawful mandate, ever. That is especially true where the government waited months to act and only now claims an efficiency interest in moving quickly. Even worse, the government seeks essentially *permanent* relief—if the mandate goes into effect, a later court order finding it illegal will be little consolation to those that had to choose between vaccination or their job.

IV. The injunction is appropriate in scope. The government's novel argument that *each* plaintiff must identify a specific contract to be covered by the injunction is unsupported and wrong.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Appellate review" of a decision to grant a preliminary injunction "is exceedingly narrow because of the expedited nature of the proceedings in the district court" and because "a district court often must make difficult judgments about the viability of a plaintiff's claims based on a limited record." *Wreal*, 840 F.3d at 1248. Here, the district court correctly found that each factor favors injunctive relief—it certainly did not abuse its discretion.

I. State Plaintiffs are likely to succeed on the merits.

State Plaintiffs will succeed on the merits for at least three reasons. First, the President lacks the authority to impose a vaccine mandate for federal contractors. The Procurement Act provides the President authority to organize the federal government contracting process, not the power to impose substantive requirements (like a major public health regulation) on internal federal contractor operations. Second, even under the

broader reading of the statute some courts have used, a vaccine mandate still fails because it lacks a "close nexus" to economy and efficiency in procurement. Third, the mandate is unlawful for failure to satisfy notice-and-comment requirements.

A. The President lacks authority to impose the contractor mandate.

The text of the Procurement Act is clear: The President can direct internal government policies to provide the "Federal Government" a more efficient "system for" contracting. 40 U.S.C. §§ 101, 121. It says nothing about authority to impose forced vaccinations on employees of private, contracting entities in an effort to make *them* supposedly more efficient in *their* work. App.Br.15. The major questions doctrine and other canons confirm that the President lacks the power he asserts. The government's counter-arguments depend entirely on old, out-of-circuit cases that examined executive orders asserting *far* more modest authority. This Court should follow the text and hold that the Procurement Act does not hide such awesome power in such a benign provision.

1. The Procurement Act grants the President authority to prescribe internal procurement policies, not regulations that would supposedly improve the efficiency of federal contractor operations.

"[W]e start where we always do: with the text of the statute." *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). The Procurement Act states that its purpose is to "provide the Federal Government with an economical and efficient system for … procuring and supplying property and nonpersonal services, and performing related functions." 40 U.S.C. § 101. It also states that "[t]he President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle." *Id.* § 121(a).

Read together, these provisions paint a clear picture, but not the one the government wants. The "Federal Government" itself needs a "system for" acquiring services and property—the purpose of the Act is to provide the *federal government* with such a "system." *Id.* § 101 (emphasis added). The President can thus direct methods or procedures for carrying out that purpose. For example, the President can direct that agencies use cross-agency communication and record keeping to avoid duplication or share best contracting practices.

The text says nothing about increasing the efficiency *of contractors and suppliers*. Instead, the President has authority to help provide "the Federal Government *with*" an efficient "system for" contracting. *Id.* (emphasis added). "'System,' in context, refers to '[a] formal scheme or method of governing organization, arrangement.'" *Kentucky*, 2022 WL 43178, at *12 (quoting *System*, Webster's New International Dictionary 2562 (2d ed. 1959)). When the President ensures that multiple agencies do not redundantly bid on services or compete with one another in purchasing, that is part of a "system" for the "Federal Government" to "[p]rocur[e]" services. 40 U.S.C. § 101. There is no textual indication that would expand that language to include authority to impose requirements on the *internal operations* of federal contractors.

A mandate to impose forced vaccinations on federal contractor employees has nothing to do with optimizing the "Federal Government['s]" "system for" procurement. *Id.* By analogy, if a company developed a "system for" its procurement of groceries, one would naturally understand that to mean the logistics of its own procurement of groceries—management of trucks, delivery dates, etc.—not a series of performance standards applied to *suppliers'* internal operations. But here the mandate imposes a

requirement *on* federal contractors, not a system *for* the federal government. It is an even starker problem because federal contractors provide everything from services to office supplies to fighter jets. There is no reason the President would need the authority to direct the internal operations of so many disparate firms, unilaterally—and one would certainly expect Congress to say so if it granted so broad a power.

The context in which the Procurement Act was passed bolsters State Plaintiffs' view. The Act was passed after World War II because "the manner in which federal agencies were *entering into* contracts to procure goods and services was not economical and efficient." *Kentucky*, 2022 WL 43178, at *13 (emphasis added). "[M]any agencies entered [into] duplicative contracts supplying the same items and creating a massive post-war surplus." *Id.* That was the problem the Act solved, not any fear that "personnel executing duties under nonpersonal-services contracts were *themselves* performing in an uneconomical and inefficient manner." *Id.*; *Util. Air Regul. Grp.* (*UARG*) *v. EPA*, 573 U.S. 302, 321 (2014) (statutory interpretation must take into account the "the broader context of the statute") (citation omitted); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (it is "entirely appropriate to consult all

public materials … to verify that what seems to us an unthinkable disposition … was indeed unthought of").

Congress's continued legislation in this area confirms as much. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1071 (2020) ("statutory history" is relevant to textual interpretation). For instance, Congress enacted the Office of Federal Procurement Policy Act Amendments of 1979 to create a "uniform procurement system." *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, *supra*, at 13. That Act created the FAR, the comprehensive body of regulations that "govern[] acquisitions of goods and services by executive branch agencies." *Id.* at 2. Likewise, "[i]n 1984, Congress enacted the modern statutory framework for federal procurement, the Competition in Contracting Act, … [which] generally requires that all executive agencies obtain full and open competition through the use of competitive procedures." *PDS Consultants, Inc. v. United States*, 907 F.3d 1345, 1348 (Fed. Cir. 2018) (citations omitted). In other words, Congress has created mechanisms and procedures for standardizing the federal contracting system, and nothing in the text of the Procurement Act suggests the President can short-circuit this process.

The government tries to avoid its textual problem with a sleight of hand. The government asserts that the text is "broadly worded," and that Congress did not limit the types of concerns "relevant to economy and efficiency." App.Br.22, 30. But that skips over the problem: even assuming "economy and efficiency" are broadly understood, it is the economy and efficiency of the federal government's "system *for*" obtaining goods and services, *not* the "economy and efficiency" of the entities that provide goods and services to the government. 40 U.S.C. § 101.

The best the government can do is its erroneous argument that improving the efficiency of contractors would (eventually, indirectly) improve the efficiency of government's "system." App.Br.15. That is not even true; the relative efficiency of a given contractor in conducting operations does not affect the efficiency of the government *system* for locating and entering into contracts. The argument is also atextual, as the Act has no language suggesting that the President can *indirectly* improve the efficiency of the federal government's system for contracting. And if it did, the President's authority would not even be limited to federal contractors. He could impose *any* regulation of any kind, on anyone, as long as he believed it eventually "improve[d] the economy and efficiency of contractors' operations." App.Br.15.

The district court was rightly concerned that, "[f]ollowing the Defendants' logic and reasoning, the Procurement Act would be construed to give the President the right to impose virtually any kind of requirement on businesses that wish to contract with the Government (and, thereby, on those businesses' employees)." Order at 22–23. The President could demand that federal contract employees maintain a certain Body Mass Index, arguing that overweight workers are more likely be unhealthy and have increased absences. He could demand celibacy to reduce the spread of sexually transmitted diseases. He could require health and fitness programs, dieting, and mandatory compliance-monitoring, on the basis that fit employees are likely to be better, more efficient employees. And it does not stop at health. The President could decide that certain corporate structures are more efficient, that certain educational institutions provide better workers—he could impose requirements of nearly any kind on contractors.

But as explained, the government's theory—anything that improves contractor efficiency is fair game, App.Br.15—does not limit the President's authority to federal contractors. So if the President needs to invalidate local zoning rules to assist federal contractors, he can. If he needs to invalidate state taxes or safety

regulations to make federal contractors more "efficient," he can. That the government's alternative theory has no endpoint—indeed, the government *does not even try to identify one*, App.Br.24— is a good indication it is not a plausible textual theory.

2. Multiple canons of interpretation, including the major questions doctrine, confirm that the President's Procurement Act authority is limited.

Because the text is clear, the Court can stop there. But canons of interpretation also confirm this reading.

a. To start, the major questions doctrine is dispositive. The courts "expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (citation omitted). So any interpretation relying on the premise that Congress has "alter[ed] the fundamental details of a regulatory scheme in vague terms or ancillary provisions" should be rejected. *Whitman*, 531 U.S. at 468. Nor is Congress *likely* to "delegate a decision of … economic and political significance" in a "cryptic" fashion. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). In fact, the Constitution prevents that kind of delegation. *See Panama Refin. Co. v. Ryan*, 293 U.S.

388, 430 (1935). The major questions doctrine thus "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives." *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

The Supreme Court has already applied this doctrine—*twice*—in rejecting expansive regulatory interpretations supposedly aimed at ameliorating the effects of COVID-19. In *Alabama Association of Realtors*, the Court examined the CDC's claim that it could impose an eviction moratorium based on statutory language that allowed it to "make and enforce such regulations as in [the CDC's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 141 S. Ct. at 2487 (citing 42 U.S.C. § 264(a)). Relying on the major questions doctrine, the Court held that the challengers were "virtually certain" to succeed on the merits. *Id.* at 2486. The moratorium affected a "$50 billion" issue, and "intrude[ed] into an area that is the particular domain of state law: the landlord-tenant relationship." *Id.* at 2489. Accordingly, the Court held that Congress had not spoken clearly enough to grant such a vast power. *Id.*

Likewise, the Supreme Court stayed President Biden's OSHA vaccine mandate. Because it was a "significant encroachment in the lives—and health—of a vast number of employees," the Court explained that Congress must speak *clearly* to grant OSHA the power to demand vaccines of workers. *NFIB*, 142 S. Ct. at 665. No provision of the statute explicitly provided for OSHA to regulate "broad public health measures," so the Court refused to interpret otherwise broad or cryptic terms to include such power. *Id.*[4]

Outside the COVID-19 context, the Supreme Court has also applied the major questions doctrine in cases that involved much closer questions of statutory interpretation than this one. For instance, in *UARG*, the Court read one definitional term ("air pollutant") to mean *two different things* as applied in different parts of the statute, because a uniform interpretation "would

[4] By contrast, where the Court upheld the (much narrower) CMS vaccine mandate, *Biden*, 142 S. Ct. at 652, the Court explained that it was likely permissible only because the statute explicitly granted power over such health regulation to CMS. "[T]here can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what [CMS] does," based on its statutory authority to protect "the *health and safety* of individuals who are furnished services." *Id.* at 652–653 (emphasis added). Requiring vaccines fit within the agency's "core mission." *Id.* at 650. Indeed, the challengers there did not contest that the agency could generally require infection control measures at recipient institutions. *Id.* at 653.

bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 573 U.S. at 316, 324.

The major questions doctrine thus eliminates any lingering uncertainty here. There "can be little doubt" the contractor mandate involves powers of "vast economic and political significance." *NFIB*, 142 S. Ct. at 665 (citation omitted). As in *Alabama* and *OSHA*, this case involves *billions* of dollars of economic activity, as well as "encroachment" into the personal "health" decisions of a huge number of people, in an area of traditional state concern. *Id.*; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. And it does this without any specific statutory direction to regulate private employees, much less a power to regulate "public health." *NFIB*, 142 S. Ct. at 665. No president has before claimed the power to mandate vaccines (or any other health procedure) for federal contractors. Nor does the government identify a limiting principle for this power, which here "sweeps in *at least* one-fifth of the American workforce." *Kentucky*, 2022 WL 43178, at *14. That is precisely the type of executive action that the major questions doctrine precludes.

Seemingly recognizing that the major questions doctrine is another death knell for its case, the government futilely tries to avoid its application. None of its attempts succeed.

First, the government denies that EO 14042 is an "exercise of 'regulatory authority,'" and somehow this means the doctrine should not apply. App.Br.25. The government cites no authority holding that the major questions doctrine applies only when a statute governs "regulatory" authority. It baldly asserts that the "Government enjoys the unrestricted power" to contract with whom it wishes, App.Br.26, 34 (citation omitted), but the question here is not what the federal government, by an Act of Congress, "*could*" do, it is what Congress "*did*" when it passed the relevant statute, *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 168 (4th Cir. 1981) (emphasis added). That is precisely the situation in which canons of interpretation like the major questions doctrine apply—and it would make no sense to limit the major questions doctrine as the government requests. The doctrine "guard[s] against unintentional, oblique, or otherwise unlikely delegations of the legislative power." *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring). The doctrine is "a vital check on expansive and aggressive assertions of executive authority." *U. S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J.,

dissenting from denial of rehearing en banc). Those concerns do not change depending on whether the government claims the delegation runs to agencies or the President himself.

Anyway, EO 14042 *is* an exercise of regulatory authority. If the President's uniform demand that one-fifth of the nation's workforce undergo vaccination is not regulatory, it is not clear what would be. The government's own cases confirm as much. When an executive order "operates on government procurement across the board, rather than being tailored to any particular setting, the order is regulatory." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003). The President's order "seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996). This is undoubtedly regulatory.

Second, the government argues that the district court misapplied the major questions doctrine, but it identifies no errors. The government insists that the Procurement Act "makes plain" that the President has the authority he exercised here, App.Br.29, but that recycled argument is no better the second time. The government also suggests that the doctrine need not apply because the President is "accountable to the people." *Id.*

(citation omitted). But agency heads are ultimately accountable to the people, too. "[R]egardless of how likely the public is to hold the Executive Branch politically accountable," executive action "must always be grounded in a valid grant of authority from Congress." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 161. And although the government insists that it would be impractical to require Congress to "specifically address" all the powers the President has under the Procurement Act, App.Br.30, no one has said Congress must. If Congress intended to grant the President unilateral authority to remake a huge portion of the economy, *that* would require clear authorization, and that is what is lacking.

Third, the government hints at the puzzling argument that the major questions doctrine does not apply because the President might have been able to "issue this Executive Order had the Procurement Act never been enacted." *Id.* A hypothetical source of power the President does not actually assert (and does not actually have) cannot undermine application of the major questions doctrine to the statute the President *did* rely on. The major questions doctrine confirms what the text provides: a limited, logistical power, not a vast, unlimited power to regulate private parties.

b. Similarly, when the executive branch invokes powers that would "significantly alter the balance between federal and state power," Congress must authorize that change with "exceedingly clear language." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020)). This rule derives from "basic principles of federalism embodied in the Constitution," which permits a federal statute to "intrude[] on the police power of the States" only when plainly authorized by Congress. *Bond v. United States*, 572 U.S. 844, 859–860 (2014).

The government's atextual reading of the Procurement Act violates that principle. "It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (citation omitted). That includes "compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176 (1922). The contractor mandate usurps that traditional authority by imposing a public health policy on millions of people and numerous state entities.

Defendants-Appellants' continued insistence that the contractor mandate is a mere exercise of the federal government's power to set the "contract terms" for "companies that elect to do business with the federal government" again misses the point.

App.Br.26. "States may have no power to dictate what and how much of something the federal government may buy," but "they certainly have a traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large." *Kentucky*, 2022 WL 43178, at *16.

If this Court permits the President to "use[] contracting as a naked pretext to invade traditional state prerogatives," *id.*, it will hand the executive a "gun to the head" of states and eviscerate their traditional police powers, *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012). The President alone—without Congress—would have overwhelming authority to singlehandedly remake the federal-state balance. If the federalism canon stands for anything, it stands for the proposition that Congress did not hide such authority in an obscure provision of a federal procurement statute.

c. Finally, if "a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that [courts must] first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (citation omitted). The government's interpretation of the Procurement Act

would potentially make the Act unconstitutional, so that interpretation fails.

Congress may delegate authority, but it must "lay down by legislative act an intelligible principle" that cabins the power granted. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citation omitted). The government acknowledges there must be *some* limiting principle to its interpretation, *see* App.Br.24, but it never identifies one. If the statutory terms here are broad enough to authorize general public health measures, the Act lacks any meaningful boundaries. *See Mistretta*, 488 U.S. at 372–73. The Court should go out of its way to avoid such an interpretation.

3. The government's counter-arguments are unpersuasive.

The government's contrary view is that the President can order anything he believes will increase the "efficiency" of federal contractors. App.Br.15. Yet the "government itself offers virtually no textual analysis, which is unsurprising given that the text undermines its position," as explained above. *Kentucky*, 2022 WL 43178, at *12. Instead, the government relies on a few out-of-circuit cases that supposedly support its view of the President's power. App.Br.15–17. And the government asserts that Congress has acquiesced in this view. App.Br.18–20. But these cases all

involved "modest, 'work-anchored' measure[s] with … inbuilt limiting principle[s]." *Kentucky*, 2022 WL 43178, at *15. None of them purported to authorize massive public health regulations. And the government's congressional acquiescence argument has it backwards: Congress has not amended the Procurement Act because no President has ever tried to use it like this before.

a. The government relies for its view on a divided decision in *American Federation of Labor and Congress of Industrial Organizations v. Kahn*, where the D.C. Circuit held that the Procurement Act permitted the President to order federal contractors to impose price controls because that order had "a sufficiently close nexus" to "economy" and "efficiency." 618 F.2d 784, 792 (D.C. Cir. 1979). This decision barely engaged with the text: it plucked the terms "economy" and "efficiency" out of the Act's purpose statement to "inject[]" content into what it believed was the "imprecise definition of presidential authority" under the Act. *Id.* at 788–89; *see also id.* at 792 (relying on "legislative history" and "[e]xecutive practice"). The court did not consider the major questions doctrine (which was not particularly developed at the time) or any other canons of interpretation. And even then, the majority emphasized it was not "writ[ing] a blank check for the President." *Id.* at 793. The decision invoked *two* vigorous dissents,

as well as *two* concurrences that emphasized the decision was not as broad as it might seem. *Id.* at 796–97 (Bazelon, J., concurring); *id.* at 797 (Tamm, J. concurring); *id.* (MacKinnon, J., dissenting); *id.* at 816 (Robb, J., dissenting).

The few later cases the government relies on add nothing to *Kahn*'s analysis. These cases cite *Kahn* (which is, of course, binding precedent in the D.C. Circuit) or hold the presidential action at issue unlawful. *See, e.g.*, *Chao*, 325 F.3d at 366–67 (relying on *Kahn*); *Reich*, 74 F.3d at 1337, 1339 (rejecting exercise of authority)*; see also Chamber of Com. of the U.S. v. Napolitano*, 648 F. Supp. 2d 726, 736–37 (D. Md. 2009) (relying on *Kahn* and providing no independent textual analysis).

And some cases cast doubt on *Kahn*'s framework. For instance, in *Friedman*, the Fourth Circuit "[a]ssum[ed], without deciding," that *Kahn*'s nexus test was appropriate, but it suggested some discomfort with the nexus test and *directly* held that the Procurement Act did not authorize the President's attempt to impose affirmative action regulations on contractors. 639 F.2d at 170, 172.

b. Nevertheless, the government tries to argue that Congress somehow acquiesced to the view that the President can do anything that makes federal contractors more efficient.

App.Br.18–19. Not so. Even if *Kahn* and its progeny stood for this proposition—and they do not—the most "clanging" silence from Congress "cannot defeat the better reading of the text and statutory context." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). "If the text is clear," then courts have one job: "give the statutory text a fair reading." *Id.*

In any case, congressional silence is always a "poor beacon" to follow, since it can be read in numerous ways. *Zuber v. Allen*, 396 U.S. 168, 185 (1969). "[S]everal equally tenable inferences" can be drawn from "[c]ongressional inaction," including that Congress thinks the statutory language already reflects its intent. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

And if a court were to rely on some form of congressional acquiescence, it can do so only when "the supposed judicial consensus [is] so broad and unquestioned" that Congress must have "kn[own] of and endorsed it." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 349 (2005). That is not the case here. The Supreme Court has never opined on this issue. *See Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947) ("We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."). The government can

identify only a few cases interpreting the President's power under the Procurement Act at all, and most of those address the question in dicta (or reject the presidential action). *See, e.g.*, *Reich*, 74 F.3d at 1337, 1339; *Friedman*, 639 F.2d at 170, 172; *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 167 (3d Cir. 1971) (holding the Act inapplicable in a case about preconditions for "federal assistance," not procurement). Indeed, the government points to *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), and *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 8 (3d Cir. 1964), even though the Supreme Court has held that those discussions are "dicta … made without any analysis of the nexus between the Federal Property and Administrative Services Act and the Executive Orders." *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979). This is hardly a "broad and unquestioned" judicial consensus. *Jama*, 543 U.S. at 349.

Congress almost certainly did not even notice past decisions in this area because none of them held that the President could impose anything like a vaccine mandate on a fifth of the nation's workforce. Instead, these few cases involved executive orders with a close relation to "the ordinary hiring, firing, and management of labor." *Kentucky*, 2022 WL 43178, at *14. Most seem to merely ensure that federal contractors comply with existing law. *See, e.g.*,

Chao, 325 F.3d at 362 (requiring contractors to inform employees of their labor rights); *Napolitano*, 648 F. Supp. 2d at 729–30 (requiring contractors to participate in a system that verified they were not employing undocumented immigrants).

To the extent the government asserts that the *executive*'s past understanding of its authority is somehow important, App.Br.15–16, that is even less persuasive. There is no "adverse-possession theory of executive authority," *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment). And the executive has *never* asserted this degree of authority previously, anyway. *Medellin v. Texas*, 552 U.S. 491, 532 (2008) ("[P]ast practice does not, by itself, create power," especially when the President takes "unprecedented action.").

If anything, past practice runs *against* the government. For one, a "telling indication" of the lack of authority is "the lack of historical precedent," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). No President has ever tried to impose a public health regulation via contractor mandate before. Similarly, Congress has been *very* active in responding to COVID-19, and yet has not purported to impose a general vaccine

mandate or grant authority to the executive to do so. Indeed, the Senate voted to disapprove at least one vaccine mandate. Jordain Carney, *Senate votes to nix Biden's vaccine mandate for businesses*, The Hill (Dec. 8, 2021), https://perma.cc/35YA-SEBK. Simply put, none of this supports the government's unbounded view that the President can impose even massive public health regulations via the Procurement Act.

B. Alternatively, the mandate fails because it does not have a "close nexus" to efficiency concerns.

Even if this Court accepts the "close nexus" view of the statute, it should still affirm. As the district court held, "EO 14042 does not have a sufficient nexus to the purposes of the Procurement Act."[5] That is, even if the government were correct that a vaccine mandate would somehow indirectly improve contractor efficiency, that is far too tenuous to pass muster under any reasonable understanding of the *Kahn* view of the statute. No court, anywhere, has ever blessed the government's view that *anything* that even conceivably makes contractors more efficient has a "close nexus" to efficiency. This Court should not be the first.

[5] Perhaps the government overlooked this holding when it argued that the district court "did not take issue with" the nexus between the order and the Procurement Act's goals. App.Br.12.

1. If the Procurement Act allows the President to manage internal contractor operations, it has to be that "economy" and "efficiency" in procurement be limited to more traditional understandings of business-related decision-making—"modest, 'work-anchored' measure[s] with … inbuilt limiting principle[s]." *Kentucky*, 2022 WL 43178, at *15. In *Kahn*, essentially the government's only source of authority, the court emphasized that the President does not have a "blank check" and can impose procurement policies only if they have a "close nexus" to "likely savings to the Government." 618 F.2d at 792–93.

The contractor mandate, by contrast, is a public health regulation, not a "modest, 'work-anchored' measure," *Kentucky*, 2022 WL 43178, at *15, with a "close nexus" to economy and efficiency in procurement. The government's theory is that improving employee health will *ultimately* redound to its benefit. Even assuming this mandate would do that—and it would not—this is a theory with no limiting principle.

The same canons of interpretation noted above—major questions, federalism, constitutional avoidance—would *at least* require that, if the *Kahn* "close nexus" view is generally correct, that nexus must actually be *close*. A general public health regulation cannot possibly have a "close nexus" to government

efficiency, or those words have lost their meaning. There is no sense in which Congress "clearly" delegated such authority under the Procurement Act. *NFIB*, 142 S. Ct. at 665 (citation omitted).

Of course, it is no surprise that the contractor mandate is so unconnected to economy or efficiency in procurement: It was never meant to be. It is a pretextual "work-around" meant to mandate vaccines for as many Americans as possible. *BST Holdings, L.L.C.*, 17 F.4th at 612. The Administration's "own documents confirm" as much. *Kentucky*, 2022 WL 43178, at *16 n.15. President Biden was explicit: his "new plan" would "reduce the spread of COVID-19." P-26 at 3–4. At every turn, the government has clarified that what it cares about is not contractor efficiency but vaccines. 86 Fed. Reg. at 63,423 (emphasizing the "once in a generation pandemic" which threatens the "health and safety of the American people," and reaches "all Americans."); Doc. 55-11 at 11, 26 ("One of the main goals of this science-based plan is to get more people vaccinated."). Indeed, the government argued in the district court that the equities were in its favor because "executive action designed to slow the spread of COVID-19" is a "compelling" state interest. Doc. 63 at 34 (citations omitted). Whether or not it is a compelling interest, it is not an efficiency interest. There is no "close nexus" here, and the government's argument fails.

2. Finally, even assuming the President *could* impose vaccine mandates on federal contractors where they would be efficient, this one is not. It is worth remembering that private entities have a profit incentive to impose vaccine mandates if they would allow them to operate more efficiently. So a federal imposition is essentially a declaration that Government Knows Best—with respect to the internal procedures of every contractor in the nation.

The government has done nothing to overcome the facial implausibility of that contention. The EO simply *asserts* that the mandate will promote economy and efficiency. EO 14042 § 1. The first OMB determination is a single sentence. 86 Fed. Reg. at 53,692. These "conclusory statements will not do; an agency's statement must be one of reasoning." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (emphasis omitted) (citation omitted).

The OMB's revised determination is longer, but rife with problems. For instance, the revised OMB "finding" is directed at guidance that is *subject to change*, and contractors must comply with all future amendments. *Issuance of Agency Deviations to Implement Executive Order 14042* at 5, *supra*. The Task Force's FAQs for federal contractors have been amended at least on

September 30, October 21, November 1, and November 19 (the latter being *after* the revised OMB determination). *See* Safer Federal Workforce, *What's New*, *supra*. The FAQs include some of the most intrusive and problematic aspects of the guidance, like the requirement that all employees must be vaccinated unless the contractor can "affirmatively determine" they will not walk past a covered employee. *See* Doc. 55-11 at 21. OMB cannot possibly know whether it will be economic and efficient for contractors to follow guidelines that do not yet exist or are constantly in flux—only a fortune teller could.

Regardless, OMB's attempt to buttress its (foregone) conclusion is unpersuasive, as is the government's attempt to defend it now. Most of the determination focuses on the idea that the Mandate is necessary to combat "a once in a generation pandemic." 86 Fed. Reg. at 63,423. No one doubts that COVID-19 is *bad*, but reciting general data about the virus does nothing to explain how this mandate will save the government money. Plus, if the mandate were really directed at *efficiency*, there would be a hardship exception for federal contractors that cannot comply—but of course there is not, because the government's goal is not efficiency, it is vaccines. *See Florida v. Nelson*, No. 8:21-CV-2524, 2021 WL 6108948, at *12 (M.D. Fla. Dec. 22, 2021); *cf. Kahn*, 618

F.2d at 786 (price controls included exception to avoid "situations o[f] undue hardship or gross inequity").

In speculating about the vaccine's impact on worker absenteeism, the government virtually ignores that employee terminations and departures will inevitably follow from the contractor mandate, in a historically "tight" labor market. Tr. at 34–35. OMB denied knowledge of any "systematic evidence" that workers might quit rather than vaccinate, 86 Fed. Reg. at 63,422, despite citing a source finding that 5% of unvaccinated adults had *already* left a job over a vaccine mandate, and that 37% would quit if their employer imposed a vaccine mandate (even with a testing alternative, which is not present here). *See id.* n.14 (citing Nate Rattner, *Some 5% of unvaccinated adults quit their jobs over Covid vaccine mandates, survey shows*, CNBC (Oct. 28, 2021), https://perma.cc/G6ES-XAC9).

OMB—and the government here—repeatedly point to private employer mandates, 86 Fed. Reg. at 63,422, App.Br.2, 21, 24, as if the choice of a few private employers could justify the President's one-size-fits-all order. But many of those private mandates were imposed to comply with federal mandates, and they have been dropped as those mandates have been enjoined or the mandates have proven unwieldy. *See, e.g.*, Paul Ziobro, *GE, Union Pacific*

Suspend Covid-19 Vaccination Mandates After Injunction on Biden Order, Wall. St. J. (Dec. 9, 2021), https://perma.cc/X5HN-7D8C; Elizabeth Chuck, *Growing number of companies suspend vaccine mandates, including hospitals and Amtrak*, NBCNews (Dec. 16, 2021), https://perma.cc/63SS-QFRW. Besides, the remaining private mandates are not nearly as extreme as the President's mandate—for instance, most include a testing alternative or apply only to those that wish to come into the office. *See* Jessica Mathews, *All the major companies requiring vaccines for workers*, Fortune (Aug. 30, 2021), https://perma.cc/7QDE-WFVA.

All the best evidence is that EO 14042 will leave federal contractors with fewer, less experienced employees to complete federal contracts. That is not likely to "restrain [federal] procurement costs." *Kahn*, 618 F.2d at 793. There can thus be no "close nexus" to economy and efficiency—the vaccine mandate is what the government has told us it is all along: A public health measure.

C. The mandate also fails because the government issued its orders and guidance without notice-and-comment.

The Court need not delve into the procedural problems with EO 14042 and its implementation. But this Court can affirm for

any reason supported by the record, *Henley v. Payne*, 945 F.3d 1320, 1333 (11th Cir. 2019), and there are serious errors in the implementation of the mandate, providing an independent basis for the preliminary injunction.

Simply put: the government ignored notice-and-comment requirements. The Office of Federal Procurement Policy Act, 41 U.S.C. § 1707(a), requires that a new "procurement policy, regulation, procedure, or form" be submitted for public notice and comment if it "relates to the expenditure of appropriated funds" and "has a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form" or "has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)(1).

The language of § 1707 is "broad." *Munitions Carriers Conf., Inc. v. United States*, 932 F. Supp. 334, 338 (D.D.C. 1996), *rev'd on other grounds,* 147 F.3d 1027 (D.C. Cir. 1998). It covers both substantive revisions *to* the FAR and deviations *from* the FAR. *See Navajo Ref.*, 58 Fed. Cl. at 208–09. So § 1707 required the government to submit the Task Force Guidance, the FAR deviation clause, and the OMB determination for notice-and-comment procedures before the mandate went into effect. They did not.

The government has tried to argue its various actions were exempt from such procedures, but it has never come up with a good reason why. These procurement regulations "relate[] to the expenditure of appropriated funds" because they establish a precondition for signing federal contracts. § 1707(a)(1)(A). And the contractor mandate is specifically devoted to creating an intrusive burden on federal contractors, so it "has a significant effect beyond the internal operating procedures of the agency" and imposes "a significant cost or administrative impact on contractors." *Id.* § 1707(a)(1)(B)(i)–(ii).

Because the government never published the Task Force Guidance or FAR deviation clause for comment, they are invalid. *See Navajo Ref.*, 58 Fed. Cl. at 209. That alone is sufficient reason to enjoin the mandate.

The OMB determination is slightly different, but it, too, fails. OMB did publish its revised determination for public comment, but not until long after the contractor mandate went into effect, violating § 1707(a)(1). And, of course, the revised determination took effect immediately, rather than *after* notice-and-comment.

Neither of OMB's reasons for promulgating prior to notice-and-comment holds up. OMB argued that when an agency is exercising power delegated by the President, the action is not

"subject to judicial review under the APA," 86 Fed. Reg. at 63,424, but § 1707 is not part of the APA. Section 1707 imposes its own, independent notice-and-comment requirement. Nor does § 1707(d)'s waiver provision for "urgent and compelling circumstances" apply. That provision requires procurement regulations to be "temporary," and the government has admitted that here, "no certain endpoint has yet been identified." Doc. 63 at 22. (Though it still insists the mandate is somehow "temporary." *Id.*) Plus, there are no "urgent and compelling circumstances" here. OMB relied on health concerns, 86 Fed. Reg. at 63,423, but the reason the contractor mandate exists, according to the government, is that it will supposedly promote economy and efficiency in federal contracting. There was no urgent need for speculative efficiency gains.[6]

II. State Plaintiffs will suffer irreparable harm if the mandate goes into effect.

After hearing hours of testimony and reviewing dozens of exhibits, the district court properly found that State Plaintiffs will

[6] In *Missouri*, the Supreme Court allowed CMS to invoke the "good cause" exception to notice-and-comment procedures under the APA, but only because the agency found that immediate release would "significantly reduce … infections, hospitalizations, and deaths." 142 S. Ct. at 654. By contrast, the government here can rely only on supposed efficiency gains.

likely suffer irreparable injury if the contractor mandate stands. There is certainly no "clear error" in this finding. *Gonzalez*, 978 F.3d at 1270.

To start, the district court specifically found that "the time and effort spent on [compliance] measures in the past—and going forward—constitute compliance costs resulting from EO 14042, which appear to be irreparable." Order at 25. The court explained it had heard "from three witnesses who described the incredibly time-consuming processes they have undertaken" to comply with the mandate, "typically requiring major input and assistance from numerous other departments across their institution," to "identify the employees covered by the mandate and to implement software and technology to ensure that those employees have been fully vaccinated (or have requested and been granted an accommodation or exemption)." *Id.* at 24. "Not only must Plaintiffs ensure that their own employees satisfy the mandate, but they also must require that any subcontractors' employees working on or in connection with a covered contract are in compliance." *Id.*; *see also, e.g.*, Doc. 55-2, ¶ 11; Doc. 55-12, ¶ 21.

The government argues that "ordinary" compliance costs are not irreparable, App.Br.36, but it is mistaken—and in any event, these are not *ordinary* compliance costs. The government cites

LabMD, Inc. v. Federal Trade Commission, 678 F. App'x 816, 821 (11th Cir. 2016), but that case *held* compliance costs irreparable and acknowledged the blackletter rule that irreparable injuries are "those that *cannot be remedied at the end of trial if the movant were to prevail*." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). "No mechanism here exists" for State Plaintiffs to recover for these harms. *Texas v. U.S. Env't Prot. Agency*, 829 F.3d 405, 434 (5th Cir. 2016); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages … renders the harm suffered irreparable."). The government does not contend that State Plaintiffs could recover costs incurred while trying to become eligible to bid on federal contracts. *See Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 629, 631 (Fed. Cl. 2002) (explaining that federal contractors cannot recover "[c]osts incurred in anticipation of or to qualify for a contract award."). And these costs are immense, far beyond the normal cost of complying with a regulation for a few months during litigation. There can be no serious argument State Plaintiffs will be able to undo this damage.

Further, even if there were some question about compliance costs, it is plain as day that, if the injunction is lifted, State Plaintiffs will be irreparably harmed. State Plaintiffs will suffer "the business and financial effects of [] lost or suspended employee[s], … the diversion of resources necessitated by the Mandate," and the financial hit of lost contracts. *BST Holdings, L.L.C.*, 17 F.4th at 618.

Testimony established that State Plaintiffs will lose longtime employees with valuable institutional knowledge. Tr. at 33–34, 36, 95–96; Doc. 55-1, ¶¶ 16–18; Doc. 55-2, ¶¶ 13–15; Doc 55-4, ¶¶ 9–10; Doc. 55-12, ¶ 24; Doc 55-13, ¶ 10. Those employees (with their years of experience and specialized training) will be difficult to replace, especially given critical labor shortages. *See* Doc. 55-4, ¶ 10. State Plaintiffs would have to fire or reassign unvaccinated employees, whether or not a suitable replacement exists (they are already understaffed, *see* Tr. at 34–35), which would also impact their ability to perform on existing contracts or other work. *See id.* at 35, 73, 95; Doc. 55-2, ¶ 14; Doc. 55-6, ¶ 14; Doc. 55-7, ¶ 14; Doc. 55-8, ¶ 11; Doc. 55-10, ¶¶ 14–15; Doc. 55-14, ¶ 14.

The government disputes that "mass firings" will occur, App.Br.38, but also cites studies finding that 5% of unvaccinated adults have *already* left a job because of a vaccine requirement,

and that 72% of unvaccinated adults say they *would* leave their job if required to get a vaccine. Kaiser Fam. Found., *KFF COVID-19 Vaccine Monitor: October 2021* (2021), https://perma.cc/M7B9-PTTF. The district court heard testimony that "many" of State Plaintiffs' covered employees were expected to refuse the vaccine. Tr. at 49. At last count, over ten thousand employees had refused to engage with compliance efforts. *See id.* at 32, 71–72, 93. That means State Plaintiffs would lose immense goodwill and could lose thousands of employees. Even if that number turns out to be lower, "it is not so much the magnitude but the irreparability that counts." *Texas*, 829 F.3d at 433–34.

And all this assumes State Plaintiffs can manage to *comply* with the mandate, which is far from certain. If they cannot, they will become ineligible to bid on federal contracts, which will put billions of dollars at risk and place the budgets for many state agencies deep into the red. Georgia Tech, as just one example, received almost $664 million in annual revenue from federal contracts in fiscal year 2021 alone. *See* Doc. 55-2, ¶ 7. A loss of 33% of Georgia Tech's total revenue would be catastrophic. *Id.*, ¶¶ 7–8; *see also, e.g.*, Doc. 55-9, ¶ 6 (explaining that the University of Alabama System currently holds $663,079,382 in federal contracts).

Defendants also argue that State Plaintiffs have shown no threat to their existing contracts, but that is wrong and irrelevant. State Plaintiffs need only make "an adequate showing that sometime in the relatively near future [they] will bid on another Government contract." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995). As the district court found, there is "ample evidence" that State Plaintiffs "routinely enter into contracts that would be covered by EO 14042." Order at 15–16 (citing Docs. 55-6, 55-10, 55-14); *see also Kentucky*, 2022 WL 43178, at *6 (finding a "virtual certainty that states will either bid on new federal contracts or renew existing ones").

Even setting aside upcoming contracts and modifications, the EO "strongly encourage[s]" agencies to modify "existing contracts" to include the COVID-19 clause. EO 14042 § 6(c). Agencies have repeatedly told State Plaintiffs that modifications to current contracts are "required" and that refusal would also mean the end of future federal contracts. Doc. 55-14, ¶ 16 (USDA stated that failure to agree to Contractor Mandate would mean no future leases); Doc. 76-3, ¶ 9 ("At NIH, Contracting Officers are required to modify these existing contracts."); Doc. 76-4, ¶ 2. Only when State Plaintiffs challenge those actions in court does the

government (sometimes) step back. *E.g.*, Doc. 76-2, ¶¶ 16–18; Doc. 63-1.

III. The balance of equities weighs heavily in favor of enjoining the mandate.

As the district court found, the preliminary injunction does "nothing more than maintain the status quo." Order at 25. That is the "chief function" of a preliminary injunction. *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). The government has no legitimate interest in enforcing an unlawful policy. *See Odebrecht Constr., Inc*, 715 F.3d at 1290. And, if the injunction were lifted, it would essentially grant the government *permanent* relief. Unvaccinated employees would immediately be forced to choose between their jobs and their liberty. A later court order could not undo that choice. *See In re MCP No. 165*, 20 F.4th 264, 284 (6th Cir. 2021) (Sutton, J., dissental).

The government has almost nothing to place on the other side of the ledger (as this Court all but held when it refused to stay the injunction on appeal). The government insists that "[d]elaying the implementation of the Executive Order will lead to productivity losses … as well as leave and health care costs." App.Br.39. But even if the EO might produce some minimal gains to federal

contractor efficiency (a conclusion that is, at best, questionable, *see supra* § I.B), that interest is hardly *urgent*. And of course, the government has dropped its previous argument that public health would suffer, having awoken to the reality that doing so would further confirm the pretextual basis for its action. Regardless, it is far too late to cry "emergency" now, when the government repeatedly delayed the imposition of this mandate. The district court did not abuse its discretion.

IV. The scope of the injunction is appropriate

The government briefly argues that only the State of Georgia and two Intervenor-Plaintiff members have identified an existing contract with the COVID-19 clause, and so the injunction should be limited to them. App.Br.44. This argument is wholly unsupported, and it contradicts the Supreme Court's clear rule that "[o]nly one petitioner needs to have standing to authorize review." *Massachusetts v. EPA*, 549 U.S. 497, 498 (2007). "[W]hen there are multiple plaintiffs," only "one plaintiff must have standing to seek each form of relief." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651 (2017).

The government also ignores the district court's alternative finding "that Article III standing exists based on the ample evidence" that State Plaintiffs "routinely enter into contracts,"

have "current contracts" that will need to be renewed or modified, and "typically … seek out contract opportunities with the federal government." Order at 15–16. Further, as set forth above, the government has used EO 14042 as the sole basis to forcibly insert the vaccine mandate into existing contracts.

The government's argument is particularly inapt *here*, where State Plaintiffs had to seek preliminary injunctive relief on a blistering timeline. Districts courts must always review requests for preliminary injunctions "on a limited record and without the luxury of abundant time for reflection." *Wreal*, 840 F.3d at 1248 (citation omitted). That is why appellate "review … is exceedingly narrow" and "deferential." *Id.* To demand that every single plaintiff produce redundant evidence would be an unheard-of attack on preliminary injunction proceedings.

Finally, with respect to the government's further argument that the injunction should not be nationwide, it provides little reason. Federal contracting is a nationwide business—having multiple entities bid under different regimes for the same contract would "prove unwieldy and would only cause more confusion," as the district court found. Order at 27. That finding was not an abuse of discretion.

CONCLUSION

The Court should affirm the order of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 12,906 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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