No. 22-15518

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BRNOVICH in his official capacity as Attorney General of Arizona; and the STATE OF ARIZONA, et al.,
Plaintiff-Appellees,

v.

JOSEPH R. BIDEN in his official capacity as President of the United States, et al.,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:21-cv-01568-MTL

STATE'S ANSWERING BRIEF

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GLOSSARY

Abbreviation	Description
Alabama Realtors	*Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).
Contractor Mandate	The vaccination mandate imposed on federal contractors by EO 14042, the Second OMB Determination, the FAR Memo, the SFTWTF Guidance, and the SFTWTF FAQs.
EO 14042	Exec. Order No. 14042, 86 Fed. Reg. 50985, "Ensuring Adequate COVID Safety Protocols for Federal Contractors," (Sept. 9, 2021).
FAR	The Federal Acquisition Regulation, established pursuant to 41 U.S.C. §1303, and which is a set of standardized requirements governing "[g]overnment-wide procurement."
FAR Council	The Federal Acquisition Regulatory Council, which is the agency exclusively charged with creating the FAR, and which is made up by the heads over various federal agencies.
FAR Memo	FAR Class Deviation Clause 252.223-7999 and accompanying guidance, which contains the contract language imposing the Contractor Mandate and requiring compliance with the SFWTF Guidance and FAQs.
OMB	The Office of Management and Budget.
Procurement Act	The Federal Property and Administrative Services Act, 40 U.S.C. §101 *et seq*.
OMB Second Determination	"Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis," 86 Fed. Reg. 63,418 (Nov. 16, 2021), which approved the SFWTF Guidance and imposed the

	Contractor Mandate.
SFWTF	The Safer Federal Worker Taskforce, established by "Protecting the Federal Workforce and Requiring Mask-Wearing," Exec. Order 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021).
SFWTF FAQs	Frequently Asked Questions released by the SFWTF as part of the Contractor Mandate, available at https://www.saferfederalworkforce.gov/faq/contractors/.; they have been updated 17 times so far, s*ee* SFWTF, What's New (visited October 4, 2022), https://www.saferfederalworkforce.gov/new/.
SFWTF Guidance	SFWTF, "COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors," released on September 24, 2021 (*see* *h*ttps://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf) and updated on November 10, 221 (*see* https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf); The guidance published by the SFWTF and which implements the Contractor Mandate.
Utility Air	*Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).
West Virginia	*West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

INTRODUCTION

This case involves a challenge to one of the most consequential and audacious actions that the Executive Branch has ever taken under the Procurement Act, 40 U.S.C. §101 *et seq*. In the entire history of our Republic before September 2021, the federal government has never mandated vaccinations for the civilian populace. Not for smallpox, which killed about one third of those infected and permanently scarred many of the survivors. Not for polio, which can inflict lifelong paralysis. Not even for influenza, which every year kills tens of thousands of Americans and causes billions of dollars in lost productivity.

Despite the medical advantages that vaccinations have provided—including outright eradication of smallpox and near-elimination of polio—Congress has never itself mandated that anyone in the U.S. submit to mandatory vaccination outside of the military context or for government personnel serving overseas. Nor, prior to last year, had the Executive Branch. Indeed, the Procurement Act has *never* been previously employed to impose *any* health-based requirements on employees of any kind whatsoever.

States, however, have a long history of imposing a variety of vaccination requirements: all 50 states, for example, generally mandate that children receive the MMR vaccine to attend public school unless they can claim an exemption. The States may do so since it is "settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*, 260 U.S. 174, 176 (1922). But the federal government has no such police power, and the President certainly does not enjoy it with the Procurement Act.

Against this backdrop, Defendants issued the Contractor Mandate in September 2021. That Mandate asserted that the Executive had authority under the Procurement Act to require that nearly all federal contractors and subcontractors. The sweep of the regulation is *vast*: governing approximately "one-fifth of the American workforce," or more than 30 million workers. *Kentucky v. Biden*, 23 F.4th 585, 606-07 (5th Cir. 2022).

This is therefore a paradigmatic "major questions" case. The Contractor Mandate is an assertion of "'unheralded' regulatory power over 'a significant portion of the American economy'" that triggers the doctrine. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022) (quoting

Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014)). It similarly presents questions of "vast 'economic and political significance.'" *Alabama Ass'n of Realtors v. HHS ("Alabama Realtors")*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air*, 573 U.S. at 324) (cleaned up).

Indeed, the Contractor Mandate unambiguously satisfies *all three* of the independent triggers for the major questions doctrine: (1) it involves a "matter of great political significance," (2) "it seeks to regulate a significant portion of the American economy," and (3) it "intrud[es] into an area that is the particular domain of state law," *i.e.*, vaccination mandates. *West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring) (cleaned up) (collecting cases).

For similar reasons, the Supreme Court has squarely held that the OSHA workplace vaccine mandate presented a major question. *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022). And just like it, the Contractor Mandate involves a "significant encroachment into the lives—and health—of a vast number of employees." *Id.* Indeed, unlike *NFIB*: (1) the Procurement Act, unlike the OSH Act, has *never* previously been used to regulate health and address workplace exposures, and (2) the Contractor

Mandate, unlike the OSHA Mandate, has no mask-and-test alternative. *Id.*

Because the major questions doctrine applies, the Contractor Mandate could only be lawful if the Procurement Act supplied "'clear congressional authorization' for the power [Defendants] claim[]." *West Virginia*, 142 S. Ct. at 2609 (majority opinion). But the Act does no such thing: its text simply does not address public health *at all*, let alone vaccination requirements. In its 73-year history, the Procurement Act has *never* been invoked even once to impose any other health-based requirement. Instead, it speaks only in extremely general terms about "econom[y] and efficien[cy]" in the federal government's own "system" of procurement. 40 U.S.C. §101. That simply does not suffice, and this case can thus be readily resolved under the major questions doctrine alone.

Defendants' defense below was overwhelmingly predicated on its contention that the major questions doctrine did not actually exist: so much so that they placed it in scare quotes *every time* they mentioned it, and acknowledged it only as the "*so-called* 'major questions doctrine." SER-17; *accord* SER-5 n.3. But *West Virginia* renders that denial indefensible.

Defendants, however, continue to be in denial or willfully obtuse to the Supreme Court's unequivocal pronouncements: even in this Court—and post-*West Virginia*—they acknowledge the doctrine by name only once, and continue to give it the scare-quotes treatment. Opening Br.36. Such denialism—now flirting with pathology—is not a viable legal defense. Nor are its other frantic attempts to invent exceptions to the doctrine.

But even if the major questions doctrine did not apply, the Contractor Mandate would still be unlawful. As the Sixth Circuit has recognized, the Procurement Act only confers authority "to implement systems making *the government's* entry into contracts less duplicative and inefficient, but it does not authorize [the President] to impose a medical mandate directly upon contractor employees themselves." *Kentucky*, 23 F.4th at 605. Defendants thus lack authority to regulate contractors directly to improve *their* economy and efficiency, rather than the government's. The Contractor Mandate thus fails.

But even those courts that have permitted the President to regulate contractor conduct have limited that authority to actions that have a "close nexus" to economy and efficiency. *AFL-CIO v. Kahn*, 618 F.2d 784,

793 (D.C. Cir. 1979) (en banc). But the Contractor Mandate is hardly the sort of "ordinary hiring, firing, and management of labor" that might qualify, and instead is a *health* mandate far afield of any direct efficiency gains. *Kentucky*, 23 F.4th at 607-08. It thus cannot be sustained under the Procurement Act.

The other requirements for injunctive relief are also met here. The State has suffered irreparable harm, both in the form of sovereign injury and irrecoverable financial harms. And Defendants' balance-of-equities arguments merely recycle COVID-19-pandemic-based arguments that they have repeatedly lost elsewhere.

Nor is the narrow scope of the district court's injunction—*i.e.*, limited to the geographic boundaries of Plaintiff Arizona's borders—an abuse of discretion. Indeed, this Court does not appear to have held *ever* that an injunction limited solely to the borders of a plaintiff state was an abuse of discretion. There is no reason for this case to be the first.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331.

The district court entered judgment for Plaintiffs on the relevant claims under Rule 54(b) and issued a permanent injunction on February

10, 2022. ER-7. Defendants filed a timely notice of appeal on April 8. ER-259.

This Court has jurisdiction under 28 U.S.C. §§1291 and 1292(a).

STATEMENT OF ISSUES

This appeal presents the following issues:

(1) Whether Defendants lack authority to issue the Contractor Mandate under the major questions doctrine.

(2) Whether that mandate exceeds Defendants' authority under the Procurement Act.

(3) Whether the district court abused its discretion or made clearly erroneous factual findings in concluding that (a) the State had established irreparable harm and (b) the balance of harms and public interest supported issuance of the injunction issued.

(4) Whether the district court abused its discretion in issuing a limited injunction that applies only within Arizona's sovereign borders.

STATUTORY ADDENDUM

Defendants' statutory addendum is complete.

STATEMENT OF THE CASE

Statutory Background

The Procurement Act

The Procurement Act was enacted in the wake of World War II to streamline federal property management. 40 U.S.C. §101 *et seq*. It states that "[t]he purpose of [the Procurement Act] is to provide the Federal Government with an economical and efficient system" for certain activities, including "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. §101(1).

In five separate provisions, the Procurement Act expressly uses the terms "economy" and "efficiency" to define the scope of an official's authority. *See* 40 U.S.C. §§501(a)(1)(A), 506(b), 581(c)(4); 584(a)(2)(C); 603(a)(1).

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."[1] To deviate from the FAR, agencies generally have to comply with certain procedures (especially if the departure is across the board). *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 that includes public commenting. *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 Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Procurement Act, but those "policies must be consistent with" the Act. 40 U.S.C. §121(a).

Under 3 U.S.C. §301, the President may delegate his statutory authority, but only to appointed officials confirmed by the Senate. And the President may not delegate his statutory authority if the relevant statute "affirmatively prohibit[s] delegation." 3 U.S.C. §302. For procurement, Congress gave the FAR Council (and not the President) exclusive power to "maintain ... a single [g]overnment-wide procurement

[1] Congressional Research Service, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions* at 2 (Feb. 3, 2015), available at https://sgp.fas.org/crs/misc/R42826.pdf.

regulation," and affirmatively prohibited other agencies from doing so. 41 U.S.C. §1303(a)-(b).

Factual Background

Initial Denial Of Vaccination Authority.

When President Biden took office, he established the Safer Federal Workforce Taskforce ("SFWTF"). As the name suggests, this was an internally directed program, designed to "provide ongoing guidance to heads of agencies … during the COVID-19 pandemic."[2] Membership of the SFWTF included White House staffers not subject to Senate confirmation.[3] The President also issued various requirements for federal land, buildings, and employees.[4]

But the President did not attempt to mandate vaccines for private entities or the general public. Indeed, through the summer of 2021, the Administration still recognized that vaccine mandates were "not the role of the federal government." ER-88. Similarly, on December 4, 2020, in response to a question about whether COVID-19 vaccines should be made

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[2] Exec. Order No. 13,991, 86 Fed. Reg. 7,045, 7,046 (Jan. 20, 2021).

[3] Safer Federal Workforce Task Force, *Protecting the Federal Workforce During the COVID-19 Pandemic,* https://bit.ly/3yYp021.

[4] 86 Fed. Reg. at 7,045, 7,047.

mandatory, then-President-Elect Biden said "[n]o, I don't think it should be mandatory. I wouldn't demand it to be mandatory." *Id.*

September 9 Course Change

On September 9, 2021, the President abruptly changed course. He announced that his "patience" with the "unvaccinated" was "wearing thin." SER-30. President Biden thus declared that the "time for waiting [to get vaccinated] [was] over," and it was "not about freedom or personal choice." SER-28. Accordingly, he would "take[] on elected officials and states" and "get them out of the way." SER-33.

To do so, the President "announc[ed] … a new plan to require more Americans to be vaccinated." SER-27. That plan consisted of a constellation of vaccine mandates to cover as many Americans as possible: about "100 million Americans—two thirds of all workers." SER-30. The President went "agency by agency" to subject as many Americans as possible to vaccination mandates.[5] These mandates included:

- ***OSHA Mandate.*** OSHA issued an emergency rule requiring most employers to fully vaccinate their workforce or show

[5] Transcript of Oral Argument at 79, *NFIB*, 142 S. Ct. 661 (No. 21A244), https://bit.ly/3CWWbUD.

negative tests. *See* 86 Fed. Reg. 61,402 (Nov. 5, 2021). The federal government withdrew the mandate, *see* 87 Fed. Reg. 3,928 (Jan. 26, 2022), after the Supreme Court held that it exceeded OSHA's authority, *see NFIB v. OSHA*, 142 S. Ct. 661 (2022).

- ***Head Start Mandate.*** HHS promulgated a rule that broadly required participants in Head Start to be masked and vaccinated. 86 Fed. Reg. 68,052 (Nov. 30, 2021). That mandate has also been enjoined. *Louisiana v. Becerra*, 577 F. Supp. 3d 483 (W.D. La. 2022).
- ***CMS Mandate.*** The Centers for Medicare and Medicaid Services ("CMS") published a rule mandating that employees at most Medicare or Medicaid providers be vaccinated. 86 Fed. Reg. 61,555 (Nov. 5, 2021). The Supreme Court stayed injunctions against the CMS Mandate in a 5-4 decision, reasoning that the mandate was "within the language of the [authorizing] statute," which was specifically directed at "health and safety." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022).

- ***Federal Employee Mandate.*** The President also signed an executive order requiring that "[e]ach agency shall implement ... a program to require COVID-19 vaccination for all of its Federal employees" (the "Employee Mandate"). 86 Fed. Reg. 50,989, 50,990 (Sept. 9, 2021).
- ***Contractor Mandate.*** At issue here is the President's decision to mandate vaccinations for "federal contractors."

Executive Order 14042.

President Biden issued Executive Order 14042 on September 9. *See* 86 Fed. Reg. 50,985 (Sept. 9, 2021) ("EO 14042"). Unlike many other mandates, which involved single agencies, the Contractor Mandate is a more complicated, multi-agency affair.

Relying on the Procurement Act, the President directed "[e]xecutive departments and agencies" to include a clause in nearly all[6] new procurement contracts, contract extensions, and renewals, requiring the contractor (and subcontractors) to "comply with all guidance … published by the" SFWTF for "the duration of the contract." EO 14042, §§2, 5. The

[6] The EO exempts "grants," contracts with "Indian Tribes," contracts of minimal value, and "subcontracts solely for the provision of products." EO 14042 §5.

President invoked 3 U.S.C. §301 as supporting authority, but did not explain how that section would permit delegation to the SFWTF, which includes members who were not Senate-confirmed. 41 U.S.C. §1303(a)-(b).

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 SFWTF to publish the "guidance" that would mandate vaccines for employees of federal contractors. *Id*. §2(b).

The President also ordered 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). He did so even though the prior section of the EO already declared the pre-ordained conclusion that the Contractor Mandate "promote[d] economy and efficiency in Federal procurement." *Id*. §1.

Finally, the President also directed the FAR 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.

Implementation Of EO 14042.

The SFWTF Guidance. On September 24, 2021, the SFWTF issued the "SWFWTF Guidance." SER-39-46. Under that guidance, all "covered contractor employees" were required to be fully vaccinated by December 8, 2021. SER-43.

The SWFWTF Guidance's sweep is broad. 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." SER-41 (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." SER-48 (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"), *all* of its employees are subject to the mandate. *Id*. The Guidance also applies to

outdoor workplaces and employees who work exclusively from their homes. SER-48-49.[7]

FAR Council Order. On September 30, 2021, the FAR Council took the initial steps that the President had ordered by issuing an interim guidance memorandum (the "FAR Memo") together with "Class Deviation Clause 52.223-99," to be included in all agency contracts. ER-137-41. 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." ER-141. The FAR Council listed EO 14042 as the sole supporting authority. ER-140. The Council also purported to suspend the normal requirement that agencies seek approval of deviations from the FAR. ER-139.

OMB Review. Meanwhile, on September 28, OMB issued its requested approval of the SFWTF guidance. The efficiency analysis that the President had ordered OMB to prepare consisted of only a single

[7] EO 14042 requires compliance with all future amendments to the Guidance. The SFWTF has updated the Guidance via its FAQs 17 times so far. *See* Safer Federal Workforce, *What's New* (visited October 4, 2022), https://www.saferfederalworkforce.gov/new/.

sentence. 86 Fed. Reg. 53,691, 53,691-92 (Sept. 28, 2021). It "included neither findings nor evidence to support [OMB's] conclusion." ER-40.

After this suit and several others were filed, OMB published a revised determination. ER-174-81 ("Second OMB Determination"). That determination includes additional language asserting that the Mandate promotes economy and efficiency in federal contracting and notes that a few private employers voluntarily imposed vaccine mandates. ER-177-78. That 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." ER-179. OMB did not undergo notice-and-comment procedures, asserting that the case for a vaccine mandate was "urgent." *Id.*. In some tension with that assertion, OMB simultaneously delayed the compliance deadline past the holiday season, to January 18, 2022. ER-176.[8]

The deviation clause promulgated by the FAR Council, to be used by every agency, requires "compl[iance] with all guidance, including

[8] *See also* Jordan Williams, *Business groups ask Biden administration to delay vaccine mandate*, The Hill (Oct. 26, 2021), https://bit.ly/3TI2zpU.

guidance conveyed through Frequently Asked Questions, as amended during the performance of this contract." ER-141.

These FAQs contain numerous substantive requirements.[9] For example, two FAQs explain that proof of prior COVID infection does not exempt a person from vaccination and that the vaccination requirements apply to pregnant women. ER-159-60. The FAQs even purport to give the FAR Council's contract clause preemptive effect, explaining that it "supersede[s] any contrary State or local law or ordinance." ER-166.

Neither the Executive Order nor any subsequent agency actions "identif[ied] any instance in which absenteeism attributable to COVID-19 among contractor employees resulted in delayed procurement or increased costs." *Florida v. Nelson,* 576 F. Supp. 3d 1017, 1035 (M.D. Fla. 2021).

"Workers employed by federal contractors comprise approximately one-fifth of the entire U.S. labor force." ER-32 "The [Contractor Mandate] covers virtually all such employees, including employees who are not themselves working on federal contracts, have previously been infected

[9] *Available at* https://www.saferfederalworkforce.gov/faq/contractors/.

with COVID-19, work entirely outdoors, and work remotely full time." ER-42.

Impact On The State

The State and many of its constituent entities regularly bid on and renew federal contracts, and they are currently parties to many such contracts involving large sums of money. For example, all three of "Arizona's public universities …. are federal contractors. In 2021, their combined federal contracting revenues totaled $1,207,926,800," or over a billion dollars. ER-28. Defendants demanded that a number of State entities enforce the contractor vaccine mandate, including (1) all state three universities; (2) the Arizona State Retirement System; and (3) the Division of Civil Rights Section of the Arizona Attorney General's Office. ER-27-29

According to polling data, roughly nearly 70% of the unvaccinated say they would quit their job in response to a vaccine mandate, and 90% of large employers believe that vaccine mandates will cause reductions in their workforces. *Kentucky*, 23 F.4th at 600-01 (citations omitted). Thus, "were the State to adhere to the mandate and require its employees to be vaccinated, some employees would resign or be terminated." ER-60.

Furthermore, the mandate will cause "the State [to] incur significant compliance and monitoring costs should its agencies be required to adhere to the mandate." *Id.*

Proceedings Below

Numerous challenges to the Contractor Mandate were filed. In particular, six separate suits by States were filed. The States have prevailed in the district court on all six challenges.

State's Complaint

Arizona and its Attorney General (the "State") filed this action after EO 14042 was issued. ER-271. After Defendants supplied additional details about the Contractor Mandate, the State amended its complaint and joined in the FAC a federal employee as a co-Plaintiff.[10] ER-272. The FAC also added Procurement Act and APA claims, as well as other claims not at issue in this appeal.[11]

The State filed a Second Amended Complaint ("SAC") on November 19, 2021 (ER-277) to clarify how the vaccine claims were being asserted

[10] The federal employee's claims are not at issue in this appeal, nor is he a party in it.

[11] The FAC also included claims related to DHS's violations of immigration law, which are still being litigated below, as well as other vaccine-related claims. None of those claims are at issue in this appeal.

under the APA and also as non-statutory causes of action. The SAC also added as co-Plaintiffs two labor unions that represent first responders in the City of Phoenix whose members were subject to the Contractor Mandate.

The operative complaint—the Third Amended Complaint ("TAC")—was filed on December 20, 2021, and substituted the real name of the employee plaintiff for his prior pseudonym. ER-65-257. The TAC did not amend any of the claims at issue in this appeal.

Motions Below

The State filed a motion for preliminary injunction shortly after its FAC, and the district court heard oral argument on November 10. ER-276. Just minutes before the hearing, Defendants issued the Second OMB Determination. SER-9:18-SER-10:2; ER-17 ("At oral argument, Defendants' counsel notified the Court that, earlier that day, the SFWTF had issued revised contractor guidance and Acting OMB Director Young had issued a revised determination.").

Defendants apparently issued the Second OMB Notice in an attempt to moot major portions of the Plaintiffs' claims. SER-11:4-5; SER-12:5-6 ("[I]t … will moot Counts 2 and Counts 3 of this case, subject,

perhaps, to repleading.... [I]t's going to moot the Section 1707 issue."). The district court then denied the Plaintiffs' preliminary injunction motion without prejudice, subject to re-pleading to address the Second OMB Determination and to clarify the causes of action being asserted.

Plaintiffs then filed a renewed preliminary injunction motion with their SAC. ER-277.

District Court's Decision And Injunction

The district court granted the State's request for a preliminary injunction in part. The court found that the Contractor Mandate would cause the State direct financial and sovereign injury, which established Article III standing. ER-25-33. Additionally, the court determined that EO 14042 exceeded the President's authority under the Procurement Act, that the State was likely to suffer irreparable harm, and that the balance of equities and public interest supported a grant of injunctive relief against the mandate. ER-59-62. The court therefore announced that it would "issue an injunction limited to the geographic boundaries of the State of Arizona." ER-63.

The district court subsequently entered final judgment and permanent injunction against "[a]ll Defendants except the City of Phoenix and President Joseph Biden." ER-4-8.

This Appeal And Related Cases

Defendants initiated this appeal 57 days later. ER-258-260.

Several other federal courts have now considered parallel challenges by other States. The Sixth and Eleventh Circuits and five other district courts had all come to the same conclusion: that States have standing to challenge the contractor vaccine mandate and that the mandate is unlawful. *See Kentucky*, 23 F.4th at 594-610; *Georgia v. Biden*, 46 F.4th 1283 (11th Cir. 2022); *Florida,* 576 F. Supp. 3d 1017, 1027-38 (M.D. Fla. 2021); *Missouri v. Biden*, 576 F. Supp. 3d 622, 629-33 (E.D. Mo. 2021); *Louisiana v. Biden*, 575 F. Supp. 3d 680, 687-93 (W.D. La. 2021).

Federal Defendants have appealed in all of these cases, and sought stays pending appeal in the Sixth and Eleventh Circuits. Both requests were denied. *Georgia v. Biden*, No. 21-14269 (11th Cir. Dec. 17, 2021); *Kentucky*, 23 F.4th at 610, 611.

SUMMARY OF THE ARGUMENT

The merits questions here can be readily resolved under the major questions doctrine alone. The question of whether the Procurement Act authorizes the Contractor Mandate—the first ever use of the Procurement Act to regulate public health, which will impose an unprecedented mandate on over 30 million people—is plainly a "major" question. Indeed, it readily satisfies all of the independent triggers for making a question a "major" one: it (1) involves "a matter of great 'political significance,'" (2) "seeks to regulate 'a significant portion of the American economy," and (3) "'intrud[es] into an area that is the particular domain of state law,'" *i.e.*, compulsory vaccination mandates. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (citations omitted) (collecting cases). Any *one* of these factors would have sufficed. Collectively, they compel a conclusion that the question presented here is governed by the major questions doctrine.

Defendants' attempts to invent exceptions to the major questions doctrine are uniformly unavailing. (1) That authority was delegated to the President, rather than an agency, provides no exemption. The doctrine's central premise is that it is implausible that Congress would

have conveyed sweeping new authority in the absence of clear statutory language, rather than being fixated on who that authority was being delegated to. Notably, there was zero doubt that President Biden personally ordered the CDC eviction moratorium in *Alabama Realtors*, but that did not preclude the doctrine from applying. (2) Defendants' contention (at 31) that the Contractor Mandate "does not exercise 'regulatory authority' at all" is squarely contradicted by their own case: when a Procurement Act order "operates on government procurement across the board … *the order is regulatory*." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 363 (D.C. Cir. 2003) (emphasis added). (3) Defendants' reliance (at 37) on "the President's inherent power under Article II" is unavailing since the Procurement Act actually is an attempted exercise of authority delegated *by Congress* under the Procurement Act. (4) The major questions doctrine is not limited to "transformational expansions" in regulatory authority. But even if it were, the Contractor Mandate is just that: the Procurement Act has *never* previously been employed to impose a health-based mandate in its 73-year history.

Because the major questions doctrine applies, the Contractor Mandate fails unless the Procurement Act supplies "'*clear* congressional authorization." *West Virginia*, 142 S. Ct. at 2609 (citation omitted) (emphasis added). No such clear language exists here, particularly as the more-explicit language of the OSH Act in the *NFIB* case was still insufficient. *NFIB*, 142 S .Ct. at 665.

Even if the major questions doctrine did not apply, the Contractor Mandate would still be unlawful. Notably, the Sixth Circuit has correctly held that the Procurement Act is limited to granting authority "to implement systems making *the government's* entry into contracts less duplicative and inefficient" but does not provide authority to regulate federal contractors to "enhance *their* personal productivity." *Kentucky*, 23 F.4th at 605-06. But even if the Procurement Act did provide such authority, the Contractor Mandate lacks the requisite "close nexus" to "likely savings to the Government." *Khan*, 618 F.2d at 792-93. In addition, the Contractor Mandate further violates the Policy Procurement Act, because *inter alia* substantial components were never published for public commenting.

The requirements for injunctive relief were also satisfied here. The State's sovereign injury alone established irreparable harm. But so too does the State's financial harms. Defendants do not challenge *any* of the district court's factual findings that such harms would occur as clearly erroneous. And given Defendants' sovereign immunity, such financial harms are irrecoverable, and hence constitute irreparable injury.

The district court properly held as much, citing *three square holdings of this Court* in three separate decisions. Defendants remarkably ignore *all* of them, even though they are binding authority that the district court necessarily made them aware of. Nor did the district court abused its discretion in balancing harms and the public interest here.

Finally, the scope of the district court's narrow injunction—limited solely to the State and its sovereign borders—was not an abuse of discretion. While this Court has previously narrowed *nationwide* injunctions to the borders of states in cases involving state plaintiffs, Defendants do not cite a single decision of this Court holding that an injunction limited to the borders of a plaintiff state was an abuse of discretion. There is no cause for this case to be the first.

Moreover, given the State's *sovereign* injury—*i.e.*, that the Contractor Mandate, in Defendants' own telling (at 45), "displace[s] States' police powers"—a more narrow injunction that leaves the Mandate in place within Arizona's borders would leave an entire category of the State's injuries unremedied. The district court did not abuse its discretion by restoring Arizona's sovereign power within its sovereign territory.

This Court should affirm the district court's judgment and injunction.

STANDARDS OF REVIEW

"A district court's decision to grant a permanent injunction involves factual, legal, and discretionary components. Therefore, [this Court] evaluate[s] a decision to grant such relief under several different standards of review." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). This Court "review[s] the district court's legal conclusions *de novo*." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). "Any factual findings supporting the decision to grant the injunction [are] reviewed for clear error." *Id.* And, the scope of an injunction is reviewed for abuse of discretion. *Walters*, 145 F.3d at 1047.

ARGUMENT

I. THE STATE' ARTICLE III STANDING IS UNCHALLENGED

The district court found that the State had standing on two independent grounds: sovereign and proprietary injury. ER-25-33. Neither is challenged here.

As to sovereign injury, the district court held that the Contractor Mandate infringes upon the State's "the power to create and enforce a legal code," and "clearly conflicts with Arizona's laws and governance policies." ER-32-33. The district court further held that the State had established sovereign injury because the Contractor Mandate directly "regulates the State" against its sovereign will. ER-32.

The district court separately held that the State had established proprietary injury, which it supported by finding seven specific instances of state agencies that had received federal demands to impose the contractor mandate, including the State's university system, which received $1.2 billion in federal contracts in 2021. ER-27-29. The loss of those federal funds constituted proprietary injury.ER-25-28.

Neither of these grounds of standing are challenged here. That matters not only because this Court has an independent obligation to

examine jurisdiction (which the district court properly held it possessed), but also because Defendants' arguments about irreparable harm and the scope of injunctive relief simply ignore the district court's now-unchallenged factual findings. *See infra* §§VI-VII.

II. THE CONTRACTOR MANDATE IS UNTENABLE UNDER THE MAJOR QUESTIONS DOCTRINE

The authority asserted by Defendants here is sweeping: *i.e.*, the power to impose *any* mandate on federal contractors and their employees as long as there is, in Defendants' words, a "reasonable nexus" to "economical and efficient" federal contracting. Opening Br.35 (quoting 40 U.S.C. §101). The swath of the economy affected by this power is vast: roughly *one-fifth* of the U.S. workforce. ER-32. And while the Contractor Mandate is the first health-based mandate directly imposing requirements on employees, Defendants' do not offer any meaningful limiting principle for this asserted authority.

The central issue here is thus whether the Procurement Act actually confers such sweeping authority upon Defendants. The answer to that question turns on a related straightforward question: is the issue of whether such authority exists under the Procurement Act a "major" question triggering the major questions doctrine?

It plainly is, as all of the Supreme Court's precedents make clear. Defendants thus "must point to 'clear congressional authorization' for the power [that Defendants] claim[]." *West Virginia*, 142 S. Ct. at 2609 (citation omitted). But such clear authorization is plainly lacking here.

The merits here thus can be readily resolved under the major questions doctrine alone.

A. This Case Presents A "Major Question" Under *Pre-West Virginia* Case Law

The Sixth Circuit has squarely held that the Procurement Act authority question here is a "major question," and the Eleventh Circuit appears to have as well. *Kentucky*, 23 F.4th at 606-08; *Georgia*, 46 F.4th at 1295-96.[12] This Court should join its sister circuits in holding as much.

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[12] The precedential status of Georgia is not perfectly clear. Judge Grant explicitly authored an "Opinion of the Court," rather than merely announcing that court's judgment. 46 F.4th at 1288. But Judge Edmundson notably "concur[red] in the result Judge Grant reach[ed]." *Id.* at 1308 (Edmundson, J., concurring). Judge Edmundson's concurrence, read in isolation, suggests that Judge Grant's opinion is a plurality-of-one opinion. Yet it was instead specifically styled as an "Opinion of the Court," and presumably is thus just that.

The distinction matters little here, however, since this Court would not be bound either way. But as persuasive authority it is just that—persuasive—as its reasoning is plainly correct.

Notably, the Supreme Court has already held explicitly that the authority to issue the OSHA workplace mandate was a major question because it "ordered 84 million Americans to either obtain a COVID-19 vaccine or undergo weekly medical testing at their own expense." *NFIB*, 142 S. Ct. at 665. That was so as it was "a significant encroachment into the lives—and health—of a vast number of employees," and thus constituted an "'exercise [of] powers of vast economic and political significance.'" *Id.* (quoting *Alabama Realtors*, 142 S. Ct. at 2489).

Whether Defendants possess authority to issue the Contractor Mandate is plainly a "major question" under this standard. True, it would "only" affect about 33 million workers[13] rather than about 84 million for the OSHA Mandate. But there is little reason to believe that 33 million workers would not also clear the "major" threshold. (Defendants certainly do not contend otherwise, or indeed meaningfully address the number of workers affected at all.)

[13] The total U.S. workforce is estimated at 164.7 million individuals, and the Contractor Mandate is estimated to affect "*at least* one-fifth of" it, although the "true proportion may be even larger." *Kentucky*, 23 F.4th at 606-07.

Indeed, what the Contractor Mandate "lacks" in numbers vis-à-vis the OSHA Mandate, it easily makes up with its intrusiveness: unlike the OSHA Mandate, there is no mask-and-test option. *Compare NFIB*, 142 S. Ct. at 662. Instead, the stark choice is to submit to mandatory vaccination or be fired. In addition, unlike OSHA's numerous prior instances of issuing regulations governing workplace adverse-health exposures, the Procurement Act has *never* been previously employed to regulate workplace health. Ever. It thus represents an "'unheralded' regulatory power over a significant portion of the American economy'" in a manner that goes far beyond what the OSHA Mandate did, since OSHA regulation of workplace exposures generally was hardly unprecedented. *West Virginia*, 142 S. Ct. at 2608 (quoting *Utility Air*, 573 U.S. at 324).

NFIB thus compels the conclusion that the Sixth Circuit reached: the lawfulness of the Contractor Mandate is a major question. But even if *NFIB* did not exist, the question presented here thus meets *all three* triggers that the Supreme Court's precedents have identified, *West Virginia*, 142 S. Ct. at 2620-21 (Gorsuch, J., concurring) (collecting cases) (cleaned up)—any *one* of which would be sufficient to trigger the major questions doctrine.

Political Significance. This case incontestably involves "a matter of great 'political significance.'" *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting *NFIB,* 142 S. Ct. at 665). The district court squarely held as much, ER-42, and Federal Defendants never actually deny the enormous political significance of the issues presented. Instead, they only offer (at 13-14, 30, 33-34) a number of reasons why the major questions doctrine does not apply notwithstanding its uncontested political significance, which fail for the reasons discussed below. *Infra* §II.E.

Economic Sweep. The Contractor Mandate similarly triggers the doctrine because "it seeks to regulate 'a significant portion of the American economy.'" *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting majority opinion, quoting in turn *Utility Air*, 573 U.S. at 324) (cleaned up).

The district court here found that the Contractor Mandate would affect "approximately one-fifth of the entire U.S. labor force." ER-32. Federal Defendants assert no error (let alone clear error) in that factia; finding. Nor do they dispute that one-fifth of the workforce constitutes a

"significant portion of the American economy"—or indeed even acknowledge the "significant portion" standard anywhere in their brief.

Intrusion Upon Traditional State Authority. Finally, the authority to issue the Contractor Mandate also qualifies as a major question because the mandate "'intrud[es] into an area that is the particular domain of state law,'" *i.e.*, vaccination mandates. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (quoting *Alabama Realtors*, 142 S. Ct. at 2489). The Supreme Court long ago made clear that this is a traditional *state* power: "it is settled that it is within the police power of *a state* to provide for compulsory vaccination." *Zucht*, 260 U.S. at 176 (emphasis added); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern."); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). In contrast, it is undisputed here that prior to 2021, the federal government has *never* attempted to mandate vaccination for U.S. civilians.

Unlike political significance and economic sweep, Federal Defendants actually do attempt to answer this trigger, albeit

unpersuasively. Defendants thus contend (at 41) that "federal contracts are not an area traditionally reserved to the States."

That argument "frames the issue at the wrong level of generality." *Kentucky*, 23 F.4th at 610. It further ignores the pertinent question here: does the challenged action actually "intrud[e] into an area that is the particular domain of state law"?—not what the source of the claimed authority to intrude is.

Compulsory vaccination policy is a traditional realm of *state* authority, which the Contractor Mandate manifestly intrudes upon: the "contractor mandate seeks to ... transfer[] *this traditional prerogative from the states* to the federal government." *Kentucky*, 23 F.4th at 609 (emphasis added).

This incursion upon traditional state authority is not immunized from the major questions doctrine simply because the intrusion originates from the exercise of federal contracting power. While the "States may have no power to dictate what and how much of something the federal government may buy … 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*, 23 F.4th at 610.

And the extent of the intrusion is underscored by the fact that the Contractor Mandate expressly purports to "supersede[] any contrary State or local law." ER-14. That is no anodyne contract provision, but rather an *explicit* displacement of State authority. If the Contractor Mandate does not intrude upon the State's authority, why did Defendants feel the need to add an express preemption provision?

Indeed, by Defendants' logic, it would not even present a major question if the federal government sought (1) to require that state governmental agencies contracting with the federal government—and no other contractors—pay a $100/hour minimum wage or (2) to deny *all* federal contracts to state government agencies where the state has not adopted minimum tax rates set by the federal government or adopt the federal government's preferred curriculum in primary schools. Under Defendants' reasoning here, the fact that such exercises of power are based in "federal contracts" would mean that *none* of these examples present a "major question." Opening Br.41. That cannot be the law.

Lack Of Limiting Principle. Finally, the "major" nature of the question presented is underscored by Defendants' inability to provide *any* limiting principle for the authority they have arrogated to themselves. They never explain, for example, why they could not "mandate that covered employees also wear masks in perpetuity" at "family gatherings, concerts, sporting events, and so on." *Kentucky*, 23 F.4th at 608. Nor have they ever answered the district court's examples here: *i.e.*, that the Contractor Mandate's rationale would similarly authorize the President to "require[e] all federal contractor employees to refrain from consuming soda or eating fast food." ER-41.

Without any limiting principle, the breadth of Defendants' asserted authority is laid bare: it is nothing less than plenary authority to regulate one-fifth of the U.S. workforce in *any* manner they see fit, including regulation of the private health decisions of all of those millions of workers through across-the-board mandates. If *that* does not give rise to a "major question," it is hard to understand what would.

B. *West Virginia v. EPA* Removes Any Conceivable Doubt That The Major Questions Doctrine Applies

Defendants' primary response to the major questions doctrine is as curious as it is palpable: denial. In briefing below, the federal government

denied the existence of the major questions doctrine, acknowledging it only as the "*so-called* 'major questions doctrine'" and placing it in scare quotes *100%* of the time it was mentioned. SER-17; *accord* SER-5 n.3. Both the drafting of the Contractor Mandate and the defense of it below were overwhelmingly premised on no such doctrine actually existing.

Even after *West Virginia*, Defendants' contempt towards the doctrine remains obvious: Defendants literally only use the phrase "major questions" *once* (at 36)—and tellingly place it in scare quotes. Indeed, through their continued use of scare quotes, Defendants effectively proceed as if the *dissenters* in *West Virginia* wrote the opinion for the Court. *See West Virginia*, 142 S. Ct. at 2633-41 (placing "major questions doctrine" in square quotes four times and accusing majority of "announc[ing] the arrival of the 'major questions doctrine'"). Nor is Defendants' approach unique to this case: Defendants' briefs in the Fifth, Sixth, Eighth, and Eleventh Circuit Contractor Mandate appeals all refer to the major questions doctrine overwhelmingly in scare quotes, as did Federal Defendants' brief in *NFIB*. *See* Response of Federal Respondents, *NFIB*, *available at* https://bit.ly/3MDFpi6.

Such persistent denial suggests that Defendants remain a few grief-processing steps away from acceptance that the major questions doctrine actually exists and is a meaningful limitation on their authority. But it does, and *West Virginia* now renders the federal government's central defense below—that no such doctrine exists at all—beyond the bounds of fair argument.

C. Defendants' Scattershot Attempts At Distinguishing The Major Questions Doctrine Are Untenable

Rather than addressing most of the factors that the Supreme Court has actually explicated for what makes a question "major," Defendants advance a smattering of perfunctory contentions that the major questions doctrine does not apply here. None of these four purported exceptions is tenable.

First, Defendants contend that the doctrine is inapplicable because the "Procurement Act vests authority in the President who … is directly accountable to the people." Opening Br.14; *accord* Opening Br.36. But there was no doubt whatsoever that the President had ordered the CDC to promulgate the eviction moratorium—indeed he unequivocally commanded CDC to do so while simultaneously acknowledging its likely

unconstitutionality.[14] But even though responsibility (and accountability) for the moratorium incontestably rested with the President, the Supreme Court had no difficulty in applying the major questions doctrine. *Alabama Realtors*, 141 S. Ct. at 2489. The same result should obtain here.

This "Presidential accountability" premise further fails because the core of the major questions doctrine is not political accountability, but rather "separation of powers principles and a practical understanding of legislative intent." *West Virginia*, 142 S. Ct. at 2609. The doctrine thus rests in large part on "common sense as to the manner in which Congress would have been likely to delegate" sweeping authority—*not* the recipient of the delegation. *Id.* (cleaned up). Indeed, *West Virginia*—now the seminal "major questions" case—notably does not refer to "accountability" *a single time* in the majority opinion. *Id.* at 2599-2616. Ultimately, "regardless of how likely the public is to hold the Executive Branch politically accountable," executive action "must always be

[14] President Biden specifically acknowledged that "[t]he bulk of the constitutional scholarship says that [the action was] not likely to pass constitutional muster" while commanding CDC to enact it anyway. Joseph Biden, Remarks at the White House (August 3, 2021), https://bit.ly/3CTW50f.

grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

To be sure, Justice Gorsuch's concurrence in *West Virginia* does identify political accountability as an additional factor supporting the major questions doctrine. *See West Virginia,* 142 S. Ct. at 2617-18 (Gorsuch, J., concurring). But that concurrence-only discussion of the lack of political accountability of agencies hardly makes it a prerequisite to applying the major questions doctrine.

Equally unavailing is Defendants' reliance (at 36) on *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010), which is a case dealing with the President's *constitutional removal powers*, not any *statutory* delegation of authority from Congress. The State does not dispute President Biden's power to fire the OMB Director and members of the FAR Council who promulgated the Contractor Mandate. But that hardly sheds light on whether they had authority to promulgate it at his direction.

In addition, although the Procurement Act might delegate authority to the President, he in turn delegated it to others here, EO 14042, §§2, 3—thus destroying the premise of their political

accountability argument by vesting authority over the Contractor Mandate with non-elected officials.

Second, Defendants contend (at 31) that the major questions doctrine does not apply because the Contractor Mandate "does not exercise 'regulatory authority' at all." But Federal Defendants cite no authority holding that the doctrine applies only when a statute governs "regulatory" authority. Instead, it governs the relevant question here: whether Congress delegated *authority* to the Executive Branch or not. Nothing in *any* of the Court's major-questions cases even hints at a limitation to "regulatory" actions, and Defendants certainly cite nothing to that effect.

In any event, Defendants' "not regulatory" premise cannot withstand scrutiny. As a matter of linguistics, it is positively Orwellian: the proposition that compelling submission of 30+ million Americans to an irreversible medical procedure is "not regulatory *at all*" is Ministry-of-Truth-level contortion of the English language that would require double-plus-good levels of doublethink to accept.

Defendants' "not regulatory" contention fares little better as a legal matter. Ironically, one of Defendants' principal cases forecloses this very

argument: when a Procurement Act order "operates on government procurement across the board, rather than being tailored to any particular setting, *the order is regulatory* under prevailing principles." *Chao*, 325 F.3d at 363 (emphasis added) (cited by Defendants at 1, 19, 20, 26). It is indisputable that the Contractor Mandate "operates … across the board" on virtually all federal contractors.

It is also difficult to understand how a mere contract provision without putative regulatory effect "at all" could include an *express preemption provision*. ER-14 and ER-166. That is no garden-variety contract provision, but rather a classic regulatory one. Moreover, Federal Defendants' aims with the Contractor Mandate are plainly regulatory in nature, particularly as their assertions of proprietary efficiency concerns are "simply a pretext to increase vaccination." *Kentucky*, 23 F.4th at 609 n.15.

Similarly, Defendants' attempted distinction (at 33) of *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) based on the broad preemption of federal labor law makes no sense. Whether an order is "regulatory" or not has nothing to do with what that order preempts (or doesn't). And *Reich* makes clear that an order is "regulatory in nature"

where it "seeks to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers." *Id.* at 1137-39. That is as apt of a description of the Contractor Mandate as one will find.

More generally, accepting Defendants' contention (at 31) that the Contractor Mandate "does not regulate employers generally (or even federal contractors generally[])" would require this Court to "to exhibit a naiveté from which ordinary citizens are free.'" *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). That Defendants seriously contend to this Court that the Contractor Mandate does not "regulate … even federal contractors generally" is emblematic of just how divorced from common sense and the manifest realities of the Contractor Mandate their arguments are.

Third, Defendants contend (at 37) that the major questions doctrine does not apply "in light of the President's inherent power under Article II." This argument is hard to follow. The Contractor Mandate is, on its face, an exercise of authority *under the Procurement Act* delegated by Congress—not any inherent constitutional executive authority of the President. EO 14042 (citing the Procurement Act and 3 U.S.C. §301 as

only specific grants of authority to justify the Contractor Mandate). The hypothetical powers that the President *could* have invoked in issuing the Contractor Mandate do nothing to bolster the only authority he (and all other Defendants) actually invoked. *Cf. DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1907 (2020) (Defense of putative exercises of delegated powers "is limited to 'the grounds that the agency invoked when it took the action.'") (citation omitted).

If the President had relied on "inherent power under Article II," that authority would be of *extremely* doubtful constitutionality. Such inherent executive power is where executive power is at the "zone of twilight" and its "lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Indeed, if the President truly possessed such "inherent power," that would mean that he could impose the Contractor Mandate even in the teeth of an express statute *prohibiting* the Executive Branch from imposing any vaccine mandates under any circumstances. That is difficult to believe, but thankfully not even presented here. Instead, Defendants' strange reference to "inherent power under Article II" is at best a *non-sequitur*.

Fourth, Defendants contend that the major questions doctrine only applies "when agency action threatens a 'transformative expansion in ... regulatory authority.'" Opening Br.30 (cleaned up) (quoting *West Virginia*, 142 S. Ct. at 2610). That will often be *sufficient* to trigger the doctrine, but it is hardly necessary. The Supreme Court has applied the doctrine in *Alabama Realtors* and *NFIB*, for example, without even mentioning any such putative "transformational expansion" requirement. *Alabama Realtors*, 142 S. Ct. at 2489; *NFIB*, 142 S. Ct. at 664-65. In particular, that OSHA issued a workplace safety rule was hardly a "transformative expansion" of its authority, but it readily qualified as a "major question" nonetheless since that mandate (as with the mandate here) was "no 'everyday exercise of federal power.'" *NFIB*, 142 S. Ct. at 664-65 (emphasis added).

In any event, the Contractor Mandate *does* constitute a "transformative expansion in regulatory authority." The federal government has *never* previously attempted to regulate the health decisions of U.S. workers under the Procurement Act. Ever. As the Sixth Circuit aptly explained, the Contractor Mandate "*transformed* [the Procurement Act] into a novel font of federal authority to regulate the

private health decisions of millions of Americans." *Kentucky*, 23 F.4th at 589 (emphasis added). And that unprecedented exercise of Procurement Act authority was premised on an unprecedented rationale: *i.e.*, "'reducing absenteeism," which is a putative regulatory basis under the Act that Defendants have *never* previously employed "from 1949 to present." *Id.* at 608.

Thus, even if a "transformative expansion" were required to make a question a "major one," the Contractor Mandate does just that.

D. The Procurement Act Does Not Supply The Requisite "Clear Congressional Authorization"

Because the major questions doctrine applies here, the relevant question thus becomes whether the Procurement Act supplies the requisite "'*clear* congressional authorization' for the power [the government] claims." *West Virginia*, 142 S. Ct. at 2609 (citation omitted) (emphasis added).[15]

The Procurement Act has no such clear statutory authorizing language. It does not address imposition of *any* requirements on federal

[15] Defendants' attempt (at 35) to substitute "reasonable nexus" for the "clear congressional authorization" that the major questions doctrine demands flatly violates Supreme Court's holding in *West Virginia*.

contractor employees directly, let alone ones regulating their personal health decisions. And it certainly does not even hint that Congress intended to disrupt the prevailing consensus that regulation of compulsory vaccination is the province of the States rather than the federal government.

Indeed, as the Sixth Circuit held (as discussed in more detail below, *infra* §III.A), the best reading of the Procurement Act's plain text is that it grants authority only for the President "to implement systems making *the government's* entry into contracts less duplicative and inefficient," but does not provide authority to regulate federal contractors to "enhance *their* personal productivity." *Kentucky*, 23 F.4th at 605-06. The Eleventh Circuit[16] held as much as well, explaining that "[n]othing in the Act contemplates that every executive agency can base every procurement decision on the health of the contracting workforce." *Georgia*, 46 F.4th at 1295. "Instead, the statutory scheme establishes a

[16] The precedential status of *Georgia* is unclear. *Supra* at 31 n.12. The remainder of this brief assumes that the opinion that the Eleventh Circuit published as the "Opinion of the Court" is, in fact, the opinion of that court. 46 F.4th at 1299.

framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want." *Id.*

This conclusion is supported by the Supreme Court's decision in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). There the Court "suggested that the President's authority [under the Procurement Act] should be based on a 'specific reference' within the Act." *Georgia*, 46 F.4th at 1294 (quoting *Chrysler Corp.*, 441 U.S. at 304 n.34).

A quick comparison to *NFIB* further demonstrates the lack of clear language that could satisfy the major questions doctrine standard here. In *NFIB*, the OSH Act at least contained language specifically authorizing regulation for "exposure to … agents determined to be … physically harmful." 29 U.S.C. §655(c)(1). But even that language was insufficient to "plainly authorize[] the [OSHA] mandate." *NFIB*, 142 S. Ct. at 665.

In contrast, the Procurement Act does not discuss worker health *whatsoever*, let alone exposures to agents at work that might cause them harm. Because the OSH Act did not provide the requisite "clear congressional authorization," the Procurement Act necessarily does not *a fortiori*.

III. THE CONTRACTOR MANDATE EXCEEDS DEFENDANTS' AUTHORITY UNDER THE PROCUREMENT ACT

Even if the major questions doctrine did not apply here, the Contractor Mandate still exceeds Defendants' powers under the Procurement Act.

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. For this reason, the Sixth and Eleventh Circuits have held the Contractor Mandate invalid. *Kentucky*, 23 F.4th at 605; *Georgia*, 46 F.4th at 1295.

But even the courts that have accepted that broader authority to regulate contractors themselves have insisted upon a "close nexus" to "likely savings to the Government." *Kahn*, 618 F.2d at 792-93. No such "close nexus" exists here.

A. The Procurement Act Does Not Grant Authority To Regulate Contractors To Make Them More Efficient

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).

These provisions do not authorize the Contractor Mandate. 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 how to communicate with contractors and keep records to share best contracting practices and avoid duplication.

But the Act's 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*, 23 F.4th at 604 (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 against one

another in purchasing, that is part of a "system" for the "Federal Government" to "[p]rocur[e]" services. 40 U.S.C. §101. But that is hardly textual authorization to impose requirements on the *internal operations* of federal contractors.

The Procurement Act's history supports the State's position here. 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*, 23 F.4th at 606. "[M]any agencies entered [into] duplicative contracts supplying the same items and creating a massive post-war surplus." *Id.* That was the problem that motivated Congress to enact the Procurement Act, not any fear that "personnel executing duties under nonpersonal-services contracts were *themselves* performing in an uneconomical and inefficient manner." *Id.*; *Utility Air*, 573 U.S. at 321 (statutory interpretation must take into account "the broader context of the statute") (citation omitted).

Defendants attempt (at 22-23) to rely upon past practice is unavailing. Indeed, 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) (citation omitted). No President has ever

tried to impose a public health requirement under the Procurement Act before. Nor do Defendants provide any indication that any previous President even *thought* he had such power. Indeed, President Biden himself recognized that mandatory vaccination was "not the role of the federal government" as recently as July 23, 2021. ER-88

For all of these reasons, the Sixth and Eleventh Circuits have held that the President lacks the power to regulate contractors to enhance their economy and efficiency. *Kentucky*, 23 F.4th at 605; *Georgia*, 46 F.4th at 1295. Those courts correctly construed the Procurement Act. This Court should join them if it does not resolve this case under the major questions doctrine alone.

B. The Contractor Mandate Lacks A "Close Nexus" To Governmental Savings

Even if this Court concludes that Defendants possess authority to regulate the efficiency of contractors, it should still affirm. Even the D.C. Circuit, which has recognized such authority, nonetheless demands a "close nexus" to "likely savings to the Government." *Khan*, 618 F.2d at 792-93. No such "close nexus" is present here.

As the district court held, "[w]hile it is of course true that the pandemic will have *some* impact on federal procurement, that alone does

not render the Contractor Mandate a *procurement* policy or directive. ER-43. 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* "close nexus" standard.

If the Procurement Act allows the President to manage internal contractor operations, such authority is limited to more traditional understandings of business-related decision-making—"modest, 'work-anchored' measure[s] with … inbuilt limiting principle[s]." *Kentucky*, 23 F.4th at 608 (citation omitted). Even the D.C. Circuit, whose view of Procurement Act authority is broadest of all circuits, 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." *Khan*, 618 F.2d at 792-93.

The Contractor Mandate is no "modest, 'work-anchored' measure," *Kentucky, 23* F.4th at 608 (citation omitted), but rather a sweeping public health regulation affecting over 30 million workers—without any "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 the Contractor Mandate would do that—and it would not—that is a theory with no limiting principle. Indeed, Defendants have *never* offered any persuasive answer to the State's examples that would also be authorized under their interpretation. *See supra* at 55-56. As the district court rightly reasoned, the President "could, on Defendants' reading, issue an executive order requiring all federal contractor employees to refrain from consuming soda or eating fast food. But in reality, the President's authority under the Act is not so broad." ER-41.

In truth, the Contractor Mandate has little to do with economy or efficiency because that was never its true goal. It is instead a pretextual "work-around" meant to mandate vaccines for as many Americans as the Executive could possibly lay its regulatory hands upon. *BST Holdings, LLC v. OSHA,* 17 F.4th 604, 612 (5th Cir. 2021). The Administration's "own documents confirm" as much: it is "naked pretext to invade traditional state prerogatives." *Kentucky*, 23 F.4th at 609 & n.15.

President Biden was explicit on this point: his "new plan" would "reduce the spread of COVID-19." ER-11 Defendants have repeatedly clarified that what they care about is not contractor efficiency but

increased vaccination rates. ER-179 (emphasizing the "once in a generation pandemic" which threatens the "health and safety of the American people," and reaches "all Americans."); ER-143 ("One of the main goals of this science-based plan is to get more people vaccinated.").

Finally, even if the President *could* impose vaccine mandates on contractors to enhance their efficiency, this one would not. Those federal contractors have a powerful profit incentive to impose vaccine mandates *if* such mandates would actually enhance their efficiency. If that were the case, it would necessarily be profit-maximizing for the companies to adopt such mandates on their own. And yet they overwhelmingly haven't. ER-101 ("Before Defendants announced their planned mandates, only 16% of a sample of 400 large employers had imposed COVID-19 vaccine mandates. After Defendants announced their mandate plans, an additional 9% of the employers imposed mandates and 13% developed future plans to impose mandates. Thus, as of October 1, 2021, only a 25% minority of large employers imposed vaccine mandates, and 60% had no plans to impose a mandate.") The Contractor Mandate is thus necessarily premised on Defendants' view that they know better than private companies what would be profit-maximizing for them, but the companies

are too stupid to recognize that themselves. That governmental paternalism—which borders on centralized planning—lacks any pretense of a "close nexus" to efficiency.

The government has done nothing to overcome the facial implausibility of its premise. The EO simply *asserts* that the mandate will promote economy and efficiency. EO 14042 §1. And the first OMB determination offered only a *single sentence* on this front. 86 Fed. Reg. at 53,692. Such "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 Second OMB Determination is longer, but little better. For instance, the revised OMB "finding" is directed at guidance that is *subject to change*, and contractors must comply with all future amendments. ER-143 ("the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force"). And the Task Force's FAQs for federal contractors have been amended at least 17 times. *Supra* at 16 n.7.

The FAQs include some of the most intrusive and problematic aspects of the guidance, like the requirement that all employees—even those who are not working on any federal contracts—must be vaccinated unless the contractor can "affirmatively determine" the employee will never come into contact with a covered employee. ER-161. OMB cannot possibly know whether it will be economical and efficient for contractors to follow guidelines that did not exist when it issued its second determination, and are constantly changing in any event.

Moreover, in postulating that the Contractor Mandate will enhance efficiency through reduced worker absenteeism, Defendants virtually ignore that employee terminations and departures will inevitably follow from the contractor mandate, in a historically tight labor market. ER-35-38. OMB denied knowledge of any "systematic evidence" that workers might quit rather than vaccinate, ER-178, 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 the Contractor Mandate lacks).[17]

Defendants repeatedly point to private employer mandates, ER-178, Opening Br.1, 6-9, 12-13, 24-25, as if the choice of a few private employers could justify the President's one-size-fits-all mandate for countless businesses and their 30-plus million employees. But many of those private mandates were imposed to comply with federal mandates, and they have been dropped as courts have invalidated the mandates or they proved unworkable.[18] And many of the remaining private mandates are not nearly as extreme as the Contractor Mandate—most, for example, include a testing alternative or apply only to those that actually go into the office.[19]

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[17] *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://cnb.cx/3MUcc2d.

[18] *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://www.wsj.com/articles/ge-union-pacific-suspend-covid-19-vaccination-mandates-after-injunction-on-biden-order-11639089010?mod=business_lead_pos12; Elizabeth Chuck, *Growing number of companies suspend vaccine mandates, including hospitals and Amtrak*, NBCNews (Dec. 16, 2021), https://www.nbcnews.com/news/us-news/companies-suspend-vaccine-mandates-hospitals-amtrak-rcna8903.

[19] *See* Jessica Mathews, *All the major companies requiring vaccines for workers*, Fortune (Aug. 30, 2021),

The Contractor Mandate will thus result in federal contractors that have fewer and less-experienced employees to compete for federal contracts. That is hardly likely to "restrain [federal] procurement costs." *Kahn*, 618 F.2d at 793. There can thus be no "close nexus" to economy and efficiency. Ultimately, the Contractor Mandate is what the government has told us it was all along: A public health measure designed to achieve *public health* goals—not economy and efficiency in contracting.

C. The State's Interpretation Is Further Supported By Constitutional Avoidance And Federalism Canons

Defendants' lack of authority to issue the Contractor Mandate is further confirmed by two important canons: the constitutional avoidance and federalism canons.

1. Constitutional Avoidance

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

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https://fortune.com/2021/08/23/companies-requiring-vaccines-workers-vaccination-mandatory/ .

(2018) (citation omitted). The government's interpretation of the Procurement Act would invite grave doubts as to the Act's constitutionality, 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 (at 24) there must be *some* limiting principle to its interpretation, but it never actually identifies one. As the Sixth Circuit correctly recognized, "If the government's interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more 'economical and efficient'—then that *certainly* would present non-delegation concerns." *Kentucky*, 23 F.4th at 606 n.14 (emphasis in original).

2. Federalism Canon

When the Executive invokes putative authority that would "significantly alter the balance between federal and state power," Congress must authorize that change with "exceedingly clear language." *Alabama Realtors*, 141 S. Ct. at 2489 (citation omitted). 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 clearly authorized by Congress. *Bond v. United States*, 572 U.S. 844, 859-60 (2014).

Defendants' expansive construction 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*, 260 U.S at 176; *accord supra* at 35. The Contractor Mandate usurps that traditional authority by imposing a public health policy on millions of people and numerous state entities. And Defendants' suggestion that the Contractor Mandate raises no federalism concerns fails for the reasons explained above. *Supra* at 35-37.

IV. ALTERNATIVELY, THE CONTRACTOR MANDATE VIOLATES THE PROCUREMENT POLICY ACT

Even if the Contractor Mandate comported with the Procurement Act, this Court should still affirm the judgment below because the mandate violates the Office of Federal Procurement Policy Act, 41 U.S.C. §1707(a) (the "Procurement Policy Act"),

The Procurement Policy Act 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 SFWTF Guidance, the SFWTF FAQs, the FAR deviation clause, and the OMB determination for notice-and-comment procedures before the mandate went into effect. They did not.

Defendants' excuses for non-compliance fall flat. 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 imposing an intrusive requirement 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 SFWTF Guidance, the SFWTF FAQs, 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 Contractor Mandate.

The Second OMB Determination is slightly different, but it, too, fails. OMB did publish its revised determination for public comment, but only *after* the Contractor Mandate already went into effect, violating §1707(a)(1). Moreover, the revised determination took effect immediately, rather than *after* notice-and-comment, further violating the statute. ER-179-81.

Neither of OMB's excuses can withstand scrutiny. OMB argued that when an agency is exercising power delegated by the President, the action is not "subject to judicial review under the APA," ER-180. But even if true, §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." But Defendants have admitted "no certain endpoint has yet been identified." *Georgia v. Biden*, No. 21-CV-00163, ECF 63 at 22 (S.D. Ga. Nov. 26, 2021). Plus, there are no "urgent and compelling circumstances" here. While OMB relied on health concerns, ER-179, the Contractor Mandate is putatively based solely on promoting economy and efficiency in federal contracting. There was no urgent need for such speculative efficiency gains.[20]

V. A REMAND TO ADDRESS UNRESOLVED CLAIMS IS WARRANTED IF THIS COURT DISAGREES WITH THE DISTRICT COURT

The State also challenged the Contractor Mandate as arbitrary and capricious under the APA. The district court, however, did not address these claims because it held the mandate violated the Procurement Act.

[20] 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.

ER-120 n.7 ("[t]he Court will not address the substance of Plaintiffs' APA claims").

Therefore, if this Court believes that the Contractor Mandate does not violate either the Procurement Act or Procurement Policy Act, it should remand to the district court to resolve the APA claims in the first instance. *See, e.g.*, *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1022 (9th Cir. 2020) (because claim was not addressed below, "we remand this claim to the district court for it to determine in the first instance").

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE STATE SATISFIED THE REQUIREMENTS FOR INJUNCTIVE RELIEF

The remaining requirements for injunctive relief were also satisfied here. Indeed, Defendants' contrary arguments not only flout the applicable standards of review, but also squarely violate unacknowledged precedents of this Court that go inexcusably ignored here.

A. The State Established Irreparable Harm

The State easily established irreparable harm here for two reasons.

1. Consider first sovereign harm. Defendants never dispute that sovereign harm would necessarily be irreparable injury: indeed, it is hard to see how money damages (not even available here in any event), could

possibly remedy such sovereign injuries. The only question then is whether such *sovereign* harms have occurred.

They have. As an initial matter, even *Defendants' own description* makes plain the sovereign injury here. In Defendants' own telling (at 45), the Contractor Mandate has "displace[d] States' police powers"—about an apt of a description of sovereign injury as one will ever find. The State here has sovereign police power, and Defendants concede they have displaced it. If that is not sovereign injury, nothing is. Moreover, "because the Contractor Mandate conflicts with Arizona law, complying with the mandate would require the State to violate its own laws" and thus cause sovereign injury to the State. ER-60. And the sovereign injury is also made clearer by the fact that Defendants felt compelled to include an express preemption provision. 86 Fed. Reg. at 50,986.

Defendants' only response to the State's injury is to regurgitate its merits argument: *i.e.*, that because the Contractor Mandate putatively authorized by the Procurement Act, it does not infringe upon the State's sovereignty. *See* Opening Br.45 (contending no sovereign injury exists because President has "lawfully" exercised powers under Procurement Act). But this Court would only reach the irreparable-harm question if

the mandate were unlawful—which it is. *Supra* §§II-V. Moreover, that contention wrongly conflates the injury inquiry with merits issues.

Defendants' recycling of their merits contentions as an irreparable-harm argument adds nothing to their arguments beyond padding the word count. If the Contractor Mandate is unlawful, Defendants effectively concede it inflicts sovereign harm.

2. Consider next the State's proprietary harms. Although Defendants have various pejorative characterizations for those harms (at 43-45), they never actually dispute that the State's harm exist—let alone demonstrate that the district court's finding that such harms would occur was *clearly erroneous*. E.R.59-60. Indeed, Defendants will not even mouth as much, conceding the issue under this Court's standard of review. (Notably, Defendants' standards of review section (at 15), tellingly does not even include the clearly erroneous standard for review of factual findings, underscoring that no such challenges was even contemplated here.)

Here the district court made specific factual findings that the State would suffer irreparable harm to its proprietary interests in three ways: (1) "Plaintiffs face the loss of significant federal contracts and funds";

(2) "some employees would resign or be terminated, harming the State's operations through the loss of institutional knowledge and human capital, and requiring the State to incur significant recruitment, on-boarding, and training costs"; and (3) "the State will incur significant compliance and monitoring costs." E.R.59-60.

Defendants' arguments that such acknowledged monetary harms do not constitute irreparable harm flirt with the boundaries of fair argument by ignoring numerous controlling precedents of this Court—of which Defendants could not possibly have been unaware.

Because the State indisputably will suffer financial harms from the Contractor Mandate, *this Court*'s precedents mandate a holding that such *irrecoverable* financial harms are *irreparable* injury. Indeed, the district court cited *three* controlling precedents of this Court holding as much: (1) *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020), (2) *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) and (3) *San Francisco v. USCIS*, 981 F.3d 742, 762 (9th Cir. 2020). ER-59.

Defendants, however, do not cite a *single* one of these *three* controlling holdings of *this Court*. Opening Br.43-45. Instead, they rely

exclusively (at 43-45) on inapposite precedents of *other circuits* to contend that the State's conceded irrecoverable financial harms somehow don't count as irreparable injury.

That approach merits this Court's unequivocal rejection. While Defendants are of course free to ask this Court to reverse itself en banc, they were duty bound not to advance arguments that contravene controlling precedents of this Court—of which they could not possibly have been unaware given the district court's explicit citation of *all three of them*. E.R.59. (Any attempt to address them in reply would be waived.)

Respectfully, where the district court cites *three* controlling precedents of this Court, Defendants are without reasonable basis to ignore all of them entirely in favor of exclusive citation to the precedents of *other* courts. If Defendants believe *all* of those precedents were wrong, they could have sought initial hearing en banc. They didn't, and instead elected to proceed as if not one of those three controlling precedents existed. They do.

In any event, even if Defendants' out-of-circuit authority controlled here rather than this Court's *thrice*-reiterated standard, Defendants' arguments would still fail. While Defendants rely (at 43-45) on

repeatedly castigating the State's harms as "speculative," the district court made an unchallenged factual finding that the State was in fact "likely to suffer irreparable harm." E.R.-59-60. "Likely" is not "speculative." Absent some argument that this finding was clearly erroneous—which Defendants unequivocally have not bothered to make—Defendants' incessant suggestions (at 43-44) that the harms were "speculative" are nothing more than sour grapes.

B. The District Court Did Not Abuse Its Discretion In Balancing The Harms And Evaluating The Public Interest

Defendants also recycle (at 46) another repeatedly-rejected argument of theirs: *i.e.*, that the COVID-19 pandemic means that they win all equitable balancing, so much so that district courts necessarily abuse their discretion whenever they balance the equities differently than the federal Executive.

Defendants have lost this argument so many times that their unwillingness to accept defeat sounds more in comedy than in law. In essence, Defendants' arguments are nothing more than a repacking of the argument that CDC pressed in *Alabama Realtors*—and lost. 141 S.

Ct. at 2490 ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.").

These arguments are also pf the same ilk that the federal government made to the Fifth Circuit in the OSHA vaccine mandate case, and lost. *BST Holdings*, 17 F.4th at 618. And then lost again in the Supreme Court. *NFIB*, 142 S. Ct. at 666 ("The equities do not justify withholding interim relief."). The instant arguments are also indistinguishable from those made unsuccessfully concerning the emergency-styled contractor vaccine mandate in the Sixth Circuit. *Kentucky*, 23 F.4th at 612 ("[T]he public's true interest lies in the correct application of the law.").

The district court did not abuse its discretion in balancing the equities in the same manner as *Alabama Realtors*, *BST Holdings*, *NFIB*, and *Kentucky*. And that is particularly so here where the Contractor Mandate was only grounded in putative concerns about contractor efficiency rather than any public-health rationale (which would incontestably be insufficient under the Procurement Act). Such putative losses in contractor efficiency do not establish the abuse of discretion that Defendants contend.

C. Defendants' Litigation Strategy Undercuts Their Equitable Arguments

Defendants' litigation strategy also belies their instant contention that the district court abused its discretion in balancing the equities for three reasons.

First, Defendants took 57 days to file their notice of appeal here. If the district court's injunction were actually causing the crisis that Defendants imply, they would have appealed faster.

Second, Defendants' refusal to seek a stay from the Supreme Court underscores Defendants' lack of conviction in their equitable (and merits) arguments. If Defendants truly believed that the various district court injunctions were causing grievous harms to the public interest, they would have sought a stay from the Supreme Court of either the nationwide injunction entered by the Southern District of Georgia, or the *Kentucky* injunction after the Sixth Circuit refused to stay it. That Defendants refused to do so should tell this Court all that it needs to know.

Third, Defendants did not seek a stay from this Court even after the Eleventh Circuit narrowed the *Georgia* injunction to exclude Arizona (and elsewhere). *Georgia*, 46 F.4th at 1308. If Defendants truly believed

that the district court's injunction would cause calamitous harms, they would have sought a stay from this Court. They didn't.

VII. THE DISTRICT COURT'S LIMITED INJUNCTION IS NOT AN ABUSE OF DISCRETION

Finally, the scope of the district court's injunction was not an abuse of discretion. As an initial matter, Defendants' scope arguments (at 47-49) do not cite a single precedent of this Court at all, let alone one holding that an injunction limited to the geographic boundaries of a state plaintiff is an abuse of discretion. There is no reason for this case to be the first.

To be sure, this Court has narrowed *nationwide* injunctions to the boundaries of state plaintiffs. *See*, *e.g.*, *San Francisco*, 981 F.3d at 763. But that essentially proves the State's point: where a state is a plaintiff and prevails on the merits, it is difficult to see how a narrow injunction limited to its boundaries could be an abuse of discretion.

More fundamentally, Defendants' arguments ignore the State's *sovereign* injury. In Defendants' own telling, the Contractor Mandate "displace[s] States' police powers" within Arizona's borders. Opening Br.45. An injunction that restores the State's police powers within its own borders is necessary to remedy that injury (which would otherwise persist unabated), and is not even conceivably an abuse of discretion.

Nor does Defendants' reliance (at 47) on *Califano v. Yamasaki*, 442 U.S. 682 (1979) establish any abuse of discretion. *Califano* explicitly held that "[t]he scope of injunctive relief is dictated *by the extent of the violation established*, not by the geographical extent of the plaintiff class." 442 U.S. at 702 (emphasis added). The State has established that the Contractor Mandate is unlawful *in toto*. *Califano* thus actually militated in favor of a nationwide injunction, since it exhorts district courts not to limit injunctive relief to "the geographical extent of the plaintiff class"—here, Arizona's boundaries. The district court's more-limited injunction is hardly an abuse of discretion, particularly where the Contractor Mandate is unlawful *everywhere* in Arizona if it is unlawful anywhere (which it necessarily is if this Court reaches the scope argument).

Nor does the fractured *Georgia* decision establish an abuse of discretion here. That case involved a preliminary injunction, where only one judge of a three-judge panel was willing to say definitely that the Contractor Mandate was unlawful (and another unequivocally said the opposite). *Georgia*, 46 F.4th 1283. This case, however, involves a *permanent* injunction where the indeterminacy that necessarily exists at

the *preliminary* injunction stage does not exist. Instead, the district court's final, *conclusive* determination that the Contractor Mandate was unlawful is the judgment on review here. And if that holding was correct (and it is), it amply justifies the district court's injunction, which is limited to the State and its sovereign borders.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's final judgment and injunction.

Respectfully submitted,

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Dated: October 21, 2022

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the State states that it is not aware of any related cases beyond those named by Defendants.

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 22-15518

I am the attorney or self-represented party.

This brief contains 13,891 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State's Answering 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 on October 21, 2022, which will send notice of such filing to all registered CM/ECF users.

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