No. 22-15518

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BRNOVICH, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

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

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

The critical question in this case is whether the President—pursuant to his authority under the Procurement Act to "prescribe policies and directives" that he "considers necessary" to "provide the Federal Government with an economical and efficient system for" contracting and procurement—may direct federal agencies to contract only with employers that follow certain COVID-19 safety protocols. As the government has explained (Opening Br. 16-29), the answer to that question is yes. For decades, all three branches of government have agreed that the Procurement Act authorizes the President to pursue policies that in his judgment will improve the economy and efficiency of the overall federal procurement system by enhancing the economy and efficiency of the services that the federal government procures. The challenged Executive Order is well within that tradition. As the President determined, requiring covered contractor employees to comply with COVID-19 safety protocols, including vaccination, reduces absenteeism among the federal contractor workforce resulting from a virulent and deadly disease.

No other considerations cast doubt on the validity of the Executive Order. Plaintiffs insist that this case implicates major questions principles, but as discussed in our opening brief (at 30-37), those principles are inapplicable where, as here, the President is acting in his proprietary authority to set conditions for those that elect to do business with the federal government. For much the same reason, the Executive Order does not implicate federalism or nondelegation concerns. And as the district

court rightly concluded, the Executive Order's implementing documents are procedurally valid.

ARGUMENT

I. THE GOVERNMENT IS CORRECT ON THE MERITS

A. The Procurement Act Authorizes Presidents To Set Policies That Improve The Economy And Efficiency Of Federal Contractor Operations

1. Plaintiffs acknowledge that § 121 of the Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle."[1] 40 U.S.C. § 121(a). Section 101 of that subtitle, in turn, informs which policies "carry out" the statute, explaining that the Procurement Act's "purpose … is to provide the Federal Government with an economical and efficient system for," among other things, "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." *Id.* § 101. That statement of purpose "is an appropriate guide to the meaning of the statute's operative provisions," including § 121. *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (cleaned up). Together then, these provisions make clear that the Procurement Act empowers the President to "prescribe policies and directives that the President considers necessary" to "provide the Federal Government with an economical and

[1] The Procurement Act defines the relevant "subtitle" to cover two provisions of the United States Code—*i.e.*, subtitle I of Title 40, and most of Title 41, subtitle I, division C. 40 U.S.C. § 111(4).

efficient system for … [p]rocuring … property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. §§ 101, 121.[2]

The Executive Order falls well within that express grant of statutory authority. It directs agencies to include a clause in certain federal contracts that requires the contractors who elect to do business with the federal government to ensure that their employees abide by COVID-19 safety protocols. Requiring contractors' employees to abide by those safety protocols, including becoming vaccinated against COVID-19, decreases the likelihood that those employees will become ill and miss work, thereby increasing the efficiency of contractor performance. And ensuring that federal contractor performance is more efficient enhances the economy and efficiency of the entire federal procurement system by enabling the government to avoid entering into costly extensions or paying millions of dollars in unanticipated leave expenses.

2. Plaintiffs urge this Court to depart from the decades-old understanding of the Procurement Act based on recent opinions in two other challenges to the Executive Order. *See* Response Br. 49-51. Those opinions depart from the consensus of other circuits that have addressed the issue, do not reflect a binding merits holding in either case, and are wrong.

In the first decision, a motions panel of the Sixth Circuit denied a stay pending

[2] Granting the President that authority does not render superfluous separate grants of concurrent authority to the Administrator of General Services to promote economy and efficiency in other contexts. *See American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815, 821-23 (D.C. Cir. 1981). *Contra* Response Br. 8; States Amicus Br. 7.

the appeal of an injunction against the Executive Order. *See Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022). The motions panel's interlocutory order declared that the statute does not permit the President to set standards governing the performance of contractual agreements, concluding instead that the President's authority is limited to policies that "mak[e] *the government's* entry into contracts less duplicative and inefficient." *Id.* at 605.

Nothing in the Procurement Act's text supports that restrictive reading. The motions panel derived the limitation from the statute's reference to the "system" for procurement, which the panel defined as a "formal scheme or method of governing organization." *Kentucky*, 23 F.4th at 604 (quotation marks omitted). Even accepting that definition, executive orders that establish requirements to be implemented in federal contracts fall within its scope. *See* Opening Br. 17. Just like the CEO of a private business, the President can establish an efficient "scheme or method" for "contracting" for services only if he takes into account factors affecting the performance of those service contracts, including the availability and productivity of service providers. A "system" for procurement thus includes appropriate measures to minimize the risks to the government that performance of contracts will be delayed or unforeseen costs incurred. That does not mean that the government is "manag[ing] internal contractor operations," Response Br. 55; rather, the government is including in its contracts a requirement that it has determined will enhance the economy and efficiency with which the contractor performs services *for the government*.

Plaintiffs also overread *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022), the second decision they cite, *see* Response Br. 49. As plaintiffs recognize, in the "fractured *Georgia* decision … 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)." Response Br. 76 (citing *Georgia*, 46 F.4th 1283). The majority of the panel agreed only that the "plaintiffs have a reasonable chance to succeed on the merits in the case underlying this interlocutory appeal." *Georgia*, 46 F.4th at 1308 (Edmondson, J., concurring with Judge Grant in the result). The lead opinion's merits analysis, upon which plaintiffs rely, *see* Response Br. 49, is thus not binding even in the Eleventh Circuit and is also deeply flawed. As the partial dissent in that case explains, the Procurement Act's statement of purpose "is part of the subtitle that § 121 gives the President the authority to carry out." *Georgia*, 46 F.4th at 1311 (Anderson, J., concurring in part & dissenting in part). The statutory language thus "clearly authorizes the President to prescribe such policies and directives that carry out the purpose of the statute to ensure an 'economical and efficient system for' procurement," which is precisely "what the President did here." *Id.* at 1309 (quoting 40 U.S.C. § 101). The lead opinion's contrary reading cannot be reconciled with the procurement powers provided by the Act, which invests the President with "particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole … in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of

economy and efficiency," *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc).

3. The longstanding practice of all three branches of government reflects this understanding of the statute.

a. Plaintiffs do not dispute that executive orders issued under the Procurement Act have consistently been directed at ensuring the government enters into contracts that will be performed efficiently. *See* Opening Br. 17-19. Nor do they contest that the "longstanding practice of [an agency] in implementing the relevant statutory authorities" is a basis for rejecting a "narrower view" of "seemingly broad language." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam).

Plaintiffs respond that none of those previous executive orders concerned workplace health or required vaccination. Response Br. 25, 33. Plaintiffs offer no reason why the government's interest in economy and efficiency does not encompass significant concerns about absenteeism resulting from a serious disease that could affect the ability of the government to obtain goods and services from contractors on time and at the negotiated-upon cost. That previous executive orders have not involved a vaccination requirement does not suggest that the President is precluded from employing this means in protecting the government's interests in an unprecedented pandemic. That conclusion would also be at odds with the Supreme Court's decision in *Biden v. Missouri,* which upheld a Centers for Medicare & Medicaid Services (CMS) vaccination requirement even though the agency had never previously

issued such a requirement. As in *Missouri*, the President "has never had to address an infection problem of this scale and scope before." 142 S. Ct. at 653. "[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the [President] has long been recognized to have." *Id.* at 654.

b. Plaintiffs' interpretation of the Procurement Act is also inconsistent with decades of judicial decisions. In *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, the court noted that anti-discrimination orders had been upheld because they would reduce "costs and delay[s]" in federal government programs, 442 F.2d 159, 170 (3d Cir. 1971); *see Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967); in *UAW-Labor Employment & Training Corp. v. Chao*, the court upheld an order requiring contractors to post employee notices because it would enhance the "productivity" of contractor employees, "facilitat[ing] the efficient and economical completion of … procurement contracts," 325 F.3d 360, 366 (D.C. Cir. 2003) (quotation marks omitted); and in *Chamber of Commerce of the United States v. Napolitano*, the court upheld an order requiring contractors to ensure that their employees are lawfully present in the United States based on the President's judgment that such assurances would create "more efficient and dependable procurement sources," 648 F. Supp. 2d 726, 738 (D. Md. 2009) (quotation marks omitted). As the D.C. Circuit concluded in *AFL-CIO v. Kahn*, the President's authority to achieve an economical and efficient system for procurement extends to policies that address "those factors

like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." 618 F.2d at 789; *see* Opening Br. 19-20.[3]

Plaintiffs attempt to distinguish those decisions as involving "modest, work-anchored measures," Response Br. 55 (alteration omitted) (quotation marks omitted), related to the "ordinary hiring, firing, and management of labor," Response Br. 6 (quotation marks omitted). Even if that characterization were accurate, it reflects an acknowledgment that courts have sustained executive orders directed to the performance of contracts, not just to the process of entering into those contracts. Plaintiffs thus do not credibly dispute that their theory of the Procurement Act conflicts with decades of judicial decisions.

In any event, the Executive Order at issue is explicitly work-anchored: It applies only to employees performing work on federal contracts or sharing workplaces where work on federal contracts is taking place. *See* 86 Fed. Reg. 63,418, 63,419 (Nov. 16, 2021). And, as private sector practice illustrates, vaccination requirements are as much a part of management of labor as other orders issued over the decades. *See id.* at 63,422.

[3] These cases likewise demonstrate why amici States are incorrect that the President's authority is limited to "required" or "indispensable" orders, States Amicus Br. 8 (quotation marks omitted). The statute empowers the President to enact policies that he "*considers* necessary" to carry out the statute's goals. 40 U.S.C. § 121(a) (emphasis added).

Plaintiffs are mistaken in suggesting that the Supreme Court abrogated this uniform interpretation of the Procurement Act in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). That case concerned disclosure regulations issued pursuant to ancillary rulemaking authority in an executive order that barred discrimination by federal contractors. The *Chrysler* Court did not "suggest[] that the President's authority [under the Procurement Act] should be based on a 'specific reference' within the Act." Response Br. 50 (second alteration in original) (quoting *Georgia*, 46 F.4th at 1294). To the contrary, the Court expressly refused "to decide whether" the executive order at issue "[wa]s authorized by" the Procurement Act, *Chrysler*, 441 U.S. at 304, and emphasized that a "grant of legislative authority" need not be "specific before [policies] promulgated pursuant to it can be binding," *id.* at 308; *see Georgia*, 46 F.4th at 1310 (Anderson, J., concurring in part & dissenting in part) (explaining that "*Chrysler* expressly disavows" any requirement that "delegated authority must always be tied to a specific statutory provision").

c. "Th[e] longstanding practice and the many judicial decisions repeatedly upholding this longstanding practice provided the backdrop for Congress's recodification of the Procurement Act in 2002." *Georgia*, 46 F.4th at 1312 (Anderson, J., concurring in part & dissenting in part). That reenactment without substantive change signals Congress's ratification of the statute's grant of authority. *See* Opening Br. 21-22. Plaintiffs fail to offer a contrary view of that 2002 recodification, noting instead that the Procurement Act's legislative history suggests Congress in 1949 was

focused on a relatively narrow government-contracting "problem." Response Br. 53. But the best indication of the Procurement Act's reach comes from "the words on the page," which have been "adopted" and *readopted* "by Congress and approved by the President" against the backdrop of repeated, expansive judicial interpretation. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020). That text affords the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies. *Chao*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 789).

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

The Executive Order reflects the required nexus to the Procurement Act's goals of economy and efficiency in federal procurement. Directing the inclusion of a COVID-19 safety clause reduces the likelihood that contractor employees who contract a severe illness will become sick and miss work and thus enables the government to avoid entering into costly extensions or paying hundreds of millions of dollars in unanticipated leave expenses. Opening Br. 23-26.

Plaintiffs repeat the district court's mistaken suggestion that this logic lacks any limiting principle. Response Br. 56. But as the government explained, Opening Br. 28-29, the President faces meaningful constraints in the exercise of Procurement Act authority: The statutory text requires that any executive order bear a close nexus to the statutory goals of establishing "an economical and efficient system" for federal procurement and contracting, 40 U.S.C. § 101; the President's status as "the most

singularly accountable elected official in the country," *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 357 (5th Cir. 2022) (Higginson, J., dissenting), checks extreme actions that would offend the popular will; and, the President, acting as a market participant, is limited to pursuing policies that other market participants find acceptable. Plaintiffs do not meaningfully engage with these limitations. *See* Response Br. 55-56. Nor do they dispute that in the Procurement Act's long history, the President has never issued the far-fetched orders that plaintiffs posit. *See, e.g.*, Response Br. 56 (theorizing orders requiring contractor employees to "refrain from consuming soda or eating fast food"). Hypothetical orders aimed at improving the general health of the contractor workforce are also different in kind from the order here, which requires contractors to adhere to workplace requirements that address acute threats posed by an unprecedented pandemic. *Cf. Missouri*, 142 S. Ct. at 653.

Plaintiffs also contend that the Office of Management and Budget (OMB) Determination is invalid because the Acting Director did not provide enough evidence or reasoning in support of her economy-and-efficiency determination and failed to account for aspects of the problem, like "employee terminations and departures." *See* Response Br. 59-61. The Acting OMB Director, however, conducted a "thorough and robust economy-and-efficiency analysis" that fully "addressed potential effects on the labor force and costs of the vaccine mandate." *Kentucky v. Biden*, 571 F. Supp. 3d 715, 733 (E.D. Ky. 2021). She considered available data from "experiences shared by private companies" before reaching her conclusion

that "few employees" would "quit because of the vaccine mandate." 86 Fed. Reg. at 63,422. And she determined that the requirements would result in savings to the government after analyzing, and quantifying, the "substantial costs" associated with lost federal contractor work hours and predicting that those costs would "be passed on to the Federal Government, either in direct cost or lower quality, including delays." *Id.* Plaintiffs might disagree with those conclusions, but "[w]hen, as here, an agency is making predictive judgments about the likely economic effects of a rule," courts "are particularly loath to second-guess its analysis." *Kentucky*, 571 F. Supp. 3d at 733 (alteration in original) (quoting *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013)).[4]

Finally, that the Executive Order also protects the health and safety of citizens does not make its economy-and-efficiency rationale pretextual, Response Br. 44, 56. Exercises of Procurement Act authority often further other goals in the course of improving the economy and efficiency of the federal contracting system. *See* Opening Br. 27-28. The President's determination of how best to achieve economy and efficiency in federal operations does not "become[] illegitimate," simply because it "serves other, not impermissible, ends." *American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815, 821 (D.C. Cir. 1981). That is particularly true where, as here, the other

[4] That guidance accompanying the Determination is subject to change does not undermine that justification. *Contra* Response Br. 58. Any such changes would become binding only if the OMB Director issues a further determination concluding that the updated guidance advances economy and efficiency in federal contracting.

end—*i.e.*, the protection of contractor employees from serious illness—directly affects the economy and efficiency of the federal procurement system. Plaintiffs offer no response to this authority.[5]

C. No Other Considerations Cast Doubt On The Validity Of The Executive Order

None of the other considerations plaintiffs offer supports invalidating the Executive Order.

1. Plaintiffs are mistaken when they argue that major question principles required Congress to speak more clearly if it intended to authorize the Executive Order. Response Br. 30-48. As the government explained (at 31-33), those principles are implicated only when an agency action threatens a "transformative expansion in … regulatory authority," *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)), and no such expansion

[5] The Acting OMB Director concluded that vaccination would decrease absenteeism by reducing transmission of the virus and limiting serious illness in those who catch it. *See* 86 Fed. Reg. at 63,422. Although the latest Centers for Disease Control and Prevention (CDC) Guidance suggests the aspects of the former justification related to the reduction of transmission may carry reduced force with respect to current vaccines and COVID variants for which data on transmission and infection is available, the latter justification remains highly relevant. *See* CDC, *Benefits of Getting a COVID-19 Vaccine*, https://perma.cc/6LFW-T3XK (last updated Aug. 17, 2022). In any event, this Court reviews the district court's decision to grant the permanent injunction for an "abuse of discretion" based on the "facts in the record," *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 965 (9th Cir. 2017) (quotation marks omitted), and as the district court explained in issuing the injunction, the record made clear that "the virus continues to claim American lives, and inhibiting its progress remains vitally important," ER-51.

occurred here because the President exercised his proprietary authority, as purchaser of services, to impose conditions on the performance of federal contracts, *see Georgia*, 46 F.4th at 1311 (Anderson, J., concurring in part & dissenting in part) (observing that "[t]he President in this case is acting in the role of a proprietor—not in the role of a regulator" and that "the proprietary role of the government here is significant").

The cases plaintiffs cite reflect this distinction. In each of those cases, an agency exercised regulatory authority unrelated to the federal government's purchasing power. For example, the Occupational Safety & Health Administration (OSHA) vaccination-or-testing standard, upon which plaintiffs focus (at 32-33, 47, 50), applied to all "employers with 100 or more employees" and was issued pursuant to authority granted by Congress under the Commerce Clause. *National Fed'n of Indep. Bus. v. Department of Labor, OSHA*, 142 S. Ct. 661, 663 (2022) (per curiam). Likewise, *West Virginia v. EPA* involved a rule that regulated greenhouse gas emissions from power plants, again invoking authority granted under the Commerce Clause. *See* 142 S. Ct. at 2612; *see also Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam) (evaluating eviction moratorium imposed on "all residential properties nationwide"); *Utility Air*, 573 U.S. at 324 (evaluating whether agency had authority to regulate greenhouse gas emissions from new motor vehicles); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (evaluating whether agency had authority to regulate cigarettes and smokeless tobacco). By contrast, where the government—for the first time in history—exercised

its spending power to impose a vaccination requirement on recipients of Medicare and Medicaid, the Supreme Court declined to require an authorization more specific than definitional provisions which authorized the Secretary to impose conditions he "finds necessary in the interest of … health and safety." *Missouri*, 142 S. Ct. at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

Plaintiffs nevertheless assert that the Executive Order is regulatory because it has real-world effects and operates "on virtually all federal contractors." Response Br. 43-44. But the practical effects and scope of an order do not transform the nature of the authority being exercised. Prior executive orders establishing anti-discrimination and noninflationary wage and price requirements applied to a significant portion of the American economy, had significant real-world effects, and involved issues of pronounced economic and political significance. *See, e.g.*, *Contractors Ass'n*, 442 F.2d at 170-71 (1960s discrimination); *Kahn*, 618 F.2d at 790-91, 790 n.32 (1970s inflation). And yet, courts uniformly upheld those orders without demanding that the Procurement Act explicitly reference either inflation or discrimination. *See* Opening Br. 19-20.

In *UAW-Labor Employment & Training Corp. v. Chao*, on which plaintiffs seek to rely, Response Br. 25, 44, the D.C. Circuit discussed the distinction between regulatory and proprietary orders in the context of preemption doctrines under the National Labor Relations Act, 325 F.3d at 366. Even in that context, the court rejected the contention that "when the Government acts through blanket, across-the-

board rules that 'flatly prohibit' … certain actions on the part of its contractors and recipients of its financial assistance, its conduct is clearly regulatory." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002) (alteration in original) (quotation marks omitted); *see also id.* (agreeing that "there simply is 'no logical justification' for holding that 'if an executive order establishes a consistent practice …, it is regulatory even though the only decisions governed by the executive order are those that the federal government makes as a market participant'" (alteration omitted)). In any event, the court in *Chao* upheld an executive order issued under the Procurement Act that required contractors to post notices of "rights under federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities." 325 F.3d at 362; *see also id.* at 366 (quoting the executive order's explanation that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced").

The cases cited by plaintiffs, moreover, reflect concerns about diminished accountability and thus suggest a need for special clarity only when there is some doubt as to whether Congress "assign[ed]" a significant decision "to an agency." *Utility Air*, 573 U.S. at 324; *see* Opening Br. 36. Those considerations are inapplicable here. The Procurement Act clearly assigns the President the authority to determine what policies are necessary to carry out the statute's economy and efficiency goals. And there is no risk of diminished accountability, as the President is "the most

singularly accountable elected official in the country," *Feds for Med. Freedom*, 25 F.4th at 357 (Higginson, J., dissenting), and has inherent power to direct operations of the Executive Branch, *Building & Constr. Trades Dep't*, 295 F.3d at 32. Even if that inherent authority is not an independent basis for sustaining the Executive Order, it nonetheless forms the backdrop against which Congress legislated in delegating authority to the President. When the President is acting in an area "where he enjoys his own inherent Article II powers," Congress can "assign the President broad authority" without raising constitutional concerns. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).[6]

2. Similar principles underscore why the Procurement Act does not violate the nondelegation doctrine. *Contra* Response Br. 61-62. That doctrine recognizes that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2123 (plurality op.). Proprietary powers granted to manage government funds and enter into contracts, however, relate to the President's inherent authority to manage the Executive Branch, and thus generally do not involve "an abdication of the 'law-making' function." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance*?, 83 Mich. L. Rev. 1223, 1266-67

[6] Plaintiffs are thus wrong to suggest (at 41) that there is no basis for applying major questions principles differently in the context of presidential exercises of authority. And they are wrong to analogize to *Alabama Ass'n of Realtors*, as there was no suggestion in that case that the President or the CDC had any inherent authority to regulate landlords, *see* 141 S. Ct. at 2489.

(1985) (quotation marks omitted); *cf. Jessup v. United States*, 106 U.S. 147, 151-52 (1882) (collecting cases establishing that agencies can enter into contracts to fulfill their statutory obligations). That is likely why every court of appeals to consider the question has held that the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that can be applied "to determine whether [the President's] actions are within the legislative delegation." *Kahn*, 618 F.2d at 793 n.51.

3. The Executive Order also does not "significantly alter the balance between federal and state power," Response Br. 35-37, 62-63 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489). Plaintiffs do not dispute that the federal government—and not the states—has the power to set conditions on federal contracts and to police the behavior of federal contractors. *See United States v. Virginia*, 139 F.3d 984, 987 (4th Cir. 1998). That ends the matter: The Executive Order does not displace state powers because it is an exercise of the President's authority to manage the terms on which services are procured for the federal government. It also demonstrates why plaintiffs' focus on the preemption provision in the Safer Federal Workforce Task Force's (Task Force) responses to Frequently Asked Questions (FAQs) is misplaced, *see* Response Br. 37, 44, 68. Federal requirements imposed on federal contractors preempt contrary state requirements related to the performance of a federal contract. *See GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 750 (9th Cir. 2022) (en banc) (invalidating state law that "purport[ed] to override the federal government's decisions about who will carry out federal functions"); *see also Gartrell Constr. Inc. v.*

Aubry, 940 F.2d 437, 441 (9th Cir. 1991) (invalidating state licensing requirements imposed on federal contractors).

Plaintiffs assert that this focus on the federal contracting context "frames the issue at the wrong level of generality." Response Br. 36 (quotation marks omitted). But adopting plaintiffs' preferred level of generality would mean that Presidents exceeded their authority under the Procurement Act when they established anti-discrimination, wage, and leave requirements for federal contractors. *See* Opening Br. 17-18. In any event, even the cases plaintiffs cite evaluate the nature of a state-regulated relationship in assessing whether federal law intrudes on state powers. *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (concluding that eviction moratorium "intrude[d] into an area that is the particular domain of state law" because it affected "the landlord-tenant relationship"). And it is undisputed that the relationship at issue here—between the federal government and its contractors—is "inherently federal in character." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001).

D. The Documents Accompanying The Executive Order Do Not Suffer From Procedural Infirmities

Plaintiffs are also mistaken when they argue that the documents accompanying the Executive Order are procedurally defective because they did not follow the notice-and-comment procedures described in 41 U.S.C. § 1707. Response Br. 64. The district court properly rejected those arguments below, ER-49-53, and this Court should do the same.

1. The memorandum issued by the FAR Council (FAR Council Memo) is not subject to the Procurement Policy Act's procedural requirements because, as the district court explained, the Memo "is merely nonbinding guidance." ER-52. The Procurement Policy Act applies only to "a procurement policy, regulation, procedure, or form" that "has a significant effect beyond the internal operating procedures of the agency" or "has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)(1). The FAR Council Memo does not satisfy those requirements. The Memo, by its terms, provides agencies only with "*initial* direction" for the incorporation of a *sample* COVID-19 safety clause into applicable contracts. ER-137 (emphasis added). It "is not binding of its own force" and "does not compel agencies to take any specific action." ER-52. Instead, the Memo points contracting officers to "the direction[s] … issued by their respective agencies" for how to use the Memo's guidance. ER-138. The FAR Council Memo thus has no effect, let alone a significant one, and "is therefore not a 'procurement policy, regulation, procedure, or form' subject to § 1707," ER-53; *Kentucky*, 571 F. Supp. 3d at 731 (similar). For these same reasons, plaintiffs lack a cause of action to challenge the FAR Council Memo under the Administrative Procedure Act (APA), which provides review only of final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

2. Plaintiffs' procedural challenge to the Task Force Guidance—including the FAQs—fails for much the same reason. The Guidance, like the FAR Council Memo, has no standalone legal force. It becomes binding only following and

pursuant to the OMB Director's economy-and-efficiency determination. It thus "do[es] not independently constitute a binding 'policy, regulation, procedure, or form.'" ER-53. The Procurement Policy Act's requirements, moreover, apply only to specifically enumerated "executive agenc[ies]." 41 U.S.C. § 1707(c); *see* ER-49.[7] The Task Force, which issued the Guidance and FAQs, is not such an agency. The Task Force is an interagency body created by executive order that exists solely to advise the President and thus lacks the "substantial independent authority" required of an "agency." *Meyer v. Bush*, 981 F.2d 1288, 1292-98 (D.C. Cir. 1993) (concluding that the President's Task Force on Regulatory Relief was not an "agency" under the Freedom of Information Act because it lacked "substantial independent authority"); *Soucie v. David*, 448 F.2d 1067, 1073-75 (D.C. Cir. 1971) (applying same test to APA).

3. The OMB Determination also is not subject to § 1707's procedural requirements, and even if those requirements do apply, the Acting OMB Director voluntarily complied with them.

As noted, the Procurement Policy Act's requirements apply only to certain "executive agenc[ies]." 41 U.S.C. § 1707(c); *see* ER-49. The Acting OMB Director, however, was not acting as an "executive agency" when she issued the OMB Determination. Instead, she was exercising authority delegated to her by the

[7] The statute defines "executive agency" to include "executive" and "military department[s]," as well as "independent establishment[s]" and "wholly owned Government corporation[s]." 41 U.S.C. § 133.

President under 3 U.S.C. § 301. *See* 86 Fed. Reg. 50,985, 50,985-986 (Sept. 14, 2021). When an agency exercises presidentially delegated authority, it "stands in the President's shoes," acting not as the agency, but as the President. *See Natural Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009). Because the President is not listed among the executive agencies subject to § 1707's requirements, *see* 41 U.S.C. § 133, it follows that the Acting OMB Director also was not subject to those requirements when she exercised delegated authority to issue the OMB Determination.

This Court, however, need not determine the applicability of the statute because the Acting OMB Director voluntarily complied with § 1707. Ordinarily, a procurement policy "may not take effect until 60 days after it is published for public comment in the Federal Register." 41 U.S.C. § 1707(a)(1). Those requirements "may be waived," however, "if urgent and compelling circumstances make compliance … impracticable." *Id.* § 1707(d). The Acting OMB Director explained that waiving § 1707's notice requirements was critical here for several reasons, including the need to align deadlines across vaccination requirements, promote regulatory certainty, and stop the spread of the pandemic. 86 Fed. Reg. at 63,423-424. As the district court correctly held, the Acting OMB Director "properly invoked the § 1707(d) waiver provision," ER-50, because "'urgent and compelling circumstances' made compliance with ordinary § 1707 procedures impracticable with respect to the revised OMB determination," ER-52.

Plaintiffs complain that the Acting OMB Director should have limited her consideration of urgent circumstances to those related to promoting economy and efficiency. Response Br. 66. But the Acting OMB Director made clear that the "broader economy-and-efficiency purpose" of the OMB Determination "would be severely undermined by the minimum delay" required under § 1707's notice-and-comment provisions. 86 Fed. Reg. at 63,424. An important purpose of the Determination, the Acting OMB Director explained, was to "align[] the vaccination deadline for Federal contractors with the vaccination deadline for private companies under recent regulatory actions," including the OSHA standard and the CMS rule. *Id.* The Acting OMB Director described how certain employers could have workers or workplaces subject to each of those different vaccination requirements. *See id.* For those employers, having the same deadline across all requirements would "promote consistency and administrability" of the requirements. *Id.* Consistent deadlines would "also avoid needless costs in having multiple systems of records and internal accountability established for different deadlines," thereby "promoting economy and efficiency in Federal procurement." *Id.* Plaintiffs offer no rebuttal to the Acting OMB Director's well-reasoned justification.[8]

[8] As the district court concluded, plaintiffs' related suggestion that the Acting OMB Director issued the revised economy-and-efficiency determination in bad faith, *see* Response Br. 21-22, falls "far short of the 'strong showing' necessary" to establish such a claim, ER-51.

II. PLAINTIFFS FAILED TO ESTABLISH THE REMAINING INJUNCTION FACTORS

Plaintiffs have not shown that the Executive Order will cause them irreparable harm, a prerequisite to the "extraordinary remedy" of a permanent injunction. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019) (per curiam) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

Plaintiffs stress the nonrecoverable monetary harm they will purportedly suffer as a result of the Executive Order. Response Br. 70. It is uncontroverted that claims of such harm may support injunctive relief when "grounded in … evidence," *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013), but plaintiffs in no way satisfied that evidentiary burden, and the district court erred in concluding otherwise. As the government explained (at 43-45), plaintiffs introduced hardly any evidence regarding the measures that they have taken to comply with the vaccination requirement or the costs associated with those measures. *Cf. Texas v. U.S. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (detailing the compliance measures required by the new regulation and the "$2 billion in costs" that they would impose). Nor did plaintiffs introduce evidence establishing how many, if any, of their employees would actually leave their roles rather than be vaccinated or what the costs of those purported losses would be. *See Florida v. Department of Health & Human Servs.*, 19 F.4th 1271, 1292 (11th Cir. 2021). And any claim premised upon future losses of unspecified contracts and solicitations is simply too "[s]peculative" to be a "basis for a

finding of irreparable harm." *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007). Plaintiffs nowhere address these inadequacies in their evidentiary showing.[9]

Plaintiffs also overstate the extent to which, if at all, their purported sovereign injury amounts to irreparable harm. As this Court recently explained, states suffer no "actual or concrete sovereign injuries" in the absence of a demonstrated "conflict between their laws and" federal law. *City & County of San Francisco v. Garland*, 42 F.4th 1078, 1086 (9th Cir. 2022). The "mere 'existence of [a federal] law' absent" a concrete threat of interference will not suffice. *Id.* (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 91 (1947)). On appeal, plaintiffs have not identified a concrete conflict between Arizona law and the Executive Order. Indeed, they do not dispute that private employers may freely impose vaccination requirements on their employees so long as they allow religious exemptions, *see* Ariz. Rev. Stat. Ann. § 23-206, as the Executive Order does, 86 Fed. Reg. at 63,420. To the extent any threatened interference amounts to a concrete sovereign injury, such harm would concern only Arizona government entities' own contracts with the federal government. *See* Ariz. Exec. Order No. 2021-19 (Oct. 8, 2021).

[9] Plaintiffs are mistaken (at 69) in suggesting that the government conceded that plaintiffs satisfied their burden of establishing irreparable harm. *See* Opening Br. 43 ("Arizona Has Not Established Irreparable Harm"). Nor did the government ignore this Court's precedent. *Contra* Response Br. 70-71. The cases plaintiffs invoke involved different evidentiary showings and thus do not control here.

In contrast to plaintiffs' speculative claims of irreparable injury, the government daily suffers concrete harm from the court's overbroad injunction. Plaintiffs do not dispute that the injunction affects millions of dollars in federal contracts. Nor do plaintiffs dispute that the productivity losses the pandemic causes those contracts—in the form of schedule delays as well as leave and health care costs—are passed on to the government and, ultimately, to the American taxpayers.

Instead, plaintiffs claim that the government's litigation decisions in this and related cases undermine its arguments on the equities. Response Br. 74-75. But plaintiffs' theory of the equities would place the government in an untenable position: It must pursue expedited appeals and emergency stays in every case, or else risk forfeiting any argument that the equities tip in its favor. The Supreme Court has specifically cautioned against drawing such negative inferences from the federal government's litigation choices precisely because the "government's litigation conduct in a case is apt to differ from that" of other litigants. *United States v. Mendoza*, 464 U.S. 154, 161 (1984). The federal government "is a party to a far greater number of cases on a nationwide basis than" any other litigant and "is more likely than any [other] party to be involved in lawsuits against different parties which nonetheless involve the same legal issues." *Id.* at 159-60. The Solicitor General must "consider[] a variety of factors[] … before authorizing an appeal." *Id.* at 161; *see* 28 C.F.R. § 0.20. That the Solicitor General declined to seek further review of other decisions in other cases says nothing about whether plaintiffs here satisfied their burden of showing the equities

favor injunctive relief. Nor does the fact that the government noticed its appeal in this case within the statutory period, rather than in an expedited fashion, bear on that question. *Contra* Response Br. 74.

III. THE INJUNCTION IS OVERBROAD

At a minimum, the district court's overbroad injunction—which applies to private contractors that were not parties to this action—should be narrowed.

The court rightly recognized that Article III and principles of equity require that "[e]quitable remedies should redress only the injuries sustained by a particular plaintiff in a particular case." ER-63. But the court disregarded those principles in enjoining enforcement of the Executive Order with regard to "any contract to which a contracting party is domiciled in or headquartered in the State of Arizona" or where the contract is "to be performed principally in the State of Arizona." ER-7-8. Private contractors were not parties before the court and thus "not the proper object of th[e court's] remediation." *Lewis v. Casey*, 518 U.S. 343, 358 (1996). The district court accordingly abused its discretion in extending the injunction's scope to private non-party contractors.

The Eleventh Circuit reached much the same conclusion in *Georgia* in the only portion of that decision that garnered a panel majority. *See Georgia*, 46 F.4th at 1308 (Grant. J.); *see id.* at 1317 (Anderson, J., concurring in part & dissenting in part). The panel concluded that the injunction was overbroad in extending "without distinction to plaintiffs and nonparties alike," *id.* at 1308 (Grant. J.), explaining that "in cases

challenging federal administrative actions," it is particularly problematic to extend relief to nonparties because "similarly situated parties may well have extremely *dissimilar* views on whether they are helped or harmed by a federal policy," *id.* at 1306-07. And despite the fact that the plaintiffs in that case included a group of several states, the court narrowed the injunction to cover only contracts and solicitations involving plaintiffs, rather than affording state-wide relief. *See id.* at 1307-08. That same logic applies here.

Plaintiffs' claimed sovereign injury cannot support a broader injunction. *Contra* Response Br. 75-76. As explained, *supra* p. 25, plaintiffs have not established any conflict between Arizona law and the Executive Order as applied to private contractors. At a minimum, then, the injunction should be narrowed to the extent it applies beyond contracts between the federal government and Arizona public entities.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1(b) because it contains 6,988 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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