No. 22-15518

In the United States Court of Appeals for the Ninth Circuit

MARK BRNOVICH, ATTORNEY GENERAL; STATE OF ARIZONA; AL REBLE; PHOENIX LAW ENFORCEMENT ASSOCIATION; UNITED PHOENIX FIREFIGHTERS ASSOCIATION LOCAL 493

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ALEJANDRO N. MAYORKAS, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HOMELAND SECURITY, ET AL.

Defendants-Appellants.

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

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

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CORPORATE DISCLOSURE STATEMENT

No. 22-15518

Mark Brnovich, Attorney General; State of Arizona; Al Reble; Phoenix Law Enforcement Association; United Phoenix Firefighters Association Local 493,

Plaintiffs-Appellees,

v.

Joseph R. Biden, in his official capacity as President of the United States; Alejandro N. Mayorkas, in his official capacity as Secretary of Homeland Security; U.S. Department of Homeland Security, et al.

Defendants-Appellants.

Under Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America ("Chamber") certifies that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

/s/ Steven P. Lehotsky
Steven P. Lehotsky
Counsel of Record for Amicus Curiae Chamber of Commerce of the United States of America

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INTEREST OF AMICUS CURIAE

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

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

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellants and Appellees do not oppose the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

encouraged, and in some cases mandated the vaccine. Rather, the Chamber's interest concerns the scope of the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 *et seq.*, which has broad ramifications for federal contracting and businesses across many sectors that contract with the federal government.

The district court's preliminary injunction correctly recognizes the limited scope of the Procurement Act. *Brnovich v. Biden*, 562 F. Supp. 3d 123, 152-54 (D. Ariz. 2022). Executive Order 14,042 and its accompanying mandate that federal contractors be vaccinated against COVID-19 exceed the authority granted to the Executive Branch under the Procurement Act. The Chamber and its members have a substantial interest in ensuring that the Executive Branch remains within the bounds of congressional authorization when regulating pursuant to the Procurement Act.

SUMMARY OF THE ARGUMENT

Since the passage of the Procurement Act in 1949, the President has enjoyed a considerable degree of deference over decisions to improve the "economy and efficiency" of federal contracting. But the contractor mandate moves far beyond previous Procurement Act cases and now ventures into regulating healthcare for approximately one-fifth of the U.S. workforce. In the contractor mandate, generous interpretations of the President's authority under the Act have reached their breaking point. There is not a sufficient nexus between the contractor mandate and improvement of economy and

efficiency in federal contracting. The district court's preliminary injunction should be affirmed for multiple reasons.

First, the text of the Procurement Act does not support the exercise of authority contained in Executive Order 14,042. Second, the contractor mandate is not reasonably related to the Procurement Act's goals of an economic and efficient system for procurement. The connection between the mandate and economy and efficiency is not a sufficient nexus to justify the regulation. Third, the contractor mandate goes beyond even previous extensions of presidential authority under the Procurement Act. Previous cases have read the President's authority broadly, but even those cases could demonstrate a more direct link between the order at issue and efficient operations related to procurement. Fourth, the Supreme Court's recent decisions regarding the major-questions doctrine—including *National Federation of Independent Business v. Department of Labor, OSHA* (the OSHA vaccine mandate case)—cast further doubt on the contractor mandate.

BACKGROUND

Through an executive order and related guidance, the President directed that all federal contracts and subcontracts must include a clause requiring contractors to comply with three COVID-related protocols. These include a mandate that all employees working on a federal contract—or working at a facility where work on a federal contract is performed—be fully vaccinated against COVID-19 by a certain date.

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

On September 24, 2021, the Safer Federal Workforce Task Force issued the Guidance contemplated by the Executive Order. The most significant feature of the Guidance is the vaccine mandate, which provides: "Covered contractors must ensure that all covered contractor employees are fully

vaccinated for COVID-19, unless the employee is legally entitled to an accommodation." Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* ("Guidance") at 5 (Sept. 24, 2021), https://bit.ly/3Bw7vpW. The Guidance applies to all areas of a covered workplace, even if performance of the federal contract occurs only in part of the workplace (with a limited exception), and the Guidance also states that the vaccine mandate applies to "[a]n individual working on a covered contract from their residence." *Id.* at 10-11.

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

The FAR Council then initiated rulemaking and issued interim guidance. Memorandum from Lesley A. Field et al., 1-2 (Sept. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf ("FAR Memorandum"). Finally, in November, the Task Force issued revised

contractor guidance, and the OMB Director issued a revised determination. Determination of the Acting OMB Director Regarding the Revised Safer Federal Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63,418 (Nov. 16, 2021). The revised Guidance set the deadline for compliance with the vaccination mandate to January 18, 2022. 86 Fed. Reg. at 63,420.

Numerous challenges to the mandate ensued. These focused on the President's Order, the Task Force's guidance, and the Director's approval, all of which rely on the President's authority over government procurement and contracting. *See, e.g.*, *Louisiana v. Biden*, 575 F. Supp. 3d 680 (W.D. La. 2021); *State v. Nelson*, 576 F. Supp. 3d 1017 (M.D. Fla. 2021); *Missouri v. Biden*, 576 F. Supp. 3d 622 (E.D. Mo. 2021); *Georgia v. Biden*, 574 F. Supp. 3d 1337 (S.D. Ga. 2021); *Kentucky v. Biden,* 571 F. Supp. 3d 715 (E.D. Ky. 2021).

One of those challenges was the case below. Arizona, its Attorney General, an employee of the U.S. Marshals Service, the Phoenix Law Enforcement Association, and United Phoenix Firefighters Association Local 493 sued challenging the mandate on September 14, 2021. After the hearing on the motion for a preliminary injunction, the Government requested a stay. The district court denied the Government's motion to stay and, on January 27, 2022, granted plaintiffs' motion for a preliminary injunction against the federal defendants. The Government then filed this appeal.

ARGUMENT

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

The government's authority to purchase is not a power to regulate. The text of the Procurement Act does not support the far-reaching measures contained in Executive Order 14,042. The Government points to two Procurement Act provisions in attempting to justify the contractor mandate. Gov't Br. 16-17. The first, 40 U.S.C. § 101, is the prefatory language of the Act. It reads, in relevant part:

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

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

As the Sixth and Eleventh Circuits explained when addressing the contractor mandate, the Act's statement of purpose is just that—a statement of

purpose, not a grant of authority. *Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022); *Georgia v. President of United States*, 46 F.4th 1283, 1298 (11th Cir. 2022); *see also Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (a declaration of purpose is "an appropriate guide to the meaning of the statute's operative provisions" (cleaned up)). That is, although "[s]tatements of purpose may be useful in construing enumerated powers later found in a statute's operative provisions," the statements "are not *themselves* those operative provisions." *Kentucky*, 23 F.4th at 604. So "[a]n executive order cannot rest merely on the policy objectives of the Act." *Georgia*, 46 F.4th at 1298 (internal quotation marks omitted); *see also Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) ("statements of purpose . . . by their nature cannot override a statute's operative language" (cleaned up)). In this case, the statute's reference to economy and efficiency provides context for the scope of the President's authority, but it does not affirmatively grant authority on every question that touches economy and efficiency.

The Government's interpretation stitches these provisions together but reads out key language. The Government has taken these provisions together to mean that the Procurement Act authorizes essentially anything that the President "considers necessary" to make anything about federal contracting more "economical and efficient." Gov't Br. 16-23. But that is not what the text says. A more natural reading conveys that the Act "permits [the President] to employ an 'economical and efficient *system*' to '*procur*[*e*]' those nonpersonal services." *Kentucky*, 23 F.4th at 604 (second alteration in

original). Stated differently, the Act grants the President authority over the federal government's *mechanisms* for achieving goals such as "procuring and supplying property and nonpersonal services," 40 U.S.C. § 101(1)—but not over every constituent part of those mechanisms, and not over the healthcare polices for the individuals that supply those nonpersonal services.

This more natural reading of the Act is confirmed by the context in which it came about. The Procurement Act was intended to "streamline[] and modernize[]" the federal government's "method of doing business." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979). Congress intended to create "an efficient, businesslike system of property management." *Reich*, 74 F.3d at 1333 (internal quotation marks omitted). And the Act "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Kahn*, 618 F.2d at 787. As the Sixth Circuit explained, "the fear . . . was not that personnel executing duties under nonpersonal-services contracts were *themselves* performing in an uneconomical and inefficient manner, but instead that the manner in which federal agencies were entering into contracts to produce goods and services was not economical and efficient." *Kentucky*, 23 F.4th at 606. The Procurement Act was intended to centralize the federal government's procurement responsibility, not grant the Executive a "latent well" of regulatory authority over every individual employed by federal contractors and subcontractors. *Id*.

This view is in accord with the larger statutory framework governing procurement. First, 41 U.S.C. § 1303(a) grants the FAR Council (with limited exceptions not applicable here), not the President, exclusive authority to "issue and maintain . . . a single Government-wide procurement regulation." Second, the Procurement Act allows the President to issue "policies and directives," but not regulations. 40 U.S.C. § 121(a). And third, the Competition in Contracting Act requires that Procurement Act policies issued by the President promote "full and open competition." 41 U.S.C. § 3301(a); *see* 40 U.S.C. § 121(a); *see also id.* § 111. But the contractor mandate would exclude from competition all contractors unable to comply with the mandate, regardless of value offered. *See Nat'l Gov't Servs., Inc. v. United States*, 923 F.3d 977, 990 (Fed. Cir. 2019).

This context frames the core issue in this case. There are many iterations of vaccine mandates and many cases challenging them. Here, the President has attempted to regulate workplace health and safety under the guise of setting procurement policy. In the OSHA vaccine mandate case, by contrast, the question was whether OSHA had acted within the scope of its delegated authority to regulate workplace safety. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA* ("*NFIB*"), 142 S. Ct. 661, 665 (2022) (per curiam). The Supreme Court held OSHA had not. *Id.* And here, Congress has circumscribed the President's power over procurement in an even more limited fashion than its delegation to OSHA. The Procurement Act was intended to facilitate the federal government's ability to contract for goods and services—*not*, as the

Government argues, to regulate anything and everything arguably connected to the realm of procurement. No one contests the President's power to procure, or even the President's power to make policies and directives to govern the process of procurement. But this power is not one to regulate generally, and certainly not one to regulate healthcare policies for employees of a federal contractor who are not even "working on or in connection with a [federal contract]." Guidance at 4; *see Georgia*, 46 F.4th at 1295.

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

For instance, a private business procuring goods and services in the marketplace from a private contractor would never insist upon that contractor paying a minimum wage of $15 per hour (or more). But the Executive Branch, under the guise of "efficiency" in contracting, insists that the Government should pay more for its goods and services. Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Jan. 30, 2022); Complaint of Texas, Louisiana, and Mississippi, *Texas v. Biden*, No. 6:22-cv-00004 (S.D. Tex. Feb. 10, 2022), ECF No. 1. Likewise, no private business purchasing goods or services would insist that a contractor or subcontractor must provide notice of *Beck* rights to its employees, or else it would not do

business with that contractor (or sub). *Comms. Workers v. Beck*, 487 U.S. 735 (1988). But the Executive Branch imposed those requirements on government contractors—and then rescinded them and reimposed them and rescinded them again in a fight over union policy, not procurement policy. *See, e.g.*, Exec. Order No. 12,800, Notification of Employee Rights Concerning Payment of Union Dues or Fees, 57 Fed. Reg. 12,985 (Apr. 13, 1992); revoked by Exec. Order No. 12,836, Revocation of Certain Executive Orders Concerning Federal Contracting, 58 Fed. Reg. 7,045 (Feb. 1, 1993); reimposed by Exec. Order. No. 13,201, Notification of Employee Rights Concerning Payment of Union Dues or Fees, 66 Fed. Reg. 11,221 (Feb. 17, 2001); revoked again by Exec. Order No. 13,496, Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 6,107 (Jan. 30, 2009).

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

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

With this context in mind, courts ask whether challenged actions are "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mut. Ins. Co. v. Friedman*,

639 F.2d 164, 170 (4th Cir. 1981). Courts sometimes articulate this reasonable-relation standard to require a "sufficiently close nexus" between the challenged order and the "criteria" of "economy" and "efficiency." *Kahn*, 618 F.2d at 792; *see also* Gov't Br. 13 (conceding that the nexus must at least be "close"). Previous examinations of the Act have emphasized that this "nexus" requirement "does not write a blank check for the President to fill in at his will." *Kahn*, 618 F.2d at 793. Rather, the nexus must tangibly relate to the systems used for procurement.

The contractor mandate fails to satisfy that requirement. The Government's stated nexus is that the contractor mandate would "improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." Request for Information and Comment on Digital Assets and Related Technologies, 86 Fed. Reg. 53,692 (Sept. 28, 2021); *see also* 86 Fed. Reg. at 63,421 ("[T]he overall effect of enacting these protocols for Federal contractors and subcontractors will be to decrease the spread of COVID-19, which will in turn, decrease worker absence, save labor costs on net, and thereby improve efficiency in Federal contracting."). In other words, unvaccinated individuals employed by federal contractors might get sick and might slow down projects or increase costs for contractors and subcontractors.

But the Procurement Act does not provide such broad authority. If it did, the Procurement Act would essentially grant the President authority over

any aspect of public health so long as it had some connection to individuals employed by federal contractors and subcontractors. The scope of such authority would be virtually limitless. Yet the Government offers no limiting principle, and it does nothing to assuage fears that the reach of the Procurement Act would continue to grow over the years. *See* Gov't Br. 29.

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

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

In *AFL-CIO v. Kahn*, for example, the President signed an executive order authorizing denial of government contracts to companies that failed or refused to comply with voluntary wage and price standards. 618 F.2d at 785. There, the court recognized that the statutory language providing that the President may "prescribe" policies as he deems "necessary" was somewhat open-ended, but not unlimited. *Id.* at 788. The court went on to note that this language was guided by the statute's purpose, which was to further the federal government's aim of having a "economical and efficient system for . . . procurement and supply." *Id.* The words "economy" and "efficiency," the court noted, "encompass those factors like price, quality, suitability, and

availability of goods or services that are involved in all acquisition decisions." *Id.* at 789. In that case, the court upheld the use of the Procurement Act to implement the wage and price controls but "emphasize[d] the importance to [its] ruling . . . of the nexus between the wage and price standards and likely savings to the Government." *Id.* at 793. For example, the court found it noteworthy that the wage and price control at issue "will likely have the direct and immediate effect of holding down the Government's procurement costs." *Id*. at 792. In contrast, the contractor mandate is premised on speculation that the mandate will have the "overall effect" of decreasing the spread of COVID-19 and in turn decrease worker absence. 86 Fed. Reg. at 63,418. The lack of a "direct and immediate effect" is indicative of a lack of a nexus.

The Government also points to *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), in support of its position that the standard under the Procurement Act is a "lenient" one. Gov't Br. 19. There, the court upheld an executive order issued under the Procurement Act requiring federal contractors to post notices at all facilities that federal labor laws protected them from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities. *Chao*, 325 F.3d at 362-63. But in *Chao*, the primary question was whether the executive order was preempted by the *Garmon* preemption doctrine of the National Labor Relations Act (NLRA). *Id.* at 363; *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Under the *Garmon* preemption doctrine, an executive order of its kind

would have been preempted if it involved regulation of an activity that was either protected or prohibited by the NLRA. *Chao*, 325 F.3d at 363. The court determined that the regulated activity was neither protected nor prohibited, and therefore the order was not preempted. *Id.* at 363-66.

The court's discussion of the Procurement Act comes almost as an afterthought to its primary holding regarding preemption. The district court had not reached the Procurement Act question, but plaintiffs offered it as an "alternative ground for affirmance." *Id.* at 362, 366. The court spent about two paragraphs on the issue and failed to explain how a sufficient nexus existed. *Id.* at 366. The court merely gave a brief summary of *Kahn* and then restated the nexus offered by the President's executive order regarding the alleged connection to economy and efficiency. *Id.* The court even acknowledged that the "link" between the order and the Act's requirements for economy and efficiency was "attenuated." *Id.* But the court dismissed its own (well-founded) skepticism and surmised that since a tenuous link had been permissible in *Kahn*, a tenuous link could be permissible there. *Id.* at 366-67.

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

As a final example, in *Chamber of Commerce v. Napolitano*, the Chamber challenged an executive order requiring federal contractors to use "E-Verify," an electronic system used to check immigration status for employment eligibility. 648 F. Supp. 2d 726, 729 (D. Md. 2009). The Chamber challenged the order under the Procurement Act, arguing that there was not a sufficiently close nexus between the order and the Procurement Act's "criteria of efficiency and economy." *Id.* at 737. Similar to *Chao*, however, the court required the President to provide only a "reasonable and rational" explanation of how the measure was "necessary" to promote "efficiency and economy." *Id.* at 738. Even assuming for the sake of argument that this interpretation of the Procurement Act was correct, the contractor mandate here has an even more tenuous connection to hiring procedures. In *Chamber of Commerce v. Napolitano*, the executive order was aimed at improving contractors' employment eligibility determinations to reduce their immigration enforcement actions. *Id.* There, the order regulated a contractor's actual hiring operations to improve a contractor's efficiency, but here, the contractor mandate regulates employee health under the reasoning that down the road it will improve operations.

In each of these cases, the courts took a deferential approach to the president's exercise of authority under the Procurement Act. Whether that overarching approach was correct is not at issue here. But in each of these cases, the challenged order was at least related to "the ordinary hiring, firing, and management of labor." *Kentucky*, 23 F.4th at 607. Assuming for present

purposes that those orders were sufficiently connected to the grant of authority under the Act, they cannot support the Government's claim of authority here. The contractor mandate goes beyond mere management issues all the way to regulating the health and safety of employees of contractors and subcontractors.

IV. Recent Supreme Court decisions about the major-questions doctrine—including the OSHA vaccine mandate case—cast doubts on the Government's assertion of authority here.

As the district court correctly concluded, the Supreme Court's recent decisions regarding the major-questions doctrine bar the Government's assertion of authority. *Brnovich*, 562 F. Supp. 3d at 153. Under this doctrine, Congress must "speak clearly" to delegate "powers of vast economic and political significance." *NFIB*, 142 S. Ct. at 665 (internal quotation marks omitted). And "[u]nder [the Supreme Court's] precedents, this is a major questions case." *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). Just this year, the Court explained that a vaccine mandate for millions of Americans implicated the major-questions doctrine because that mandate constituted "a significant encroachment into the lives—and health—of a vast number of employees." *NFIB*, 142 S. Ct. at 665. So too here—"[i]ncluding a [COVID]-19 vaccination requirement in every [government] contract and solicitation, across broad procurement categories, requires 'clear congressional authorization.'" *Georgia*, 46 F.4th at 1296 (quoting *West Virginia*, 142 S. Ct. at 2609).

The Government resists the conclusion that the major-questions doctrine applies, even as it concedes that the authority it claims here is "unquestionably broad." Gov't Br. 35. The Government argues that the contractor mandate does not involve the exercise of "regulatory authority," which, in its view, is a prerequisite for the doctrine to apply. *Id.* at 30-31 (internal quotation marks omitted). And it posits that the doctrine can be ignored when the President is involved in making the challenged decision. *Id.* at 31-32.

Not so. The major-questions doctrine is a tool for determining whether Congress intended to divest itself of certain "fundamental policy decisions" that must ordinarily be made by the legislative branch. *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment); *see West Virginia*, 142 S. Ct. at 2617 (Gorsuch, J., concurring). For that reason, major-questions caselaw makes no distinction between regulations on the one hand and other kinds of executive action on the other. Instead, the Supreme Court has stated that the doctrine applies in "all corners of the administrative state," *West Virginia*, 142 S. Ct. at 2608 (majority op.), regardless of whether the entity claiming congressional authority is subject to the direct control of the President, *see, e.g.*, *id.* at 2610 (applying the doctrine to review action by the Environmental Protection Agency, a quasi-independent agency); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (applying the doctrine to review action by the Attorney General, a cabinet appointee). The major-questions doctrine applies.

Clear congressional authorization is wanting here. The Government locates its purported authorization in sections 101 and 121, arguing that those provisions are worded "broad[ly]." Gov't Br. 35. But as the Supreme Court's major-questions decisions establish, it is a mistake to conflate breadth with clarity. In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), for example, the Government relied on a similarly broad statute to claim the authority to halt evictions. There, the Government pointed to the Surgeon General's authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" between States. *Id.* at 2487 (quoting 42 U.S.C. § 264(a)). And in *NFIB*, the Government relied on the power to set "occupational safety and health standards" to support its workplace vaccine mandate. *NFIB*, 142 S. Ct. at 665 (quoting 29 U.S.C. § 655(b)). In both instances, the statutory language was arguably *broad* enough to authorize the power the Government claimed. *West Virginia*, 142 S. Ct. at 2609. But in neither instance was the statute *clear* enough. *See id.*; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *NFIB*, 142 S. Ct. at 665. And unlike the statutes in those cases, the Procurement Act does not "so much as mention[] either public health or vaccination," making "the [c]ontractor [m]andate [] even more clearly unlawful than the OSHA mandate" or the eviction moratorium. *Brnovich*, 562 F. Supp. 3d at 153 & n.18.

There are still other "telling clues" that Congress did not authorize the sweeping power the Government asserts. *West Virginia*, 142 S. Ct. at 2622

(Gorsuch, J., concurring). "[T]he age and focus of the statute," for example, offer no indication that the Procurement Act permits the contractor mandate. *Id.* at 2623. These considerations undermined the Government's position in *NFIB* because the statute at issue "was adopted 40 years before the pandemic and . . . focused on conditions specific to the workplace rather than a problem faced by society at large." *Id.* And they undermine the Government's position here, too. As already explained, the Procurement Act, passed in 1949, was enacted to improve the efficiency of the government's procurement system, not to prescribe the healthcare decisions of those with whom it contracted. *Georgia*, 46 F.4th at 1293-94. The Government's "attempt to deploy an old statute focused on one problem to solve a new and different problem [is] a warning sign that it is acting without clear congressional authority." *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

Or consider the Government's "past interpretations of the [] statute." *Id.* The government mentions several executive orders issued under the Procurement Act, *see, e.g.*, Gov't Br. 18-19, but "[o]nly one example it offers is even remotely in the realm of public health: a directive by President Obama requiring federal contractors to provide paid sick leave to employees," *Georgia*, 46 F.4th at 1301. And "no circuit court" has "weigh[ed] in on [the] validity" of that order. *Id*. As the Eleventh Circuit explained, this "single order falls far short of establishing the kind of longstanding practice that might support interpreting the Procurement Act to contemplate a vaccination power." *Id.* (internal quotation marks omitted); *see West Virginia*, 142 S. Ct. at

2623 ("When an agency claims to have found a previously unheralded power, its assertion generally warrants a measure of skepticism." (internal quotation marks omitted)).

Another basis for skepticism of the Government's position is the "mismatch between [the Government's] challenged action and its congressionally assigned mission and expertise." *West Virginia*, 142 S. Ct. at 2623. "When an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *Id.* at 2612-13 (majority op.) (cleaned up). That is one reason why, "in *Alabama Ass'n of Realtors*, th[e] [Supreme] Court rejected an attempt by a public health agency to regulate housing." *Id.* at 2623 (Gorsuch, J., concurring). That is why, "in *NFIB v. OSHA*, the Court rejected an effort by a workplace safety agency to ordain broad public health measures that fell outside its sphere of expertise." *Id.* (cleaned up). And that is why this Court should reject the improbable notion that Congress would grant to the FAR Council, a body that specializes in procurement, the power to make public health decisions for one-fifth of the U.S. private-sector workforce.

CONCLUSION

The Court should affirm the district court's preliminary injunction.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

On October 28, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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FOR THE NINTH CIRCUIT
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