

67 F.4th 921

United States Court of Appeals, Ninth Circuit.

Kristin K. MAYES, 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; Troy A. Miller, in his official capacity as Senior Official Performing the Duties of the Commissioner of US Customs and Border Protection; Tae Johnson, in his official capacity as Senior Official Performing the Duties of Director of US Immigration and Customs Enforcement; Ur Mendoza Jaddou, in her official capacity as Director of US Citizenship and Immigration Services; Office of Personnel Management; Kiran Ahuja, in her official capacity as director of the Office of Personnel Management and as co-chair of the Safer Federal Workforce Task Force; United States General Services Administration; Shalanda Young, in her official capacity as Acting Director of the Office of Management and Budget and as a member of the Safer Federal Workforce Task Force; Safer Federal Workforce Task Force; Jeffrey Zients, in his official capacity as co-chair of the Safer Federal Workforce Task Force and COVID-19 Response Coordinator; L. Eric Patterson, in his official capacity as Director of the Federal Protective Service and member of the SFWTF; James M. Murray, in his official capacity as Director of the United States Secret Service and member of the SFWTF; Deanne Criswell, in her official capacity as Director of the Federal Emergency Management Agency and member of the SFWTF; Rochelle Walensky, in her official capacity as Director of the Centers for Disease Control and Prevention and member of the SFWTF; Centers for Disease Control and Prevention; Federal Acquisition Regulatory Council; Mathew C. Blum, in his official capacity as Chair of the Federal Acquisition Regulatory Council and Acting Administrator of the Office of Federal Procurement Policy, Office of Management and Budget; Lesley A. Field, in her official capacity as a member of the Federal Acquisition Regulatory Council and Acting Administrator for Federal Procurement at the Office of Federal Procurement Policy, Office of

Management and Budget; Karla S. Jackson, in her official capacity as a member of the Federal Acquisition Regulatory Council and Assistant Administrator for Procurement at the National Aeronautics and Space Administration; Jeffrey A. Koses, in his official capacity as a member of the Federal Acquisition Regulatory Council and Senior Procurement Executive at the General Services Administration; John M. Tenaglia, in his official capacity as a member of the Federal Acquisition Regulatory Council and Principal Director of Defense Pricing and Contracting at the Department of Defense; United States of America; United States Department of Justice; Merrick B. Garland, Attorney General, in his official capacity as Attorney General of the United States, Defendants-Appellants, Arizona Chamber of Commerce & Industry; Fifty-Sixth Arizona Legislature, Intervenor.

No. 22-15518

|
Argued and Submitted March 7, 2023 Las Vegas,
Nevada

|
Filed April 19, 2023

Synopsis

Background: State attorney general, federal contractor, and federal employee brought action challenging validity of President's executive order requiring federal contractors' and subcontractors' employees to be vaccinated against COVID-19. The United States District Court for the District of Arizona, Michael T. Liburdi, J., 2022 WL 19560411, granted plaintiffs' motion for permanent injunction, and federal government appealed.

Holdings: The Court of Appeals, Bennett, Circuit Judge, held that:

major questions doctrine did not apply in evaluating executive order;

executive order did not violate major questions doctrine;

executive order fell within scope of President's authority under Procurement Act;

executive order did not violate nondelegation doctrine;

neither federalism nor state sovereignty concerns barred

executive order;

task force created by executive order was not executive “agency” subject to Procurement Policy Act’s procedural requirements;

Federal Acquisition Regulation (FAR) Council memorandum was not subject to Procurement Policy Act’s notice-and-comment requirements; and

acting Office of Management and Budget (OMB) director properly invoked Procurement Policy Act’s waiver of its notice-and comment provisions.

Reversed.

Procedural Posture(s): On Appeal; Motion for Permanent Injunction.

***925** Appeal from the United States District Court for the District of Arizona, Michael T. Liburdi, District Judge, Presiding, D.C. No. 2:21-cv-01568-MTL

Attorneys and Law Firms

David L. Peters (argued), Anna O. Mohan, and Mark B. Stern, Appellate Staff Attorneys; Joshua Revesz, Counsel, Office of the Assistant Attorney General; Brian M. Boynton, Principal Deputy Assistant Attorney General; United States Department of Justice; Washington, D.C.; Samuel F. Callahan, Associate Deputy General Counsel; Shraddha A. Upadhyaya, Associate General Counsel; Arpit K. Garg, Deputy General Counsel; Daniel F. Jacobson, General Counsel; Office of Management and Budget; Washington, D.C.; for Defendants-Appellants.

Alexander W. Samuels (argued), Principal Deputy Solicitor General; James K. Rogers, Senior Litigation Counsel; Drew C. Ensign, Deputy Solicitor General; Joseph A. Kanefield, Chief Deputy & Chief of Staff; Kristin K. Mayes, Attorney General of Arizona; Office of the Arizona Attorney General; Phoenix, Arizona; Hannah H. Porter and Kevin E. O’Malley, Gallagher and Kennedy, Phoenix, Arizona; for Plaintiffs-Appellees Kristin K. Mayes and State of Arizona.

Dennis I. Wilenchik, Wilenchik & Bartness PC, Phoenix, Arizona, for Plaintiff-Appellee Al Reble.

Michael Napier, Napier Abdo Coury & Baillie PC, Phoenix, Arizona, for Plaintiff-Appellee Phoenix Law Enforcement Association and United Phoenix Firefighters Association Local 493.

Michael G. Bailey (argued), Tully Bailey LLP, Phoenix,

Arizona, for Intervenor Arizona Chamber of Commerce & Industry.

Kory Langhofer (argued) and Thomas J. Basile, Statecraft PLLC, Phoenix, Arizona, for Intervenor Fifty-Sixth Arizona Legislature.

Natalie P. Christmas, Assistant Attorney General of Legal Policy; James H. Percival, Deputy Attorney General of Legal Policy; Henry C. Whitaker, Solicitor General; Ashley Moody, Attorney General of Florida; Office of the Florida Attorney General; Tallahassee, Florida; for Amici Curiae the States of Florida, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia.

Daryl Joseffer and Stephanie A. Maloney, United States Chamber Litigation Center, Washington, D.C.; Steven P. Lehotsky, Gabriela Gonzalez-Araiza, and Adam Steene, Lehotsky Keller LLP, Washington, D.C.; Matthew H. Frederick, Lehotsky Keller LLP, Austin, Texas; for Amicus Curiae the Chamber of Commerce of the United States of America.

Before: Richard R. Clifton, Mark J. Bennett, and Roopali H. Desai, Circuit Judges.

OPINION

BENNETT, Circuit Judge:

***926** The purpose of the Federal Property and Administrative Services Act of 1949 (“Procurement Act”), 40 U.S.C. § 101 *et seq.*, “is to provide the Federal Government with an economical and efficient system for ... [p]rocuring and supplying property and nonpersonal services, and ... contracting,” *id.* § 101(1). “The President may prescribe policies and directives that the President considers necessary to carry out” the Procurement Act, so long as they are “consistent” with the Act. *Id.* § 121(a). President Biden was justified in concluding that requiring federal contractors who worked on or in connection with federal government projects to be vaccinated against COVID-19 would promote economy and efficiency in federal contracting. Because the district court erred in

enjoining the President’s “Contractor Mandate” Executive Order, we dissolve the injunction entered by the district court.

In the midst of the COVID-19 pandemic—and faced with a rising death toll and lost work hours during a recession—the President invoked his authority under the Procurement Act. He used that authority to direct federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, including vaccination requirements, for employees to be eligible to work on federal government projects. The President’s delegated executive officer found that requiring vaccination against COVID-19 would reduce absenteeism, lower cost overruns, and prevent delays on government projects. 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, 63,418 (Nov. 16, 2021) (“OMB Determination”).

Plaintiffs sued to enjoin the vaccination requirement. The district court granted a permanent injunction against the Contractor Mandate, effective in any contract that either involved a party domiciled or headquartered in Arizona and/or was performed “principally” in Arizona. The federal government appealed. We stayed the district court’s injunction pending resolution of this appeal. Dkt. No. 70.

We have jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1). We **REVERSE** the district court’s grant of a permanent injunction and dissolve the injunction.

I. BACKGROUND

A. Statutory Framework

1. The Procurement Act

This dispute involves two provisions of the Procurement Act:

§ 101. Purpose

The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:

***927 (1)** Procuring and supplying property and nonpersonal services, and performing related functions including contracting

40 U.S.C. § 101.

§ 121. Administrative

(a) Policies prescribed by the President. – The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.

Id. § 121.

2. The Procurement Policy Act

The Office of Federal Procurement Policy Act (“Procurement Policy Act”), 41 U.S.C. § 1707,¹ states that a “procurement policy, regulation, procedure, or form ... may not take effect until 60 days after it is published for public comment in the Federal Register” if it “relates to the expenditure of appropriated funds” and either “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.” *Id.* § 1707(a)(1).

The Procurement Policy Act’s requirements apply to specific “executive agenc[ies].” *Id.* § 1707(c)(1). But “[i]f urgent and compelling circumstances make compliance with the [notice and comment] requirements impracticable,” the officer authorized to issue the procurement policy may waive them. *Id.* § 1707(d).

B. Organizational Framework

On his first day in office, President Biden issued Executive Order 13,991, establishing the Safer Federal Workforce Task Force (“Task Force”). Protecting the Federal Workforce and Requiring Mask-Wearing, 86 Fed. Reg. 7,045, 7,046 (Jan. 25, 2021). Executive Order 13,991 charged the Task Force with “provid[ing] ongoing guidance to heads of agencies on the operation of the Federal Government, the safety of its employees, and the continuity of Government functions during the COVID-19 pandemic.” *Id.*

The Office of Federal Procurement Policy is part of the Office of Management and Budget (“OMB”). 41 U.S.C. §

1101(a). Congress has authorized it to “provide overall direction of Government-wide procurement policies ... and promote economy, efficiency, and effectiveness in the procurement of property and services.” *Id.* § 1101(b).

Congress also created the Federal Acquisition Regulatory Council (“FAR Council”). 41 U.S.C. § 1302(a). The Administrator of the Office of Federal Procurement Policy chairs the FAR Council and provides guidance on how agencies should obtain full and open competition in contracting. *See id.* §§ 1121, 1122(a)(1)–(2), 1302(b). The FAR Council promulgates the Federal Acquisition Regulation (“FAR”), *id.* § 1303, which contains standard provisions that are included in certain government contracts, *see* 48 C.F.R. §§ 1.000–53.300.

C. Factual Background

There have been over 760 million confirmed cases of COVID-19 worldwide,² and *928 more than 100 million such cases in the United States.³ The disease has caused over 6.8 million deaths around the world.⁴ More than 1.1 million of those deaths have been in the United States.⁵ Since January 2020, a state of public health emergency has been in effect in the United States because of the disease.⁶

The COVID-19 pandemic has also had profound economic effects. The pandemic triggered the greatest worldwide recession since the end of World War II.⁷ The United States Census Bureau concluded that the pandemic’s initial impact on the U.S. economy was “more widespread than on mortality.”⁸ It “caused the biggest blow to the U.S. economy since the Great Depression.”⁹ Just a year into the pandemic, the cost of lost work hours in the United States associated with the pandemic had exceeded \$100 billion.¹⁰

In response, and once COVID-19 vaccinations were widely available and deemed safe and effective, the President issued an executive order requiring federal contractors’ employees to get vaccinated if they work on or in connection with federal government contracts or work in the same workplace as such employees. This lawsuit revolves around four documents that together comprise the “Contractor Mandate”: (1) the Executive Order, (2) the Task Force Guidance, (3) the OMB Determination, and (4) the FAR Council Guidance.

1. The Executive Order

In September 2021, President Biden issued Executive Order 14,042, Ensuring Adequate COVID Safety Protocols for Federal Contractors. 86 Fed. Reg. 50,985 (Sept. 14, 2021) (“EO”). The EO was issued pursuant to the Procurement Act to “promote[] economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument.” *Id.* at 50,985.

The EO directs executive agencies subject to the Procurement Act to include, in *929 qualifying federal contracts,¹¹ a clause requiring contractors to comply with guidance that would subsequently be issued by the Task Force. *Id.*¹² The Task Force was directed to issue its guidance by September 24, 2021. *Id.* The EO states that, before the deadline, the OMB Director “shall, as an exercise of the delegation of my authority under the [Procurement] Act, *see* 3 U.S.C. § 301, determine whether such Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors.” *Id.* at 50,985–86.

The EO further instructs the FAR Council to amend the FAR to include the same COVID-19 safety clause. *Id.* at 50,986. It states that “agencies are strongly encouraged, to the extent permitted by law,” to seek to modify existing contracts to include the COVID-19 safety clause. *Id.* at 50,987.

2. The Task Force Guidance

On September 24, 2021, in accordance with the President’s deadline, the Task Force issued its initial guidance for federal contractor and subcontractor work locations. The guidance was updated on November 10, 2021, and states, in relevant part:

Covered contractors must ensure that all covered contractor employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than January 18, 2022. After that date, all covered

contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract.

Safer Federal Workforce Task Force, *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* 5 (updated Nov. 10, 2021) (“Task Force Guidance”).¹³

The Task Force Guidance defines “covered contractor employee” as “any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace.” *Id.* at 3. The definition extends to employees who were “not themselves working on or in connection with a covered contract.” *Id.* A “covered contractor workplace” excludes a covered employee’s residence but encompasses any location “controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.” *Id.* at 4. The Task Force Guidance includes exceptions for otherwise-covered employees who are not vaccinated against COVID-19 because of a disability (including medical conditions) or a “sincerely held religious belief, practice, or observance.” *Id.* at 5.

***930 3. The OMB Determination**

On November 10, 2021, the Acting OMB Director—exercising power delegated under § 2(c) of the EO—determined that the Task Force Guidance *would* promote economy and efficiency in federal contracting. OMB Determination, 86 Fed. Reg. at 63,418. The Acting OMB Director reasoned that the Task Force Guidance would “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.” *Id.* at 63,421. The OMB Determination also explained how COVID-19 infections “impose[] significant costs on contractors and the federal government,” and how vaccination against COVID-19 “reduces net costs.” *Id.* at 63,421–22 (bolding and capitalization omitted).¹⁴

4. The FAR Council Guidance

On September 30, 2021, the FAR Council—in accord with § 3(a) of the EO—issued guidance on how to include the COVID-19 safety clause in new contracts and solicitations. *See generally* Memorandum from FAR Council to Chief Acquisition Officers, et al., *Issuance of Agency Deviations to Implement Executive Order 14042* (Sept. 30, 2021) (“FAR Council Guidance”).¹⁵ The FAR Council Guidance includes a sample clause that implements the COVID-19 vaccination requirement. *Id.* at 4–5.

D. Proceedings Below

The State of Arizona and then-Attorney General Mark Brnovich (“Arizona”) filed a lawsuit challenging the EO on September 14, 2021—the date the EO was published. Once the scope of the Contractor Mandate became clear, Arizona amended its complaint to also challenge the Task Force Guidance, OMB Determination, and FAR Council Guidance, and filed a motion for a preliminary injunction.¹⁶ All plaintiffs¹⁷ filed a renewed motion for a preliminary injunction with the Second Amended Complaint.

In January 2022, the district court issued an order granting plaintiffs’ request for a preliminary injunction. *See generally Brnovich v. Biden*, 562 F. Supp. 3d 123 (D. Ariz. 2022). The district court first held that Arizona had standing to challenge the Contractor Mandate because of its proprietary interests (its contracts with the federal government) and its sovereign interests (its own vaccination policies). *See id.* at 142–47.

Next, the district court concluded that the Contractor Mandate exceeded the President’s statutory authority under the Procurement Act. *See id.* at 150–57. The court reasoned that allowing the Mandate to go into effect would allow the President to enact any policy, “no matter how tenuous[ly]” connected to “the broad goals of achieving economy and efficiency in federal procurement.” *Id.* at 152. The court also ***931** concluded that the Contractor Mandate is a public health measure, not a procurement policy. *See id.* at 153–54. It held that the Procurement Act does not clearly authorize the passage of such a measure, because “[w]e expect Congress to speak clearly when authorizing [the executive branch] to exercise powers of ‘vast economic and political significance.’ ” *Id.* at 153 (second alteration in original) (quoting *Alabama Ass’n of Realtors v. Dep’t of Health & Human Servs.*, — U.S. —, 141 S. Ct. 2485, 2489, 210

L.Ed.2d 856 (2021) (per curiam)).

The court then concluded that, as many Arizona agencies are federal contractors, Arizona would suffer irreparable harm from implementing the Contractor Mandate in the form of (1) lost contracts, funds, and employees; (2) “compliance and monitoring costs”; and (3) the purported conflict between the Mandate and Arizona’s vaccination laws. *Id.* at 165. The court found that the balance of harms and public interest weighed in favor of an injunction because “issuing an injunction here would do [the government] little harm” as the President could “recommend vaccination among contractors” rather than mandating it. *Id.* at 166. The court rejected Arizona’s proposal for a nationwide injunction, reasoning that “[e]quitable remedies should redress only the injuries sustained by a particular plaintiff in a particular case.” *See id.* at 166–67.¹⁸

In February 2022, the district court issued a permanent injunction barring the federal government from enforcing the Contractor Mandate in any contract (i) “to which a contracting party [was] domiciled in or headquartered in the State of Arizona” or (ii) “to be performed principally in the State of Arizona.”¹⁹ The court also issued a final judgment pursuant to Federal Rule of Civil Procedure 54(b).²⁰ The federal government appealed.²¹

*932 After oral argument, we stayed the district court’s permanent injunction. Dkt. No. 70. We issued the stay “pursuant to Fed. R. Civ. P. 62(g) and ... until we issue[d] an opinion on the merits of this appeal.” *Id.*

II. STANDARD OF REVIEW

We review the district court’s decision to grant a permanent injunction for an abuse of discretion. *Gonzalez v. U.S. Immigr. & Customs Enf’t*, 975 F.3d 788, 802 (9th Cir. 2020). We review determinations underlying the injunction under three standards: “factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion.” *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017).

A plaintiff seeking a permanent injunction must establish: “(1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction.” *Indep. Training & Apprenticeship Program v. Cal. Dep’t of Indus. Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013)

(citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006)). When the United States is a party, the balance of the equities and public interest factors merge. *Cf. Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (noting the merging of the two factors in a preliminary injunction analysis).

III. DISCUSSION

On appeal, no party challenges the district court’s finding that Arizona has Article III standing because of its proprietary interests. The district court did not err—let alone clearly err—in its factual finding that Arizona is “likely to suffer direct injury as a result of the Contractor Mandate.” *Brnovich*, 562 F. Supp. 3d at 143. To compete for and work on federal government contracts, Arizona would have to comply with the Contractor Mandate. We therefore move on to whether Arizona has satisfied the first factor of the permanent injunction inquiry: actual success on the merits.²²

A. The Major Questions Doctrine does not apply.²³

1. The doctrine does not apply to actions by the President.

The Major Questions Doctrine has evolved over the years, but in its current form, it requires “Congress to speak clearly *933 if it wishes to assign to *an agency* decisions of vast ‘economic and political significance.’ ” *Util. Air. Regul. Grp. v. EPA* (“*UARG*”), 573 U.S. 302, 324, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) (emphasis added) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

But there is no relevant agency action here. Through the Procurement Act, Congress delegated to *the President* the authority to “prescribe policies and directives that the President considers necessary” to “provide the Federal Government with an economical and efficient system” for “[p]rocurring ... property and nonpersonal services, and performing related functions including contracting.” 40 U.S.C. §§ 101, 121. The Major Questions Doctrine is motivated by skepticism of agency interpretations that “would bring about an enormous and transformative expansion in ... regulatory authority without clear congressional authorization.” *UARG*, 573 U.S. at 324, 134 S.Ct. 2427. Those concerns are not implicated here as the

President “does not suffer from the same lack of political accountability that agencies may, particularly when *the President* acts on a question of economic and political significance.” *Georgia*, 46 F.4th at 1313 (Anderson, J., concurring in part and dissenting in part) (emphasis added); *see also Louisiana*, 55 F.4th at 1038 (Graves, J., dissenting) (same).

Article II provides that “[t]he executive Power shall be vested in a President,” who must “take Care that the Laws be faithfully executed.” U.S. Const. art. II, §§ 1–3. “[T]he Framers made the President the most democratic and politically accountable official in Government.” *Seila L. LLC v. Consumer Fin. Prot. Bureau*, — U.S. —, 140 S. Ct. 2183, 2203, 207 L.Ed.2d 494 (2020). This accountability is ensured through regular elections and “the solitary nature of the Executive Branch, which provides ‘a single object for the jealousy and watchfulness of the people.’ ” *Id.* (quoting *The Federalist* No. 70, at 479 (A. Hamilton) (J. Cooke ed., 1961)). And, of course, the President does not get a “blank check,” here or otherwise. First, the President’s actions must be authorized by and consistent with the Procurement Act. Second, the Constitution always provides checks on all branches of government.²⁴ If we were to determine that the Major Questions Doctrine prevents the President from exercising lawfully delegated power, we would be rewriting the Constitution’s Faithfully Executed Clause in a way never contemplated by the Framers. We decline to do so.

We recognize that three other circuits have concluded, without expressly deciding, that the Major Questions Doctrine applies to presidential action. But the Sixth Circuit never squarely addressed its reasoning for treating presidential action the same as agency action. *See* *934 *Kentucky v. Biden*, 23 F.4th 585, 606–08 (6th Cir. 2022) (relying on circuit precedent involving the Occupational Safety & Health Administration to equate Congressional requirements for agency action with those for presidential action). Similarly, the lead opinion from the Eleventh Circuit—while not labeling its analysis as pursuant to the Major Questions Doctrine—discussed the “statutory parameters” of contracting for agencies, but never discussed how or why such constraints apply to the President. *See Georgia*, 46 F.4th at 1295–97. And in its opinion upholding a preliminary injunction enjoining the Contractor Mandate, the Fifth Circuit similarly held that “delegations to the President and delegations to an agency should be treated the same under the major questions doctrine” because the Constitution “makes a single President responsible for the actions of the Executive Branch.” *Louisiana*, 55 F.4th at 1031 n.40 (quoting *Seila Law*, 140 S. Ct. at 2203).

But that supposed equivalence does not account for how the two are different, as recognized by the Supreme Court in its treatment of agencies as different from the President. *See, e.g., Free Enter. Fund*, 561 U.S. at 513–14, 130 S.Ct. 3138 (holding that the structure of an independent agency violated the Constitution *because* the President, who is “accountable to the people for executing the laws,” lacked the ability to hold the independent agency accountable). Far from assuming the President is limited in the performance of his duties, the Supreme Court instead requires an “express statement” to find that Congress meant to subject the President’s actions to additional scrutiny. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 800–01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (declining to consider the President an “agency” under the APA because Congress did not explicitly subject his actions to review under the statute).

It is perhaps for these reasons that, before our sister circuits enjoined the Contractor Mandate, the Major Questions Doctrine had “never been applied to the exercise of power by the President.” *Georgia*, 46 F.4th at 1314 (Anderson, J., concurring in part and dissenting in part). We find that the Doctrine does not apply to Presidential actions and therefore does not bar the Contractor Mandate.

2. The Contractor Mandate is not a transformative expansion of regulatory authority.

But even if the Major Questions Doctrine applied to Presidential actions, it would still not preclude the Contractor Mandate. Arizona initially argued that the Doctrine applies here because the Contractor Mandate satisfies what Arizona described as the Doctrine’s three “independent triggers”: 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. Arizona relied on Justice Gorsuch’s concurrence in *West Virginia* in advancing this position. *W. Virginia v. EPA*, — U.S. —, 142 S. Ct. 2587, 2620–21, 213 L.Ed.2d 896 (2022) (Gorsuch, J., concurring).

However, the majority in *West Virginia* described the effect of the EPA action in that case as “restructur[ing] the American energy market” because it “*represent[ed]* a ‘transformative expansion in [its] regulatory authority.’ ” *Id.* at 2610 (quoting *UARG*, 573 U.S. at 324, 134 S.Ct. 2427) (third alteration in original) (emphasis added). We do not read that sentence to mean that restructuring a

sector or seeking to regulate a significant portion of the American economy is sufficient by itself to trigger the Major Questions Doctrine. But even if that were sufficient, no *935 part of the Contractor Mandate represents an “enormous and transformative expansion in ... regulatory authority.” *UARG*, 573 U.S. at 324, 134 S.Ct. 2427.

First, the Contractor Mandate is not an exercise of regulatory authority at all, but of proprietary authority. The district court concluded that the Mandate is a regulatory public health measure, not a proprietary procurement policy. See *Brnovich*, 562 F. Supp. 3d at 153–54. But nothing in the Mandate constitutes a regulation. And its broad scope alone does not make it regulatory.²⁵

It is true that “[a]n exercise of proprietary authority can amount to a regulation if it seeks to regulate conduct *unrelated* to the government’s proprietary interests.” *Georgia*, 46 F.4th at 1314 n.3 (Anderson, J., concurring in part and dissenting in part) (emphasis added). But the conduct that the Contractor Mandate seeks to regulate *is* related to the government’s proprietary interest here: efficient and economic procurement of services. The Contractor Mandate requires vaccination of all contractor employees who will work on or in connection with a covered contract. It also imposes that requirement on employees in the same workplace as a covered contractor employee, presumably because of the way a contagious disease such as COVID-19 spreads. *Id.* (Anderson, J., concurring in part and dissenting in part); see also *S. Bay United Pentecostal Church v. Newsom*, — U.S. —, 140 S. Ct. 1613, 1613, 207 L.Ed.2d 154 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (“Because people may be infected but asymptomatic, they may unwittingly infect others [with COVID-19].”). To some, the requirement may appear overinclusive;²⁶ to others, it may seem underinclusive. But even if the Contractor Mandate were overinclusive or underinclusive (or both), that would not mean it is *unrelated* to efficient and economic procurement of services.

The government, as it does every day, drew certain lines. Perfection in line-drawing is not required. Cf. *Dandridge v. Williams*, 397 U.S. 471, 484–85, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) (discussing how “the concept of ‘overreaching’ ” has “no place” in analysis of a “regulation in the social and economic field”). And imperfect over- or under-inclusiveness does not mean that the authority being exercised is *regulatory* rather than proprietary. Nor does it give courts the authority to redraw those lines.

Second, the Contractor Mandate is not a “transformative expansion” of any authority—regulatory *or* proprietary. Arizona, the district court, and other circuits raise alarms about how the federal government has never sought, under the authority of the Procurement Act, to regulate the health decisions of American workers or to “reduc[e] absenteeism.” *936 *Brnovich*, 562 F. Supp. 3d at 152–53 (“Nor has the President, in the seventy years since the Procurement Act was enacted, ever used his authority under the Act to effectuate sweeping public health policy.”); *Kentucky*, 23 F.4th at 607 (“[W]e lack ... a clear statement from Congress that it intended the President to use a property-and-services procurement act, for a purpose never-before recognized, to effect major changes in the administration of public health.”). But this argument equates inactivity with forbidden activity. See *PennEast Pipeline Co., LLC v. New Jersey*, — U.S. —, 141 S. Ct. 2244, 2261, 210 L.Ed.2d 624 (2021) (“[T]he non-use[] of a power does not disprove its existence.” (citation omitted)). The history of the Procurement Act, Executive Orders passed under its authority, and subsequent judicial interpretations demonstrate that the Contractor Mandate is not a transformative expansion of the President’s statutory authority.²⁷

The Procurement Act was enacted in 1949. As discussed above, the purpose of the Act is to promote an economical and efficient system of federal government procurement. See *Gundy v. United States*, — U.S. —, 139 S. Ct. 2116, 2127, 204 L.Ed.2d 522 (2019) (plurality op.) (noting that a statute’s statement of purpose “is an appropriate guide to the meaning of the [statute’s] operative provisions” (alteration in original) (internal quotation marks and citation omitted)).

“[T]he most prominent use of the President’s authority under the [Act]” in the first few decades of its existence was “a series of anti-discrimination requirements for Government contractors.” *Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 790–91 (D.C. Cir. 1979) (en banc). Several Presidents issued Executive Orders forbidding contractors from discriminating on the basis of race, creed, color, or national origin. *Id.* at 790–91, 791 n.33 (citing orders). In *Kahn*, the en banc D.C. Circuit recognized that some of these Executive Orders “were issued under the President’s war powers and special wartime legislation,” but that “for the period from 1953 to 1964[,] *only* the [Procurement Act] could have provided statutory support for the Executive action.” *Id.* at 790–91 (emphasis added).

In 1964, the Third Circuit became the first appellate court to consider these executive actions. See *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3d Cir. 1964). The

Farmer court ruled that the President had the authority to issue the orders under the Procurement Act. *Id.* at 8 (“In view of the [Procurement Act], we have no doubt that the applicable executive orders and regulations have the force of law.”).²⁸ Three years later, the Fifth Circuit also declined to hold that an antidiscrimination Executive Order was “so unrelated” to the Procurement Act’s purpose that it “should be treated as issued without statutory authority.” *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967).

In 1971, the Third Circuit upheld an Executive Order requiring contractors to commit to affirmative action hiring programs. *Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971). *937 The court found the Executive Order supported by the President’s authority under the Procurement Act because preventing the federal government’s suppliers from “increasing its costs and delaying its programs by excluding from the labor pool available minority workmen” would improve the economy and efficiency of federal contracts. *Id.*

In 1979, the en banc D.C. Circuit upheld an Executive Order by President Carter that required federal contractors to adhere to price and wage guidelines. *Kahn*, 618 F.2d at 785. The *Kahn* court recognized that the Executive Order had the additional motive of slowing inflation in the economy, *see id.* at 792–93, but respected the President’s calculation that there was a “nexus between the wage and price standards and likely savings to the Government,” *id.* at 793.

In 1986 and 1996, Congress recodified the Procurement Act without any substantive change.²⁹ In 2001, President Bush issued an Executive Order that required government contractors and their subcontractors to post notices at their facilities informing their employees of certain labor rights. Exec. Order No. 13,201, 66 Fed. Reg. 11,221, 11,221–22 (Feb. 17, 2001). This was the first Executive Order to explicitly cite the Procurement Act as its source of authority. *Id.* at 11,221; *but see Louisiana*, 55 F.4th at 1037 (Graves, J., dissenting) (“Executive Orders are not required to lay out the specific statute that the President’s authority falls under.”).

A year later, Congress recodified the Procurement Act³⁰ with minor changes but clarified that those edits made “no substantive change in existing law.” Act of August 21, 2002 § 5(b). This is the Act’s present form as to the provisions relevant here.

In 2003, the D.C. Circuit upheld the validity of President Bush’s 2001 Executive Order. *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360, 362 (D.C. Cir. 2003). President Bush had justified the Executive Order

by asserting a nexus to economy and efficiency because “[w]hen workers are better informed of their rights, ... their productivity is enhanced” and because “[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.” *Id.* at 366 (quoting 66 Fed. Reg. at 11,221). The D.C. Circuit recognized that the “link may seem attenuated” but found that there was “enough of a nexus” to uphold the Order. *Id.* at 366–67.

In 2009, the District Court of Maryland upheld an Executive Order issued by President Bush requiring federal contractors to use the E-Verify system to confirm employees’ compliance with immigration law (“E-Verify Order”). *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 738 (D. Md. 2009). The district court deferred to the President’s judgment that contractors with “rigorous employment eligibility confirmation policies” would be “more efficient and dependable procurement sources,” *id.* (quoting Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008)), and noted that “[t]he President and his Administration are in a better position than this Court to make such determinations,” *id.*

Finally, in 2015, President Obama issued an Executive Order requiring federal contractors to “ensur[e] that employees on *938 [federal] contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care.” Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015). The President justified the order under the Procurement Act on the following basis:

Providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

Id. This order was not challenged in federal court. *See Georgia*, 46 F.4th at 1301.

As this history demonstrates, Presidents have used the Procurement Act to require federal contractors to commit

to affirmative action programs when racial discrimination was threatening contractors' efficiency; to adhere to wage and price guidelines to help combat inflation in the economy; to ensure compliance with immigration laws; and to attain sick leave parity with non-contracting employers because federal contractors were lagging behind and losing talent. It is not a "transformative expansion" of that same authority to require federal contractors—amid an unprecedented global pandemic—to take vaccination-related steps (already required by many private employers) that promote economy and efficiency by reducing absenteeism, project delays, and cost overruns.

Congress's re-enactment of the Procurement Act is also instructive. "Congress is presumed to be aware of a[] ... judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [substantive] change." *Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168, 1174 (9th Cir. 2017) (citation omitted); see also *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 536, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) ("If a word or phrase has been given a uniform interpretation by inferior courts, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (cleaned up) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012))). We must presume that, when recodifying the Act in 2002, Congress knew that the Third, Fifth, and D.C. Circuits had interpreted the President's Procurement Act authority and the statutory terms "economy" and "efficiency" broadly, and that President Bush had—just a year prior in 2001—relied on those terms to issue an Executive Order requiring government contractors to post notices informing their employees of certain labor rights.³¹

Congress's affirmation of the broad understandings of those terms through re-enactment adds further weight to our holding that the Procurement Act supports an *939 exercise of authority like the Contractor Mandate. Presidents have, when the need arose, used the Procurement Act in ways they found necessary to promote economy and efficiency in federal contracting and procurement. The Contractor Mandate, which fits well within the Procurement Act's historical uses, was not a transformative expansion of the President's authority under that Act.³²

The Fifth Circuit recognized the history of the Procurement Act, but concluded that the Contractor Mandate was "strikingly unlike" any past action taken under the Act, not least because "a vaccination cannot be undone at the end of the workday." *Louisiana*, 55 F.4th at 1030 (cleaned up) (quoting *Nat'l Fed'n of Indep. Bus. v.*

Dep't of Lab., — U.S. —, 142 S. Ct. 661, 665, 211 L.Ed.2d 448 (2022) (per curiam)). But the *impacts* of anti-discrimination or affirmative action programs, wage and price policies, and immigration law compliance mechanisms also do not *end* with the workday—and even if they did, we do not see how that in itself would circumscribe the President's authority.

The Fifth Circuit also found important that previous Executive Orders "govern[ed] the conduct of *employers*, [whereas] the vaccine mandate purports to govern the conduct of *employees*." *Id.* But this supposed distinction "frames the issue at the wrong level of generality." *Kentucky*, 23 F.4th at 610. As Judge Graves highlighted in dissent in *Louisiana* when discussing the E-Verify Order, the employer/employee distinction does not stand up to scrutiny:

Both Executive Orders require something of employers, namely that the employer use the E-Verify system to verify the immigration eligibility of its workers, and that the employer uses a system to verify the vaccine eligibility of its workers. Both necessarily touch the employees, namely that employees working for federal contractors must be verified under the E-Verify system or be subject to termination, and that employees working for federal contractors must be verified as being COVID-19 vaccine compliant or be subject to termination.

55 F.4th at 1036–37 (Graves, J., dissenting).

In sum, we find that the Major Questions Doctrine is not relevant here because the Contractor Mandate is a Presidential—not an agency—action. But even if the Doctrine applied, it would not bar the Contractor Mandate because the Mandate is not a transformative expansion of the President's authority under the Procurement Act.

B. The Contractor Mandate falls within the President's authority under the Procurement Act.
Plaintiffs also argue that, even if the Major Questions

Doctrine does not bar the Contractor Mandate, the Mandate nonetheless exceeds the scope of the President's authority under the Procurement Act. We disagree.

***940** The Procurement Act empowers the President to “prescribe policies and directives that the President considers necessary to carry out” the statute’s objective of “provid[ing] the Federal Government with an economical and efficient system” for “[p]rocur[ing] ... nonpersonal services, and performing related functions including contracting.” 40 U.S.C. §§ 101, 121(a). Our Circuit has not yet addressed the scope of the President’s authority under the Procurement Act. But for the EO to have the force of law, “it is necessary to establish a nexus between the [EO] and some delegation of the requisite legislative authority by Congress.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 304, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979).

Different circuits have interpreted that requirement differently. The D.C. Circuit requires a “sufficiently close nexus” between an order issued pursuant to the Procurement Act and the statutory goals of economy and efficiency. *See Chao*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 792). The Fourth Circuit requires a finding that the executive branch policies are “reasonably related to the Procurement Act’s purpose.” *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). Even though the D.C. Circuit’s language sounds more stringent, its standard is a “lenient” one, *Chao*, 325 F.3d at 367, and “[e]conomy” and “efficiency” are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions,” *Kahn*, 618 F.2d at 789.

The President tasked the OMB Director to “determine whether [the Task Force’s] Guidance will promote economy and efficiency in Federal contracting if adhered to by Government contractors.” 86 Fed. Reg. at 50,986. The Acting OMB Director determined that the Task Force Guidance will “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.” 86 Fed. Reg. at 63,421. The OMB Determination further explained how COVID-19 infections “impose[] significant costs on contractors and the federal government,” and how vaccination against COVID-19 “reduces net costs.” *Id.* at 63,421–22 (bolding and capitalization omitted). Although Arizona describes the Contractor Mandate as an effort to make federal contractors “supposedly more efficient,” the district court did not make factual findings that contradicted the findings underlying the OMB Determination or conclude that those findings were arbitrary and capricious. *See generally Brnovich*, 562 F. Supp. 3d at 152–57. There is no legal basis to disregard the OMB’s findings, all of

which support the reasoning behind the Contractor Mandate.

Under either the D.C. or Fourth Circuit’s tests, the Contractor Mandate falls within the President’s Procurement Act authority.³³ The findings in the OMB Determination show a “sufficiently close nexus” with, *Kahn*, 618 F.2d at 792, and a “reasonabl[e] relat[ionship]” to, *Liberty Mut.*, 639 F.2d at 170, the Contractor Mandate and the Procurement Act’s goals of economy and efficiency. It is axiomatic that federal contracts will be performed more economically and efficiently with fewer absences. Would our analysis be different if the COVID-19 pandemic were far less serious? Perhaps, but unfortunately the President did *not* face that hypothetical. The President faced a pandemic the likes of which the world has not seen in more than a century.

***941** Our conclusion is bolstered by precedent interpreting the Procurement Act. The broad language of the Act purposefully gives the President both “necessary flexibility and ‘broad-ranging authority’ ” in setting procurement policies. *Chao*, 325 F.3d at 366 (citation omitted). And the Act leaves room for the President’s discretion by directing the President to “prescribe policies and directives that the President *considers* necessary” to carrying out the purposes of the Act. 40 U.S.C. § 121(a) (emphasis added). This statute does not present the worry of Congress hiding “elephants in mouseholes.” *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001).

In this way, the Procurement Act is similar to the statutory text at issue in *Biden v. Missouri*, — U.S. —, 142 S. Ct. 647, 211 L.Ed.2d 433 (2022) (per curiam). In *Missouri*, the Supreme Court held that language authorizing the Secretary of Health and Human Services to impose conditions he “*finds necessary* in the interest of ... health and safety” was adequate authorization to impose a vaccination requirement on the employees of facilities that receive Medicare and Medicaid funds. *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)) (emphasis added).

The Sixth Circuit concluded that 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. Therefore, according to the *Kentucky* court, the government lacked authority to regulate contractors directly to improve *their* economy and efficiency, rather than the government’s. *Id.* Likewise, the Eleventh Circuit held the Procurement Act’s “statutory scheme” is limited to “a framework through which agencies can articulate

specific, output-related standards” for their procurement decisions. *Georgia*, 46 F.4th at 1295. There, the court determined the Contractor Mandate is “different in nature than the sort of project-specific restrictions” set forth in the Procurement Act. *Id.* at 1296.

We respectfully disagree. The Act’s text—empowering the President to “prescribe ... directives that the President considers necessary,” 40 U.S.C. § 121(a), to realize “an economical and efficient system” for “[p]rocurring ... services, and performing ... contracting,” *id.* § 101(1)—allows for prescribing requirements that address contractors’ operations. The word “system” encompasses *how* the contractors’ services are to be rendered. Merriam-Webster defines “system” as “an organized or established procedure.”³⁴ We hold that the President was justified in finding that prescribing vaccination-related steps contractors must take in order to work on government contracts would directly promote an economical and efficient “system” for both procuring services and performing contracts. And we believe the President was authorized by the Act to establish a procedure by which taxpayer funds used to pay contractors who work on federal government projects are only used to pay those contractors whose relevant employees are vaccinated against COVID-19.

The Sixth Circuit in *Kentucky* also did not adequately address Presidents’ historical practices under the Procurement Act, many of which undeniably affected contractors’ own operations rather than merely *942 the government’s entry into contracts. *See* 23 F.4th at 605–10. President Bush justified his 2001 Executive Order requiring contractors to post notices informing their employees of certain labor rights on the explicit basis that “[w]hen workers are better informed of their rights, ... *their productivity is enhanced.*” 66 Fed. Reg. at 11,221 (emphasis added). This was the last Executive Order issued under the Procurement Act before Congress’s latest recodification of the Act, in which Congress stated it was making “no substantive change in existing law.” Act of August 21, 2002 § 5(b).

The *Kentucky* court classifies the Executive Orders in *Kahn*, *Chao*, and *Napolitano* as having a “‘close nexus’ to the ordinary hiring, firing, and management of labor.” *Kentucky*, 23 F.4th at 607 (quoting *Kahn*, 618 F.2d at 792). But the Contractor Mandate is also closely related to the ordinary management of labor—as evidenced by the analogous private sector practices that the Acting OMB Director cited in the OMB Determination. 86 Fed. Reg. at 63,421–22; *accord Louisiana*, 55 F.4th at 1036–37 (Graves, J., dissenting) (explaining how the E-Verify Order in *Napolitano* and the Contractor Mandate place similar requirements on employees).

The district court, Arizona, and the Fifth Circuit worry that upholding the Contractor Mandate will mean there is no limiting principle to the President’s authority under the Procurement Act. The district court hypothesized that sustaining the Contractor Mandate would permit the President to enact any executive order, “no matter how tenuous” the connection to economy and efficiency, such as “requiring all federal contractor employees to refrain from consuming soda or eating fast food.” *Brnovich*, 562 F. Supp. 3d at 152. The Fifth Circuit went further, positing that upholding the Contractor Mandate would enable the Executive Branch to require that “all federal contractors certify that their employees take daily vitamins, live in smoke-free homes, exercise three times a week, or even, at the extremity, take birth control in order to reduce absenteeism relating to childbirth and care.” *Louisiana*, 55 F.4th at 1031–32; *accord Georgia*, 46 F.4th at 1296 (warning that the Procurement Act “is not an ‘open book’ to which contracting agencies may ‘add pages and change the plot line’ ” (quoting *West Virginia*, 142 S. Ct. at 2609)).

We reject these invitations to adjudicate slippery-slope hypotheticals. “In our system of government, courts base decisions not on dramatic Hollywood fantasies, ... but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record.” *United States v. Kincaide*, 379 F.3d 813, 838 (9th Cir. 2004) (en banc) (internal citation omitted). Moreover, the Procurement Act has a clear textual limiting principle in that the President can *only* prescribe policies and directives that he “considers necessary” to ensure “an economical and efficient system” for procurement and contracting. 40 U.S.C. §§ 101, 121(a). While a future President might try to analogize soda consumption to a worldwide pandemic in issuing an Executive Order under the Procurement Act, we will leave the consideration of that hypothetical Executive Order to a future court.

We hold that the Contractor Mandate falls within the President’s authority under the Procurement Act.

C. Other doctrines do not bar the Contractor Mandate.

1. Nondelegation Doctrine

The district court also invoked the constitutional

avoidance canon to invalidate *943 the Contractor Mandate, reasoning that the Mandate “raises serious constitutional questions” under the nondelegation doctrine. *Brnovich*, 562 F. Supp. 3d. at 155–56. We disagree. The nondelegation doctrine arises out of the principle that Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’ ” *Gundy*, 139 S. Ct. at 2123 (quoting *Wayman v. Southard*, 23 U.S. 1, 42–43, 10 Wheat. 1, 6 L.Ed. 253 (1825)). But the Supreme Court has recognized that “Congress simply cannot do its job absent an ability to delegate power under broad general directives,” *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), and has concluded that a statutory delegation is constitutional so long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform,” *id.* (second alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)).

The Supreme Court has only twice found statutory delegations excessive under the nondelegation doctrine.³⁵ No statutory delegation has been invalidated due to nondelegation concerns in nearly ninety years. The Supreme Court has found an intelligible principle when the agency was authorized to regulate in the “public interest,” see *National Broadcasting Co. v. United States*, 319 U.S. 190, 215–17, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), and—more recently—when the agency issued air quality standards “requisite to protect the public health,” *Whitman*, 531 U.S. at 473, 121 S.Ct. 903. The Procurement Act has a clear intelligible principle that easily clears the low threshold established by *National Broadcasting Company*: it authorizes the President to “prescribe policies and directives that the President considers necessary” to secure “an economical and efficient system” for procurement and contracting. 40 U.S.C. §§ 101, 121(a). This principle “can be applied generally to the President’s actions to determine whether those actions are within the legislative delegation.” *Kahn*, 618 F.2d at 793 n.51.

2. Federalism and State Sovereignty

Neither federalism nor state sovereignty concerns bar the Contractor Mandate. The district court viewed the Mandate as a “regulation of health and safety matters” and thus in conflict with Arizona’s “traditional police power.” See *Brnovich*, 562 F. Supp. 3d at 156–57 (citations omitted). But the Contractor Mandate is aimed

at federal contracting, even if also motivated by health and safety concerns. And the federal government undisputedly has the power to regulate the performance of federal contracts. See *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 440–41 (9th Cir. 1991) (exempting federal contractors from state licensing requirements); *United States v. Virginia*, 139 F.3d 984, 990 (4th Cir. 1998) (“[F]ederal contractors cannot be required to satisfy state ‘qualifications in addition to those that the [Federal] Government has pronounced sufficient.’ ” (second alteration in original) (quoting *944 *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190, 77 S.Ct. 257, 1 L.Ed.2d 231 (1956))). Even if the Mandate did regulate health and safety, the federal government does not “invade[]” areas of state sovereignty “simply because it exercises its authority ... in a manner that displaces the States’ exercise of their police powers.” *Hodel v. Virginia Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 291, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

The nondelegation doctrine and state sovereignty concerns do not somehow invalidate the Contractor Mandate.

D. The Contractor Mandate satisfies the Procurement Policy Act’s procedural requirements.

Arizona contends that the Task Force’s Guidance, the FAR Council Guidance, and the OMB Determination fail the Procurement Policy Act’s procedural requirements. The Procurement Policy Act typically requires that comments on a proposed policy be open for at least 30 days and that the policy not take effect until 60 days after its publication for comment. 41 U.S.C. § 1707(a), (b). The district court correctly rejected Arizona’s procedural challenges.

1. Task Force Guidance and FAQs

The Task Force documents survive any procedural challenge for two reasons. First, the Task Force is not one of the specifically enumerated “executive agenc[ies]” that the Procurement Policy Act’s requirements apply to. *Id.* § 1707(c)(1). It is merely a body created by Executive Order 13,991. See 86 Fed. Reg. at 7,045–46. It can only advise the President, *id.* at 7,046, and thus lacks the “substantial independent authority” required of an “agency,” *Meyer v. Bush*, 981 F.2d 1288, 1292 (D.C. Cir. 1993). See also *id.* at 1292–97 (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”).

Second, the Task Force Guidance and FAQs have no standalone legal force. The EO stated that any Task Force Guidance would only be binding *after* the OMB Director’s economy-and-efficiency determination. 86 Fed. Reg. at 50,985–86. Therefore, as the district court found, the Task Force Guidance and FAQs “do not independently constitute a binding ‘policy, regulation, procedure, or form.’ ” *Brnovich*, 562 F. Supp. 3d at 160.

2. The FAR Council Guidance

The district court correctly held that the FAR Council Guidance “is not binding of its own force” and “does not compel agencies to take any specific action.” *Id.* That Guidance points contracting officers to “the direction[s] ... issued by their respective agencies.” FAR Council Guidance, at 2. Thus, the FAR Council Guidance is not a “ ‘procurement policy, regulation, procedure, or form’ ” such that it would need to conform to the Procurement Policy Act’s notice-and-comment procedures under 41 U.S.C. § 1707. *Brnovich*, 562 F. Supp. 3d at 160.

3. The OMB Determination

The federal government argues, as it did below, that the Acting OMB Director did not have to comply with the notice-and-comment provisions because the Director was acting pursuant to power delegated to her by the President. The federal government also notes that, like the district court, this court “need not determine the applicability of the [Procurement Policy Act] because the ... Director voluntarily complied with § 1707.”

The district court found that even if the Acting OMB Director were subject *945 to the notice-and-comment requirements of the Procurement Policy Act, she “properly invoked the § 1707(d) waiver provision,” *id.* at 158, because “ ‘urgent and compelling circumstances’ made compliance with ordinary § 1707 procedures impracticable with respect to the revised OMB determination,” *id.* at 159. We agree.

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. Arizona

claims that § 1707(d)’s waiver provision only applies to “temporary” procurement regulations, whereas the OMB Determination here has “no certain endpoint.” Arizona incorrectly equates an unknown duration with an *unlimited* duration. In a dynamic situation such as a pandemic, the absolute end date of temporary measures cannot be definitively determined in advance. In that way, the OMB Determination is temporary much like a public health emergency or a grant of emergency use authorization is temporary.

Arizona also argues that there are *no* “urgent and compelling circumstances” here because the Contractor Mandate is “putatively based solely on promoting economy and efficiency in federal contracting” and the government relies on “supposed efficiency gains.” In contrast, Arizona highlights that the Centers for Medicare & Medicaid Services in *Missouri* had found that immediate publication would “significantly reduce ... infections, hospitalizations, and deaths.” 142 S. Ct. at 654. Health-related concerns like those in *Missouri* may be immediately calculable. But the economic and logistical consequences of infections, isolation periods, and quarantine requirements on federal contracts and budget overruns necessarily operate as domino effects. Therefore, it is not disqualifying that health concerns in one context were based on actual data while economic projections in this context are just that: projections.

For similar reasons discussed above (no final agency action in the case of the FAR Council Guidance and no agency in the case of the Task Force), Arizona’s claims under the Administrative Procedure Act (“APA”) also fail.³⁶

Because Arizona fails to satisfy the first prong of the permanent injunction inquiry—actual success on the merits—we need not analyze whether it has satisfied the remaining prongs. *Cf. Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (stating that courts “need not consider the remaining” preliminary injunctive factors if a plaintiff fails the “threshold inquiry” of likelihood of success on the merits (quoting *Ass’n des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013))).

IV. CONCLUSION

The President, when faced with an unprecedented pandemic that has claimed millions of lives and caused billions of dollars of productivity losses, issued a Mandate requiring that certain employees of contractors working on federal projects be vaccinated against the disease that resulted in the pandemic. The President appropriately *946 relied on a statute that gave him the necessary flexibility and broad-ranging authority to ensure economy and efficiency in federal procurement and contracting. The President issued the Contractor Mandate following the required procedural measures, and the Mandate became effective upon a reasoned determination of its

benefits by the OMB.

We **REVERSE** the district court’s grant of a permanent injunction and dissolve the injunction.

All Citations

67 F.4th 921

Footnotes

- ¹ In addition to the substantive challenges to the Contractor Mandate that Arizona asserted related to the Procurement Act, Arizona also asserted procedural challenges under the Procurement Policy Act.
- ² World Health Organization, Coronavirus (COVID-19) Dashboard, <https://covid19.who.int> (last visited Apr. 11, 2023) (hereinafter “Global WHO Dashboard”).
- ³ World Health Organization, Coronavirus (COVID-19) Dashboard: United States of America, <https://covid19.who.int/region/amro/country/us> (last visited Apr. 11, 2023) (hereinafter “United States WHO Dashboard”).
- ⁴ Global WHO Dashboard, *supra* note 2.
- ⁵ United States WHO Dashboard, *supra* note 3.
- ⁶ The state of emergency will expire at the end of day on May 11, 2023. See Exec. Off. of the President, Statement of Administration Policy Re: H.R. 382 & H.J. Res. 7 (Jan. 30, 2023).
- ⁷ Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19* (Brookings Inst., Brookings Global Working Paper #158, 2021), at 1, <https://www.brookings.edu/research/social-and-economic-impact-of-covid-19/>.
- ⁸ U.S. Census Bureau, *Pandemic Impact on Mortality and Economy Varies Across Age Groups and Geographies* (Mar. 8, 2021), <https://www.census.gov/library/stories/2021/03/initial-impact-covid-19-on-united-states-economy-more-widespread-than-on-mortality.html>.

- ⁹ Lucia Mutikani, *What to Know About the Report on America's COVID-Hit GDP*, World Economic Forum (July 31, 2020), <https://www.weforum.org/agenda/2020/07/covid-19-coronavirus-usa-united-states-economy-gdp-decline/>.
- ¹⁰ Abay Asfaw, *Cost of Lost Work Hours Associated with the COVID-19 Pandemic—United States, March 2020 Through February 2021*, 65 AM. J. INDUS. MED. 20, 27 (2022).
- ¹¹ We use the term “contracts” to also include the “contract-like instruments” referenced in the EO. *Accord Georgia v. President of the U.S.*, 46 F.4th 1283, 1290 n.1 (11th Cir. 2022).
- ¹² The EO extends to subcontractors “at any tier.” 86 Fed. Reg. at 50,985. Hence, we use the term “contractors” to include both contractors and subcontractors. *Accord Georgia*, 46 F.4th at 1290 n.1.
- ¹³ Available at https://www.saferfederalworkforce.gov/downloads/Guidance%20for%20Federal%20Contractors_Safer%20Federal%20Workforce%20Task%20Force_20211110.pdf.
- ¹⁴ The Acting OMB Director had previously issued a determination reaching the same conclusion but with less detail. *See generally* 86 Fed. Reg. 53,691 (Sep. 28, 2021). The November 10 OMB Determination “rescind[ed] and supersede[d]” that prior determination. 86 Fed. Reg. at 63,418.
- ¹⁵ Available at <https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf>.
- ¹⁶ A federal employee joined the amended complaint and motion for a preliminary injunction.
- ¹⁷ Two Arizona public sector unions also joined Arizona and the federal employee, *see* note 16 *supra*, as plaintiffs, asserting claims against Defendant City of Phoenix, a federal contractor, for implementing the Contractor Mandate.
- ¹⁸ The court instructed Arizona to submit a proposed form of permanent injunction. *Id.* at 167.
- ¹⁹ Until the district court’s permanent injunction, the Contractor Mandate was not otherwise prohibited from implementation in Arizona. While the Mandate had already been challenged in various courts across different circuits, and several of those courts had enjoined the Mandate, none of those injunctions covered contracting

parties domiciled in or headquartered in Arizona or contracts to be performed principally in Arizona. *See Louisiana v. Biden*, 55 F.4th 1017, 1019, 1021 (5th Cir. 2022) (preliminary injunction covering Indiana, Louisiana, and Mississippi); *Georgia v. President of the United States*, 46 F.4th 1283, 1289, 1291 (11th Cir. 2022) (preliminary injunction covering Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia); *Commonwealth v. Biden*, 57 F.4th 545, 557 (6th Cir. 2023) (limiting the already-granted preliminary injunction to the named parties); *Missouri v. Biden*, 576 F. Supp. 3d 622, 635 (E.D. Mo. 2021) (preliminary injunction covering Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming); *State v. Nelson*, 576 F. Supp. 3d 1017, 1040 (M.D. Fla. 2021) (preliminary injunction covering Florida); *but see* Order, *State v. Nelson*, 8:21-cv-02524-SDM-TGW, ECF No. 48 (Nov. 9, 2022) (granting stay pending appeal until March 31, 2023); Joint Status Report, ECF No. 49 (Mar. 29, 2023) (jointly proposing a continuation of the stay until May 25, 2023).

²⁰ The district court dismissed the plaintiffs’ claims challenging a different Executive Order, which required COVID-19 vaccinations for federal employees. The district court also dismissed (without prejudice) the federal employee plaintiff’s claims because they were nonjusticiable, and dismissed with prejudice the unions’ claims.

²¹ After briefing was completed in this case, the State of Arizona elected a new Attorney General, Kristin Mayes. AG Mayes informed the court that Arizona would no longer pursue certain arguments it had previously made. However, Arizona would continue to defend the district court’s core holding that the Contractor Mandate exceeded the defendants’ authority under the Procurement Act and that the equitable factors for injunctive relief were met. Shortly thereafter, the Arizona Legislature, the Speaker of the Arizona House of Representatives, the President of the Arizona Senate, and the Arizona Chamber of Commerce & Industry filed an emergency motion to intervene, seeking to continue to assert the “abandoned” positions. We granted permissive intervention to the Arizona Legislature and the Arizona Chamber of Commerce & Industry, and the Intervenors participated in oral argument.

²² Because Arizona suffers a direct injury sufficient to confer standing, we do not need to determine whether Arizona has also suffered injury to its “sovereign” interests.

²³ Arizona has purported to no longer pursue its Major Questions Doctrine argument. The Intervenors continue to advance it. Regardless, we independently determine whether the Major Questions Doctrine bars the Contractor Mandate. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) (“[T]he court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”).

²⁴ One of those checks requires the judicial branch to respect the constitutional powers of the political branches. *See New York v. United States*, 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (“The Constitution’s division of power among the three branches is violated where one branch invades the territory of another”); *Myers v. United States*, 272 U.S. 52, 116, 47 S.Ct. 21, 71 L.Ed. 160 (1926) (“[T]he reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended”).

And allowing the President the necessary discretion to faithfully execute our laws is a core principle of our government. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 493, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (“It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President”).

- ²⁵ The Fifth Circuit relied on the broad scope of the Contractor Mandate to conclude that it is regulatory. *Louisiana*, 55 F.4th at 1032–33 (stating that “[t]here is little internal about a mandate which encompasses even employees whose sole connection to a federal contract is a cubicle in the same building as an employee working ‘in connection with’ a federal contract” (internal quotation marks and footnote omitted)). But we believe that is not the correct inquiry for whether conduct is regulatory. Because the federal government contracts with approximately one-fifth of the American workforce, almost any procurement policy will have “external” effects. See U.S. Dep’t of Labor, *History of Executive Order 11246*, <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited Apr. 11, 2023).
- ²⁶ The Contractor Mandate could cover employees who never interact directly with an employee working on a federal contract. That possible over-inclusiveness does not somehow render the Mandate legally infirm.
- ²⁷ Other circuits have recounted this history as well. See *Louisiana*, 55 F.4th at 1023–27; *Kentucky*, 23 F.4th at 605–06; *Georgia*, 46 F.4th at 1299–1301.
- ²⁸ *Farmer* also relied on the Defense Production Act of 1950 for statutory authorization. See 329 F.2d at 7–8. However, the *Farmer* court made clear that such reliance was in addition to the Procurement Act’s authority. See *id.* (quoting provisions of the Procurement Act and referring to those provisions for statutory authority when finding the Executive Orders at issue “have the force of law,” *id.* at 8).
- ²⁹ Pub. L. No. 99-500, 100 Stat. 1783, 1783-345 (1986); Pub. L. No. 99-591, 100 Stat. 3341, 3341-345 (1986); Pub. L. No. 104-208, 110 Stat. 3009, 3009-337 (1996).
- ³⁰ Pub. L. No. 107-217, 116 Stat. 1062, 1063, 1068 (2002) (“Act of August 21, 2002”).
- ³¹ Since the Procurement Act was last recodified in 2002, we will not presume Congressional approval of President Bush’s Executive Order upheld in *Chao*, the E-Verify Order, or President Obama’s Executive Order targeting paid sick leave. But when “the President’s view of his own authority under a statute ... has been acted upon over a substantial period of time without eliciting congressional reversal, it is ‘entitled to great respect’ ” and the President’s “construction of a statute ... should be followed unless there are compelling indications that it is wrong.” *Kahn*, 618 F.2d at 790 (emphasis added) (citations omitted); see also *Kisor v. Wilkie*, — U.S. —, 139 S. Ct. 2400, 2426, 204 L.Ed.2d 841 (2019) (Gorsuch, J., concurring in the judgment) (“[T]he government’s early, longstanding, and consistent interpretation of a statute, regulation, or other legal instrument could count as powerful evidence of its original public meaning.” (emphasis omitted)).
- ³² At oral argument, counsel for one Intervenor stated that it “is difficult to reconcile” multiple historical uses of the Procurement Act—such as the antidiscrimination orders or the E-Verify Order—with their view of the Major Questions Doctrine. Oral Arg., at 45:20–46:15. We think that might well be true: *if* Arizona’s initial and Intervenor’s

current view of the Doctrine were correct, then many prior actions by Presidents would be suspect. But that provides us with an additional reason why that view of the Doctrine is *not* correct. We agree with the courts that upheld those prior Executive Orders as within the President's authority under the Procurement Act for the same (or similar) reasons we now find that the Contractor Mandate is within President Biden's authority.

³³ Because any formulation of the nexus test we might adopt would yield the same result, we do not need to provide a definitive standard here.

³⁴ *System*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/system> (last visited Apr. 11, 2023).

³⁵ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530–42, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (invalidating a statute that empowered the President to approve industry-specific “codes of fair competition” and thus regulate the entire economy); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 414–20, 55 S.Ct. 241, 79 L.Ed. 446 (1935) (invalidating a statute that authorized the President to prohibit interstate and foreign transportation of oil produced in excess of state quotas but provided no guidance for how to exercise discretion).

³⁶ In its briefing, Arizona originally requested that we remand the APA claims to the district court for further injunction-related litigation. However, Arizona has now abandoned that request, and Intervenors have not sought such a remand. Thus, we treat that remand request as waived.

End of Document