A MISSED OPPORTUNITY: CLARIFYING PRESIDENTIAL POWER UNDER THE PROCUREMENT ACT

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In late 2021, President Biden relied on the Procurement Act to sign an Executive Order effectively requiring every employee of any private company that contracts with the federal government to be fully vaccinated for COVID-19. While the mandate was ultimately rescinded less than two years later, it produced four inconsistent federal circuit court opinions that together expose the problems with existing judicial frameworks for analyzing executive authority under the Procurement Act.

This Note explores the growth of the federal procurement industry, the evolution of executive orders under the Procurement Act, and the existing jurisprudence for executive power under the Act. The dominant judicial test, the Kahn *framework, contains no inherent limiting principle to the President's authority and is outdated given the ever-increasing size of the federal procurement industry and the evolving nature of executive orders under the Act. Meanwhile, the circuits enjoining the contractor vaccine mandate reached the correct outcome given the text and legislative history of the statute, but erred in applying the major questions doctrine to a presidential delegation. This Note proposes that courts should first inquire into what extent an order imposes affirmative obligations on contractor employees beyond what is necessary for performance on the government contract. This inquiry will recenter Procurement Act jurisprudence back to the text and legislative history of the statute, offer a limiting principle to the* Kahn *framework, and avoid the interpretive pitfalls of applying the major questions doctrine to a presidential delegation. Furthermore, it will help to clarify public and*

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private accountability by placing limits on the executive's role in altering private employment relationships through government contracts.

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INTRODUCTION

On September 9, 2021, President Biden relied on the Federal Property and Administrative Services Act of 1949 ("the Procurement Act") to sign Executive Order 14042 ("the contractor vaccine mandate"),[1] which effectively required every employee of any private company that contracts with the federal government to be fully vaccinated for COVID-19.[2] The contractor vaccine mandate applied to *all* employees of current and future contractors, regardless of those employees' connection to a specific government contract.[3] While the mandate was ultimately

[1] Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021); Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of 40 U.S.C. and 41 U.S.C.).

[2] Exec. Order No. 14,042, 86 Fed. Reg. 50985.

[3] *Id.*; Louisiana v. Biden, 55 F.4th 1017, 1032–33 (5th Cir. 2022) (explaining that the mandate "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" (footnote omitted) (quoting Jason Miller, *New Guidance on COVID-19 Workplace Safety for Federal Contractors*, WHITE HOUSE (Sept. 24, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/09/24/

rescinded in May 2023,[4] it produced four conflicting federal circuit court opinions[5] that together expose the problems with existing judicial frameworks for analyzing executive authority under the Procurement Act.

Enacted in 1949, the Procurement Act governs the federal government's entry into contracts with private companies to procure certain goods and services.[6] Washington's "blended workforce" has contributed to many of our government's most notable achievements, like the creation of the Interstate Highway System.[7] Today, federal agencies contract with private companies to procure a wide variety of goods like food, aircrafts, and weaponry, and services such as IT specialists and nuclear scientists.[8] Agencies also use contractors to fill a gap in specialized expertise for short-term projects for which hiring permanent government employees would not be logistically justifiable.[9] Over the past few decades, the modern procurement industry has grown significantly in size, with Americans today being more likely than ever before to be employed by a private company with at least one government contract.[10]

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new-guidance-on-COVID-19-workplace-safety-for-federal-contractors [https://perma.cc/EH5D-95M5])).

4 Exec. Order No. 14,099, 88 Fed. Reg. 30891 (May 9, 2023) ("Since September 2021, COVID-19 deaths have declined by 93 percent, and new COVID-19 hospitalizations have declined by 86 percent. Considering this progress and based on the latest guidance from our public health experts, we no longer need a Government-wide vaccination requirement . . . for Federal contractors.").

5 *See generally* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); *Louisiana*, 55 F.4th at 1017.

6 *See* Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of 40 U.S.C. and 41 U.S.C.).

7 PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT: TRACKING WASHINGTON'S BLENDED WORKFORCE, 1984–2015 28 (2017) ("Washington's blended workforce has contributed to many of the federal government's greatest achievements, such as building the Interstate Highway System, conducting the basic research to help reduce life-threatening disease, exploring space, and administering antipoverty programs.").

8 Louis Peck, *America's $320 Billion Shadow Government*, FISCAL TIMES (Sept. 28, 2011), https://www.thefiscaltimes.com/Articles/2011/09/28/Americas-320-Billion-Shadow-Government [https://perma.cc/4EZS-YENY] ("The government is buying contract workers ranging from information technology specialists at Washington agency headquarters to security officers in Iraq and Afghanistan to nuclear scientists at Energy Department laboratories across the country."); *A Snapshot of Government-Wide Contracting for FY 2022*, U.S. GOV'T ACCOUNTABILITY OFF. (Aug. 15, 2023), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022 [https://perma.cc/ZD3G-V6V].

9 Peck, *supra* note 8 (quoting a former federal employee who stated that "usually a federal agency hires a contractor when they don't have the in-house expertise to do something themselves, or they conclude that they're going to need specialized expertise, but only for a relatively short period of time").

10 *See infra* Section I.C.

The Procurement Act delegates authority to the President to prescribe policies and directives necessary to carry out the Act's stated purpose[11] of providing the government with a centralized "economical and efficient system" for its procurement activities.[12] The broad textual language of the delegation has posed ongoing problems for judicial interpretation,[13] as judges disagree about the precise limits of presidential authority.[14] Before 1949, the legislative branch historically enjoyed the ability to fix the terms and conditions of government contracts in pursuit of policy-oriented goals.[15] The massive purchasing power of the federal government[16] and the nature of contractors as, effectively, hired administrators of government policy[17] gives the government a vested

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11 40 U.S.C. § 121(a).

12 40 U.S.C. § 101.

13 Louisiana v. Biden, 55 F.4th 1017, 1027–28 (5th Cir. 2022) ("Under the Government's theory of the case, the only practical limit on presidential authority in this sphere is the executive's ability to tie policy priorities to a notion of economy or efficiency. To an extent, this is borne out by the statutory text. The statute introduces no serious limit on the President's authority and, in fact, places discernment explicitly in the President's hands . . . .").

14 *See generally* Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (finding President Carter's wage and price controls to be within the President's authority under the Procurement Act and creating the dominant *Kahn* framework); Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023) (holding the contractor vaccine mandate is within the President's authority under the *Kahn* framework). *But see* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022) (enjoining the contractor vaccine mandate as outside the scope of the President's Procurement Act authority); *accord* Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); *Louisiana*, 55 F.4th 1017. Legal scholars have similarly grappled with this issue. *See generally* Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955) [hereinafter Miller, *Government Contracts*]; Cody Hagan, *Myth or Reality: Obama's Presidential Power Grab by Way of the Executive Order*, 84 UMKC L. REV. 493 (2015); J. Frederick Clarke, AFL-CIO v. Kahn *Exaggerates Presidential Power under the Procurement Act*, 68 CALIF. L. REV. 1044 (1980); Kimberly A. Egerton, *Presidential Power over Federal Contracts Under the Federal Property and Administrative Services Act: The Close Nexus Test of* AFL-CIO v. Kahn, 1980 DUKE L.J. 205 (1980).

15 Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."); *see also* Miller, *Government Contracts*, *supra* note 14, at 28–30 (explaining how the attachment of conditions to government procurement contracts began as early nineteenth century but increased in importance as the scale of federal purchasing grew in the 1930s); Arthur S. Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 MICH. L. REV. 781 (1955) [hereinafter Miller, *Administrative Discretion*].

16 *See generally* PAUL CHASSY & SCOTT AMEY, PROJECT ON GOV'T OVERSIGHT, BAD BUSINESS: BILLIONS OF TAXPAYER DOLLARS WASTED ON HIRING CONTRACTORS (2011) https://www.pogo.org/reports/bad-business-billions-of-taxpayer-dollars-wasted-on-hiring-contractors [https://perma.cc/3F5G-J349] [hereinafter CHASSY & AMEY, BAD BUSINESS]; Peck, *supra* note 8; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8.

17 RSCH. & POL'Y COMM., COMM. FOR ECON. DEV., NATIONAL SECURITY AND INDIVIDUAL FREEDOM 12 (1949) ("The more that government purchases dominate the market, the more businessmen become, in effect, hired administrators of government contracts."); Miller, *Government Contracts*, *supra* note 14, at 29–30.

interest in requiring certain standards of practice for private parties in its contracts.[18] The important question is thus precisely *how much* control over a private contracting entity is warranted by the Procurement Act's delegation to the President?

Courts typically apply the same principles of general private contract law to contracts with the federal government,[19] which reflects a practical necessity: the government needs procurement contracts to be enforceable against private parties or else it risks constant claims of invalidation by coercion.[20] The parties entering into these contracts are undoubtedly sophisticated; it would be absurd to purport that companies like Lockheed Martin or Pfizer are victims of coercive contracting, even in light of the government's superior bargaining power as a bulk purchaser.[21] When applied to contractual provisions imposing affirmative obligations on employees, however, this interpretative doctrine extends privity of contract from the government to the contractor's employee through the employer's government contract, thus allowing the government to alter relationships extraneous to the government contract itself.

While the contractor vaccine mandate's scope may strike many as a sound policy choice given the contagious nature of the COVID-19 virus, the breadth of authority it necessarily implies under the Act poses a significant risk of abuse. In 2020, amidst right-wing political pushback directed toward "critical race theory" and "diversity, equity, and inclusion" initiatives, President Trump relied on the Procurement Act to issue Executive Order 13950, which prohibited federal contractors from promoting a list of "divisive concepts" in workplace trainings, namely discussing "privilege" and assigning "fault, blame, or bias" based on one's race or sex.[22] Although this Order ran into broader constitutional challenges beyond its statutory authority,[23] the invocation of the

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18 OFF. OF SEN. ELIZABETH WARREN, BREACH OF CONTRACT: HOW FEDERAL CONTRACTORS FAIL AMERICAN WORKERS ON THE TAXPAYER'S DIME 1–3 (2017), https://www.warren.senate.gov/files/documents/2017-3-6_Warren_Contractor_Report.pdf [https://perma.cc/ZV93-HP3K]. *See generally* Miller, *Government Contracts*, *supra* note 14.

19 Miller, *Administrative Discretion*, *supra* note 15, at 783–84; Priebe & Sons v. United States, 332 U.S. 407, 411 (1947) ("It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law.").

20 *See* Freeman, *infra* note 164.

21 Lockheed and Pfizer are some of the government's largest contractors, with contracts in the tens of billions of dollars. *The Top Ten Government Contractors*, BLOOMBERG GOV'T (June 21, 2023), https://about.bgov.com/these-are-the-top-10-government-contractors [https://perma.cc/9WE9-EM59].

22 Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 28, 2020).

23 The Northern District of California enjoined Executive Order 13950 on First Amendment grounds. *See* Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 535 (N.D. Cal. 2020).

Procurement Act supports the need for a more consistent judicial understanding of the Act's limits to curb potential misuse of the Act as a statutory back door for presidential social policymaking lacking broader legislative support.

The contractor vaccine mandate litigation produced four appellate decisions: the Fifth, Sixth, and Eleventh Circuits each enjoined enforcement of the mandate on the ground that it was outside the scope of authority delegated to the executive under the Procurement Act,[24] while the Ninth Circuit rebuked those conclusions to uphold the mandate.[25]

Procurement Act precedents provide little guidance on the outer scope of the President's power under the Act. The D.C. Circuit's 1979 case, *AFL-CIO v. Kahn*, created the dominant judicial test, requiring that the President's action has a "close nexus" to the statutory purpose of promoting "economy and efficiency."[26] Legal scholars criticized *Kahn*'s "close nexus" test for its broad deference to the executive and lack of a clearly articulated limiting principle.[27] The issues inherent in the continued application of the *Kahn* framework are evident in the Ninth Circuit's opinion upholding the mandate.[28] At over four decades old, the *Kahn* test,[29] as applied by the Ninth Circuit,[30] does not contemplate executive action imposing affirmative obligations on employees of federal contractors, nor does it reflect the changing realities of the modern-day procurement industry, which has expanded significantly in size and scope since both 1949 and 1979.[31]

The circuits that invalidated the mandate relied to varying extents on the major questions doctrine[32] to find that the vaccine mandate was an "enormous and transformative" expansion of delegated authority

24 Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022).

25 Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023).

26 Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979).

27 Clarke, *supra* note 14, at 1047–51; Egerton, *supra* note 14, at 217–21; *see also Kahn*, 618 F.2d at 797–816 (D.C. Cir. 1979) (MacKinnon, J., dissenting).

28 *Mayes*, 67 F.4th at 926.

29 *See Kahn*, 618 F.2d at 792.

30 *See Mayes*, 67 F.4th at 940–42.

31 *See generally* LIGHT, *supra* note 7, at 18–19; DONALD F. KETTL, ESCAPING JURASSIC GOVERNMENT: HOW TO RECOVER AMERICA'S LOST COMMITMENT TO COMPETENCE 121 (2016); CHASSY & AMEY, BAD BUSINESS, *supra* note 16.

32 The major questions doctrine is "a substantive canon of construction that bars agencies from resolving questions of 'vast economic and political significance' without clear statutory authorization." Samuel Buckberry Joyce, Note, *Testing the Major Questions Doctrine*, 43 STAN. ENV'T L.J. 50, 50 (2024).

under the Procurement Act.[33] That doctrine's exclusive application to administrative agency delegation in prior case law complicates its applicability to a unilateral order by the President alone.[34] But those courts were largely correct in viewing the contractor vaccine mandate as fundamentally distinct from previous exercises of Procurement Act authority—those examples offer no equivalent analog to the imposition of an affirmative obligation on the *employees* of federal contractors disconnected from what is required to perform under the contract.[35]

This Note proposes that the circuits enjoining the vaccine mandate reached the correct outcome given the text and legislative history of the Act, but erred in their reasoning.[36] The application of the major questions doctrine in this context was improper,[37] and its misguided presence drew attention away from important interpretive insights weaved throughout

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33 Louisiana v. Biden, 55 F.4th 1017, 1032 (5th Cir. 2022) ("The pandemic, challenging as it has been for the President, the legislature, the courts, and especially the populace, does not justify such an enormous and transformative expansion of presidential authority."); Georgia v. President of the U.S., 46 F.4th 1283, 1301 (11th Cir. 2022) ("The plaintiffs . . . are likely to succeed on their claim that the President exceeded his authority by issuing the contractor vaccine mandate . . . ."); Kentucky v. Biden, 23 F.4th 585, 608 (6th Cir. 2022) ("The dearth of analogous historical examples is strong evidence that § 101 does not contain such a power.").

34 Case Comment, Georgia v. President of the United States*: Eleventh Circuit Applies the Major Questions Doctrine to a Delegation to the President*, 136 HARV. L. REV. 2020, 2020 (2023) ("[I]n [*Georgia*], the Eleventh Circuit struck down President Biden's federal-contractor vaccine mandate, extending the major questions doctrine to delegations to the President. In so doing, the Eleventh Circuit applied the doctrine in a way that is unjustified by the Supreme Court's stated rationales for it."); *Louisiana*, 55 F.4th at 1038 (Graves, Jr., J., dissenting) ("[T]he major questions doctrine is only invoked when there are potential anti-delegation issues to agencies, and that is not the situation here."); *Georgia*, 46 F.4th at 1314 (Anderson, J., concurring in part and dissenting in part) ("[T]he major questions doctrine has never been applied to an exercise of proprietary authority and has never been applied to the exercise of power by the President . . . ."); *Mayes*, 67 F.4th at 939 ("[W]e find that the Major Questions Doctrine is not relevant here because the Contractor Mandate is a Presidential—not an agency—action."); *see also* Halina R. Bereday, West Virginia v. EPA*: Majorly Questioning Administrative Agency Action & Authority*, 82 MD. L. REV. 820, 855 (2023) ("With no clear test or standards, the MQD has been a nightmare for lower courts to apply."); Jaclyn Lopez, *The Major Questions Doctrine Post-*West Virginia v. EPA, 54 A.B.A. TRENDS, Jan.–Feb. 2023, at 4, 4.

35 *Kentucky*, 23 F.4th at 608 ("[T]hose points underscore just how inapposite are the government's historical examples—wage and price controls, union posters, confirmation of immigration status, and anti-discrimination in hiring. Each is a modest, 'work-anchored' measure with an inbuilt limiting principle."); *Louisiana*, 55 F.4th at 1030 ("Most significantly, unlike the non-discrimination, E-Verify, *Beck* rights, and sick leave orders, which govern the conduct of *employers*, the vaccine mandate purports to govern the conduct of *employees*—and more than their conduct, purports to govern their individual healthcare decisions."); *Georgia*, 46 F.4th at 1296 ("An all-encompassing vaccine requirement is different in nature than the sort of project-specific restrictions contemplated by the Act."); *see also* Miller, *Government Contracts*, *supra* note 14, at 46.

36 *See infra* Part III.

37 *See infra* Section II.A.

those decisions.[38] Instead, the courts should have enjoined the mandate by categorizing the nature of Procurement Act authority being exercised. The fundamental inquiry must ask: *who will bear the affirmative obligation of the contractual provision?* Orders that direct government employees to prioritize certain considerations in the contracting process are explicitly authorized by the text of the Act and pose little problem for judicial interpretation.[39] Contractual provisions that impose social policy obligations on the contracting firm, like antidiscriminatory hiring practices, are within the implicit power delegated to the President under the Act and have been broadly upheld since *Kahn*, as long as those goals can be reasonably connected to probable cost-savings for the government.[40] However, contractual provisions that "reach through" the contracting firm to impose an affirmative obligation on that private firm's employees as a whole are a more complicated matter for judicial interpretation, necessitating a stronger test than is currently offered by the *Kahn* framework.[41]

Part I of this Note begins with a description of the contractor vaccine mandate, the legislative history and relevant statutory language of the Procurement Act, and the stakes at issue in the modern federal procurement industry. Part I then provides a background on previous judicial interpretation of presidential power under the Procurement Act and goes on to explain how the four circuits that decided the vaccine mandate cases addressed the *Kahn* framework and the major questions doctrine. Part II critically analyzes the circuit court opinions, finding fault with both the applicability of the major questions doctrine and the undue deference of the *Kahn* framework in the context of these cases. Finally, Part III proposes an interpretative solution that requires judges to categorize Procurement Act executive orders into three distinct categories based upon whom the onus of the affirmative obligation falls.

I. BACKGROUND

A. *The Mandate*

The federal contractor vaccine mandate at issue in the circuit split is an amalgam of multiple federal directives that together created the

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38 *See infra* Section II.B.

39 This would fall under Category (1). *See infra* Part III.

40 This would fall under Category (2). *See infra* Part III.

41 This would fall under Category (3). *See infra* Part III.

mandate,[42] most important of which is President Biden's Executive Order issued on September 9, 2021.[43] In effect, the combination of directives created a mandatory government contract clause requiring full COVID-19 vaccination for all employees of federal contractors and subcontractors, including those working in covered contractor "workplaces," regardless of whether those employees were working directly on a federal contract.[44] The government justified the Order by asserting that the vaccine mandate would improve the economy and efficiency of procurement activities by reducing labor costs and mitigating workplace absenteeism within the contractor's operations,[45]

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42 Mayes v. Biden, 67 F.4th 921, 928 (9th Cir. 2023) ("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.").

43 Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021). On its face, that Order does not deal explicitly with vaccination mandates, but instead directs all executive agencies to ensure that all public contracts contain a binding clause based on guidance promulgated by the Safer Federal Workforce Task Force (another COVID-era executive creation) as approved by the Director of the Office of Management and Budget (OMB). *See id.*; Exec. Order No. 13,991, 86 Fed. Reg. 7045 (Jan. 20, 2021).

44 *COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors*, SAFER FED. WORKFORCE TASK FORCE, 1 (Nov. 10, 2021), https://www.saferfederalworkforce.gov/downloads/Guidance-for-Federal-Contractors_Safer-Federal-Workforce-Task-Force_20211110.pdf [https://perma.cc/QPU2-9CTK]. Within its first few sentences, the guidance cites the President's *Path out of the Pandemic: COVID-19 Action Plan*, one of the main goals of which was to "to get more people vaccinated." *Id.* (citing Memorandum from the White House, *Path Out of the Pandemic: President Biden's COVID-19 Action Plan* (Sept. 2021), https://davidscott.house.gov/uploadedfiles/white_house_COVID_action_plan.pdf [https://perma.cc/BQ3L-EKS5]). The regulation was not limited to merely new contracts: the Federal Acquisition Regulation Council, an executive branch administrative office created by Congress, issued a memorandum urging agencies to expeditiously modify existing contracts to the extent allowable by law, expanding the potential reach of the mandate into prior contracts. Memorandum from the Fed. Acquisition Regul. Council to the Chief Acquisition Officers, et al. (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 [https://perma.cc/W5AV-VF6W]; *see also* Louisiana v. Biden, 55 F.4th 1017, 1020 (5th Cir. 2022) ("Together, these four actions require nearly all federal contractors, either immediately (in the case of new contracts or by consented-to changes to old contracts) or at the soonest opportunity, to consent to a contractual clause obliging them to follow guidance from the Task Force.").

45 This assertion comes from the OMB determination, issued subsequent to the initial Executive Order. Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Exec. Order No. 14,042, 86 Fed. Reg. 53691 (Sept. 28, 2021). Four days prior to the release of the OMB memo, Deputy Director Jason Miller hinted at his forthcoming determination, reiterating in a White House blog post that the Safer Federal Workforce Task Force guidance "advances one of the main goals of this science-based plan: *getting more people vaccinated*." Miller, *supra* note 3. The initial OMB finding contained limited evidential support, as noted by the Fifth Circuit in *Louisiana*: "OMB rescinded its initial finding and issued instead a longer finding . . . which reached the same conclusion with far more support." *Louisiana*, 55 F.4th at 1020; Determination of the Acting OMB Director Regarding the Revised Safer Federal

thus invoking the language of the Procurement Act's 'purpose' statement as codified in § 101.[46]

The Biden Administration ceased enforcement of the mandate in response to injunctions issued by the Eleventh and Fifth Circuits in August and December of 2022, respectively.[47] On May 9, 2023, the President issued Executive Order 14099, which formally revoked 14042, citing significant declines in COVID-19 deaths and hospitalizations.[48] Despite this, however, the four circuits that considered the constitutionality of the Order while it was still in effect created a muddled and conflicted body of Procurement Act case law. Such ambiguity demands clarification given the potential breadth of the President's authority under the Act.

B. *The Statute*

1. Legislative History

The Procurement Act[49] was first enacted by Congress in 1949 in response to inefficiencies discovered by the Hoover Commission in the federal procurement of goods and services during the Second World War.[50] Congress determined that the Commission's findings of rampant waste and ineffective management largely came as a result of the decentralized nature of the contracting process within the government itself. The lack of central standardization in the growing federal supply business resulted in duplicative processes and poor coordination, reflecting a need for improved and centralized methods and procedures for government procurement activities conducted by agencies.[51] Thus, the Act consolidated previously disparate agency procurement functions into the General Services Administration (GSA) and delegated

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Workforce Task Force Guidance for Federal Contractors and the Revised Economy & Efficiency Analysis, 86 Fed. Reg. 63418 (Nov. 16, 2021).

46 40 U.S.C. § 101.

47 Leigh M. Nason, T. Scott Kelly & Hera S. Arsen, *Is This the End of the Federal Contractor COVID-19 Vaccine Mandate?*, OGLETREE DEAKINS (May 5, 2023), https://ogletree.com/insights-resources/blog-posts/is-this-the-end-of-the-federal-contractor-COVID-19-vaccine-mandate [https://perma.cc/EHG9-XNRQ]; Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); *Louisiana*, 55 F.4th at 1017.

48 Exec. Order No. 14,099, 88 Fed. Reg. 30891 (May 9, 2023).

49 Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended in scattered sections of 40 U.S.C. and 41 U.S.C.).

50 Egerton, *supra* note 14, at 206; H.R. Doc. No. 73, at 1–2, 25, 35 (1949).

51 *Georgia*, 46 F.4th at 1293; 95 Cong. Rec. 7441 (1949) (statement of Rep. Chester E. Holifield); H.R. Doc. No. 73, at 1–2, 25, 35 (1949).

centralized supervisory authority to the President, granting him authority to "prescribe policies and directives" to carry out the duties explained in the Act.[52] Prior to the 1949 presidential delegation, Congress had historically enjoyed the power to impose social policy obligations on government contractors, regulating labor conditions in contractor workplaces as early as 1840.[53] Exercise of this power became increasingly common as the scale of federal procurement spending grew in the twentieth century.[54]

2. Statutory Language

The statutory provision most directly implicated in the contractor vaccine mandate cases is § 121(a), which grants the President oversight authority to prescribe policies that are necessary to carry out specifically enumerated provisions of the Act.[55] Those specific provisions cover a lengthy amount of statutory language (nearly 170 code sections), including the entirety of subtitle I of Title 40[56] as well as portions of division C of Title 41.[57] Section 301 of Title 40 establishes the GSA, and § 501(b)(1)(A) tasks the Administrator with procurement and supplying duties.[58] The Administrator of the GSA shares the authority of the President under Title 40 to "prescribe regulations to carry out this subtitle."[59] Title 40 also sets out the procurement authority of administrative agencies, subject to oversight by the President and the administrator of the GSA.[60] Section 121, thus, grants the President

52 *Georgia*, 46 F.4th at 1293; 40 U.S.C. § 121(a).

53 Matthew A. Kelly, *Early Federal Regulation of Hours of Labor in the United States*, 3 INDUS. & LAB. RELS. REV. 362, 369–71 (1950). Early emphasis focused on maximum hours provisions, with minimum wage provisions becoming more prominent in the twentieth century. Miller, *Government Contracts*, *supra* note 14, at 46.

54 Miller, *Government Contracts*, *supra* note 14, at 29 ("[T]he comparatively small volume of purchases by the National Government during [the nineteenth century] made it relatively unimportant. However, with the growth of federal purchasing, both in dollar value and number of transactions, has come a concomitant increased use of the technique. Since the 1930's it has occupied a high position in the hierarchy of available techniques.").

55 40 U.S.C. § 121(a).

56 *Id.*

57 *Id.* § 111(4) ("[T]he words 'this subtitle' are deemed to refer also to division C (except sections 3302, 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of title 41.").

58 *Id.* §§ 301, 501(b)(1)(A).

59 *Id.* § 121(c)(1).

60 *Id.* § 111(4).

oversight power to guide agencies in the exercise of their own statutorily granted procurement authority.[61]

In addition to delegating supervisory authority to the President and establishing the terms of the GSA, Title 40 covers specific terms relating to the management, procurement, use, and disposal of real property by government agencies.[62] The connected subtitles of Title 41, meanwhile, provide explicit policies on public contracts for agencies.[63] Numerous provisions peppered throughout Title 41 emphasize the promotion of competition between prospective contractors,[64] along with a goal of making those competitive procedures compatible with small business concerns.[65] These provisions connect directly to the legislative history of the Hoover Commission findings and add legislative muster to the stated purpose of the Act: to provide the government with an "economical and efficient system" for its procurement activities.[66]

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61 Georgia v. President of the U.S., 46 F.4th 1283, 1293 (11th Cir. 2022) ("§ 121(a) generally grants the President the power to instruct those actors on how to exercise their statutory authority.").

62 40 U.S.C. §§ 501–506, 521–529, 541–559, 621–624.

63 41 U.S.C. §§ 3101–3106, 3301–3312, 3501–3509.

64 *Id.* § 3301(a) ("[A]n executive agency in conducting a procurement for property or services shall—(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and (2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement."); *id.* § 3306(a)(1) ("In preparing for the procurement of property or services, an executive agency shall—(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement . . . and (C) develop specifications in the manner necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.").

65 *Id.* § 3104 ("It is the policy of Congress that a fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns.").

66 40 U.S.C. § 101 ("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, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies."). In 2002, Congress recodified the Procurement Act, and in doing so explicitly stated that it did not make any "substantive change in existing law." Pub. L. No. 107-217, 116 Stat. 1062, 1303 (2002); *see also* 40 U.S.C. § 486(a) (1996); *id.* § 121(a) (2002).

C. *The Modern Procurement Industry*

The federal procurement industry today is significantly larger in both size and scope than at the time of the Procurement Act's initial 1949 enactment,[67] growing especially over the past few decades.[68] Government contract spending saw a steady twelve percent year-over-year growth rate in the years 2000 to 2008,[69] and grew by eighty-seven percent in inflation-adjusted terms between 2000 and 2012.[70] In 2022, the U.S. Government Accountability Office estimated that approximately one-fourth of all federal discretionary spending was spent on service contractors.[71]

The government does not make publicly available the official number of federal contractor employees.[72] The dearth of official data makes it exceedingly difficult to consider the macro impact of federal procurement policy on individual workers. In 2011, Professor Paul Light estimated the number of contract and grant workers at 7.5 million people, over three times the number of workers directly employed by the government.[73] Organizations like the Professional Services Council dispute this estimate as "astronomically" inflated.[74] However, even if these numbers are inflated, they remain hard to square with the Department of Labor's assertion that workers employed by federal contractors amount to approximately one-fifth of the country's entire

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67 LIGHT, *supra* note 7, at 2 ("Some of these agencies must have had fewer contract and grant employees during the 1950s—after all, the departments of Energy, Homeland Security, Housing and Urban Development, and Transportation had not been created yet; the Education Department had not been carved off Health, Education, and Welfare; and the Veterans Administration had not been raised to cabinet status.").

68 For example, fiscal year 2022 saw a government contract commitment of $694 billion, a $3.6 billion increase from the prior year after adjusting for inflation. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8; *see also* Yev Shelkovskiy, *The Benefits of Allocating to U.S. Federal Contractors*, EMLES (Oct. 29, 2020), https://emles.com/insights/the-benefits-of-allocating-to-u-s-federal-contractors [https://perma.cc/PA9P-6DF2].

69 *Improving the Way the Government Buys: Getting the Best Value for Our Taxpayers*, OFF. MGMT. & BUDGET (July 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/procurement/reports/improving-the-way-government-buys.pdf [https://perma.cc/Z3KH-S86C].

70 Letter from Douglas W. Elmendorf, Dir., Cong. Budget Off., to the Honorable Chris Van Hollen, Ranking Member, Comm. on the Budget (Mar. 11, 2015) (on file with the Cong. Budget Off.).

71 CHASSY & AMEY, BAD BUSINESS, *supra* note 16, at 2.

72 Peck, *supra* note 8.

73 *Id.*

74 *Id.* ("Alan Chvotkin, executive vice president of the Professional Services Council, which represents businesses that contract with the federal government, said his group regards Light's figures as 'astronomically high' and inflated by a methodology that counts the indirect as well as direct economic impact of federal contracts.").

labor force.[75] The Department of Labor's estimate is cited extensively throughout opinions invalidating the mandate,[76] and this estimate is neither directly addressed nor disputed by the Ninth Circuit's opinion upholding the mandate.[77] The Bureau of Labor Statistics estimated the entire civilian labor force in October 2022 at approximately 164 million people.[78] If we were to take the Department of Labor at its word in both instances, this would mean the true number of federal contractor employees could be close to thirty-two million people—a far cry from Light's debatably inflated estimates.[79] Regardless, since Americans today are more likely than ever to work for large employers,[80] and the government contracting industry continues to grow,[81] it can be reasonably inferred that the number of employees working for a company with at least one such government contract is similarly increasing. Thus, more Americans than ever are eligible to be roped into the growing dragnet of federal procurement policy.[82]

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75 *History of Executive Order 11246*, U.S. DEP'T LAB., https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history [https://perma.cc/AJ24-FPE5].

76 Louisiana v. Biden, 55 F.4th 1017, 1028 (5th Cir. 2022) ("The Department of Labor has suggested that roughly 'one-fifth of the entire U.S. Labor Force' is 'employed by federal contractors.'"); Kentucky v. Biden, 23 F.4th 585, 591 (6th Cir. 2022) ("First, according to the Department of Labor, 'workers employed by federal contractors' constitute 'approximately one-fifth of the entire U.S. labor force.'").

77 *See generally* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023).

78 Press Release, Bureau of Lab. Stats., The Employment Situation—October 2023 (Nov. 3, 2023), https://www.bls.gov/news.release/archives/empsit_11032023.htm [https://perma.cc/U3EX-WPDG].

79 Peck, *supra* note 8; LIGHT, *supra* note 7.

80 Theo Francis, *Why You Probably Work for a Giant Company, in 20 Charts*, WALL ST. J. (Apr. 6, 2017, 10:45 AM), https://www.wsj.com/graphics/big-companies-get-bigger [https://perma.cc/3NWB-P63E] ("In the late 1970s, an American employee was more likely to work at a company with fewer than a hundred workers than one that employed 2,500 or more. Today, Americans are more likely to work for the larger firms. More than a quarter of all U.S. employees worked at firms employing at least 10,000 people in 2014, the most recent year for which the Census Bureau has released comprehensive data.").

81 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 8; Shelkovskiy, *supra* note 68.

82 Perhaps more important than the sheer number of contract employees is the modern-day ratio of these workers to those directly employed by the government. The number of employees directly employed by the federal government has stayed relatively stagnant since 1984, hovering at around 2.1 million employees. Peck, *supra* note 8; LIGHT, *supra* note 7, at 3. The ratio of contractors to federal employees has ebbed and flowed since 1984, perhaps coinciding with episodes of war and peace. *Id.* at 4 ("[W]ar and peace play a much more important role in shaping the true size of the federal government's blended workforce than grand announcements of caps, cuts, and freezes on federal hiring."). For example, Light estimated the number of contract and grant employees amounted to a ratio of 2.4 for every federal employee, later reaching a three-decade high point in 2010 at a ratio of 3.4 for every federal employee. *Id.* at 3–4 ("As Table 2 shows, the ratio was low and stable from 1984 to 2002, surged in 2005, reached a three-decade high point of 3.4 contract and grant employees for every 1 federal employee in 2010, then fell back toward the historical average

Numerous political circumstances, like delays in the presidential appointment process and public frustration toward bureaucratic sluggishness, incentivize the government's increasing reliance on private contractors.[83] The most frequent justification for privatization, however, is taxpayer cost-savings: federal agencies might save taxpayer money by contracting out to private firms who compete on cost-efficiency to win government bids.[84] Although there is some debate over whether such cost-saving benefits are actually realized in practice,[85] promoting competition among rival government contract bidders is an explicit goal peppered throughout the text of the Procurement Act.[86]

D. *Judicial Interpretation and the Circuit Split*

The primary issue in most Procurement Act cases is the extent to which a President may impose affirmative obligations on a contracting party to regulate that party's internal efficiency in pursuit of social policy goals.[87] Congressional policy exercises of this type have a long history in

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in 2015."). Again, if we were to take the Department of Labor at its own word, this ratio would be significantly higher than Light's estimates.

83 LIGHT, *supra* note 7, at 25 ("The delays caused by the presidential appointments process create incentives for outsourcing, including regular vacancies at the top."); *id.* at 28 ("Americans have long held seemingly irreconcilable opinions about the federal government and its employees. They seem to hate the federal bureaucracy, but they love its programs and services."); *see also id.* at 26.

84 Stephen Moore, *Contracting Out: A Painless Alternative to the Budget Cutter's Knife*, *in* 36 PROSPECTS FOR PRIVATIZATION 60, 61 (Steve H. Hanke ed., 1987) ("The primary motivation for contracting out is to cut government costs by employing more economically efficient private vendors. The injection of competition into the procurement process is the critical feature of contracting out that drives down the expense of government goods and services from 20 to 50 percent."); *see also* CHASSY & AMEY, BAD BUSINESS, *supra* note 16, at 1–2; LIGHT, *supra* note 7, at 22 ("Contract and grant employees are often promoted as a low-cost alternative to federal employees . . . .").

85 LIGHT, *supra* note 7, at 22 ("Contract and grant employees are often promoted as a low-cost alternative to federal employees, but the data suggest quite the opposite. Federal employees may seem more expensive than contract and grant employees on average but may be much less expensive than contract employees when compared occupation by occupation."); CHASSY & AMEY, BAD BUSINESS, *supra* note 16, at 1 ("POGO estimates the government pays billions more annually in taxpayer dollars to hire contractors than it would to hire federal employees to perform comparable services.").

86 41 U.S.C. §§ 3301(a)(1), 3306(a)(1); *see also* Georgia v. President of the U.S., 46 F.4th 1283, 1290, 1294, 1296 (11th Cir. 2022); Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 803 (D.C. Cir. 1979) (MacKinnon, J., dissenting) ("[The statute] therefore continues to express Congress' determination that there shall be 'full and free competition' for federal government procurement contracts.").

87 The body of case law relied on by the federal circuits in the vaccine mandate cases exclusively concerns directives of this type. *See* Mayes v. Biden, 67 F.4th 921, 928 (9th Cir. 2023); Louisiana v. Biden, 55 F.4th 1017, 1030 (5th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); *Georgia*,

the United States, predating the Procurement Act's presidential delegation.[88] President Carter's 1978 Executive Order mandating wage and price controls on contracting businesses for the purpose of reducing overall inflation levels in the economy serves as an important flashpoint in the evolving nature of Procurement Act power.[89] That Order led to the seminal case interpreting presidential Procurement Act authority: *AFL-CIO v. Kahn*.[90]

1. The *Kahn* Framework

In the 1979 decision *AFL-CIO v. Kahn*, the D.C. Circuit held that the Procurement Act authorized the President to impose wage and price standards on federal contractors as part of a broader effort by the Carter Administration to reduce inflation in the economy.[91] *Kahn* created the seminal "close nexus" test: executive orders relying upon the Procurement Act must bear a "close nexus" to "the values of 'economy' and 'efficiency'" as outlined in the statute's purpose statement in § 101.[92] In other words, a contractual provision may be authorized by the Act as long as the government can prove that provision's connection to likely savings for the government. The court found that wage and price standards on government contractors had a sufficiently close nexus to likely savings for the government on procurement contracts in the long term.[93] Judge MacKinnon's dissent denounced the majority's test for offering far too much deference to the executive.[94] Judge MacKinnon relied on the legislative history of the statute to conclude that the presidential delegation only granted the President authority to give centralized guidance on *internal* government contract process, bound by the specific provisions of the Procurement Act, not to be used as an

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46 F.4th 1283; *see also* Sandy Hoe & Emma Merrill, *How Presidential Power over Procurement Can Be a Vehicle for Social Change* 64 GOV'T CONTRACTOR, Sept. 21, 2022, at 1, 1 (2022) (explaining that Presidents of both major political parties have used Executive Orders under the Procurement Act to issue policy).

88 Miller, *Government Contracts*, *supra* note 14, at 29 ("With the new federal activities came new techniques and wider use of older devices to put policies into effect, in order to carry on the manifold duties of the expanding Government. One of these was the device of contract manipulation, that is, the attachment of conditions to contracts for the purchase of goods and services. Such regulation by the Federal Government is not a newly invented method of effecting social control.").

89 Exec. Order No. 12,092, 43 Fed. Reg. 51375 (Nov. 3, 1978).

90 *Kahn*, 618 F.2d at 784.

91 *Id.*

92 *Id.* at 792.

93 *Id.* at 793.

94 *Id.*

external instrument in service of broader policy goals.[95] Legal scholars lodged similar criticisms against the *Kahn* opinion for failing to articulate the outer limits of the President's power under the test.[96] This critique has re-emerged in the modern judicial debate over *Kahn*'s application to the contractor vaccine mandate.[97]

The Supreme Court has not directly addressed *Kahn*, nor has it provided much guidance on the Procurement Act except in limited dicta.[98] The Ninth Circuit viewed the Court's silence on *Kahn* and its certiorari denials in other Procurement Act cases as implicit judicial approval of the test, warranting its application in the contractor vaccine mandate context.[99] Additionally, it found implied legislative branch approval for the *Kahn* framework by pointing to the 2002 congressional recodification of the Procurement Act.[100]

In upholding the mandate, the Ninth Circuit broadly adopted the *Kahn* test, relying almost exclusively on the President's broadly delegated authority in § 121(a) combined with the Act's purpose statement in § 101 of creating an "economical and efficient system" in procurement

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95 In a particularly salient articulation, Judge MacKinnon's dissent in *Kahn* notes that while "[t]here may be several ways to skin a cat . . . the President here has reached into an arsenal Congress did not provide for that purpose to unsheathe a knife designed for and restricted to more limited chores." *Id.* at 800 (MacKinnon, J., dissenting).

96 Clarke, *supra* note 14, at 1056 (arguing that *Kahn*'s weakness lies in its failure to articulate factors that would signal overreach of presidential discretion); Egerton, *supra* note 14, at 217 ("The court's guidance is sketchy and inconsistent.").

97 *See generally* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023); Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022).

98 As the Fifth Circuit notes, "The Supreme Court has had little occasion to review presidential authority under the Procurement Act, and even its most direct consideration is not particularly direct." *Louisiana*, 55 F.4th at 1025. The Supreme Court's very limited dicta on the Procurement Act came in *Chrysler* when the Court considered a regulation issued adjacently to an antidiscrimination executive order. *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) ("For purposes of this case, it is not necessary to decide whether Executive Order 11246 as amended is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.").

99 *See Mayes*, 67 F.4th at 928.

100 *Mayes*, 67 F.4th at 942; 40 U.S.C. § 486(a) (1996); 40 U.S.C. § 121(a) (2002). Congress's recodification explicitly stated that it did not make any "substantive changes in existing law." Pub. L. No. 107-217, 116 Stat. 1062, 1303 (2002). When considering delegations of legislative power to the executive branch, the Ninth Circuit argued that congressional recodification can serve as an approval of lower court's uniform interpretation of the statute. *See Mayes*, 67 F.4th at 942; *see also* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (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." (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012))).

activities.[101] The court found that the government's purported justification of mitigating workplace absenteeism through vaccination bore an "axiomatic[ally]" close nexus to increased economy and efficiency for contractors.[102]

The circuits invalidating the mandate found different reasons to hold *Kahn* inapplicable.[103] In *Kentucky v. Biden*, the Sixth Circuit refused to apply the "close nexus" test, emphasizing the fundamental dissimilarity between previous Procurement Act orders and the Biden Administration's vaccination Order. It described the historical examples as being "work-anchored" measures each with an "inbuilt limiting principle,"[104] meaning that those examples bound the conduct of the private entity itself as to its performance on the contract, as opposed to individual employees' conduct disconnected from the contract's purpose. The court viewed the historic examples, like antidiscrimination orders, as valid due to their close nexus to "the ordinary hiring, firing, and management of labor."[105] Comparatively, the vaccine mandate was categorized as a "medical procedure" imposed on individual employees, not connected to the ordinary management of labor. For the Sixth Circuit, the substance of the mandate (a medical procedure) removed it from the scope of the *Kahn* framework.[106]

In *Georgia v. President of the United States*, the Eleventh Circuit found fault with the government's asserted reading of the *Kahn* framework on a fundamental level, finding that its excessive reliance on the "economy and efficiency" language in the Act's preamble could allow for presidential orders that directly contravened other parts of the statutory text.[107] The court cited language from the *Kahn* opinion and its concurrences which emphasized the narrowness of the holding and cautioned that executive power must maintain consistency with the Act's

[101] *Mayes*, 67 F.4th at 942.

[102] *Id.* at 941 ("[T]he 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."); *id.* at 940 ("It is axiomatic that federal contracts will be performed more economically and efficiently with fewer absences.").

[103] *See generally* Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022).

[104] 23 F.4th at 608.

[105] *Id.* at 607–08.

[106] *Id.* ("But none of those comes even *close* to the deployment of the Property Act to mandate a medical procedure for one-fifth (or more) of our workforce.").

[107] 46 F.4th at 1298 ("The . . . purpose-based reading of the President's statutory authority . . . contravenes the text of § 121(a) . . . [which] does not give the President authority to 'carry out' the *purpose* of the statute. It delegates the power to 'carry out *this subtitle*' . . . .").

other provisions.[108] Specifically, the Eleventh Circuit rejected the idea that the Act's preamble in § 101 should be embedded into the presidential delegation under § 121.[109] Instead, it concluded that the "economy and efficiency" language in § 101 should act as a secondary restriction on the President's authority, as opposed to an expansion like the government asserted.[110] Thus, the President must point to specific provisions within Title 40 and division C of Title 41, which articulate "output-related standards" directly connected to the execution of contractual obligations, to invoke the "close nexus" test.[111] In sum, the court found that a broad all-employee vaccine mandate could not fit cleanly within the type of project-specific restrictions that the Procurement Act contemplates.[112]

The Fifth Circuit's December 2022 opinion in *Louisiana v. Biden* found that the government's reading of the *Kahn* test would provide the President "with nearly unlimited authority" to add binding provisions in government contracts, given the ease by which such provisions can purport to promote "economy or efficiency."[113] To showcase the inherent lack of a limiting principle in the *Kahn* "close nexus" test, the court walked through absurdist hypotheticals like daily vitamin requirements or bans on second-hand smoke exposure for contractor employees.[114] All such examples could conceivably be validated by the *Kahn* test as promoting efficiency in the contracting entity.[115]

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108 *Id.* at 1299 ("Though *Kahn* has since been read in some quarters as a blueprint for near-limitless executive procurement authority, it need not be. Indeed, that decision warns that the Procurement Act does not give the President a 'blank check' for him 'to fill in at his will.'").

109 *Id.* ("[T]reating economy and efficiency as the only content defining the President's procurement power works the same result as embedding the purpose statement of § 101 into the operative delegation of § 121(a)—an untenable approach.").

110 *Id.* at 1300 ("We disagree with this purpose-based approach, detached as it is from the Act's remaining text and structure. The purpose the Act serves is, if anything, a secondary restriction on the President's authority rather than an expansion.").

111 *Id.* at 1295 ("[T]he statutory scheme establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want.").

112 *Id.* at 1296 ("An all-encompassing vaccine requirement is different in nature from the sort of *project-specific restrictions* contemplated by the Act." (emphasis added)).

113 55 F.4th 1017, 1027–28 (5th Cir. 2022).

114 *Id.* at 1031–32 ("The President would have little difficulty, under the close nexus test, finding a close relationship between economy and efficiency and a requirement 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.").

115 *Id.* at 1031 ("We agree that no court would uphold [these hypotheticals], but the Government provided no dividing line by which a court might rule out the one and uphold the other. Though the government suggests that the "close nexus" test provides such a line, respectfully, that line is no line at all.").

2. The Major Questions Doctrine

Whether the major questions doctrine should apply to a presidential delegation is a recurring debate underlying this circuit split. The major questions doctrine is a modern canon of administrative law jurisprudence[116] that instructs courts *not* to defer to an agency's statutory interpretation where the relied-upon text is unclear and the challenged action involves a transformative expansion of regulatory authority that is of 'vast' economic and political significance.[117] It was typically deployed as a means of precluding *Chevron*-deference[118]—which for forty years had instructed courts to broadly defer to agency interpretation of ambiguously worded enabling statutes.[119] Derived from broad constitutional principles like the formalistic separation of powers, federalism, and the nondelegation doctrine,[120] its most recent iteration essentially operates as a clear-statement rule:[121] once triggered, the agency must be able to point to clear and explicit congressional authorization for the regulatory action in the statutory text.[122]

116 *See generally* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

117 West Virginia v. EPA, 597 U.S. 697, 700 (2022) ("This is a major questions case[] [because] EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler.").

118 Deacon & Litman, *supra* note 116, at 1020–21 ("In a set of cases, the Court has suggested either that an issue should not be analyzed using the Chevron framework because Congress did not authorize agencies to resolve the issue due to its majorness, or that the Chevron analysis operates differently because the agency policy is a major one. These cases have come to be known as the major questions doctrine.").

119 The Supreme Court formally overruled *Chevron* in 2024. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837 (1984).

120 *West Virginia*, 597 U.S. at 742 (Gorsuch, J., concurring) ("At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and the separation of powers. . . . The major questions doctrine seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests."); *id.* at 700 ("[G]iven both separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization' for the authority it claims."); *see also* King v. Burwell, 576 U.S. 473, 485–86, 497–98 (2015).

121 Deacon & Litman, *supra* note 116, at 1035 ("As Justice Gorsuch has stated, the core features of the new major questions doctrine resemble a clear statement rule rather than a method of resolving statutory ambiguity in the traditional sense.").

122 *West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring) ("Under [the major questions] doctrine's terms, administrative agencies must be able to point to 'clear congressional authorization' when they claim the power to make decisions of vast "'economic and political significance.'" (quoting majority opinion)).

In 2022, the Supreme Court applied the doctrine to a different COVID-era mandate promulgated by the Secretary of Labor through OSHA, which sought to require employees of large companies (with over one hundred employees) to vaccinate or be subject to weekly test and masking requirements.[123] In the *per curiam* opinion, the Court invoked the major questions doctrine on the grounds that the vax-or-test requirement was of "vast economic and political significance" because it was a "significant encroachment into the lives—and health—of a vast number of employees."[124] The Court thus struck down the mandate on the grounds that the explicit text of the agency's enabling statute did not empower the Secretary to impose broad public health measures, but merely workplace safety measures.[125]

The OSHA mandate case dealt with an agency delegation, fitting cleanly in line with the Court's prior applications of the major questions doctrine[126]—how easily the doctrine fits into the Procurement Act's presidential delegation is less clear. The Ninth Circuit viewed the doctrine as inapplicable because it had never been applied to presidential actions and instead had been limited to the agency context,[127] a claim also found in the Fifth Circuit dissent.[128] That same argument was further expounded upon in the Eleventh Circuit dissent, which explained that the President does not suffer from the same lack of political accountability as agencies to warrant the doctrine's application.[129] But the Fifth Circuit majority disagreed, insisting in a footnote that the doctrine should not be limited to its prior applications because the Supreme Court had never explicitly confined the doctrine to agency actions, pointing to the President's constitutional responsibility for the actions of the entire executive branch.[130]

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123 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117 (2022).

124 *Id.*

125 *Id.* ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.").

126 *See supra* note 34 and accompanying text.

127 Mayes v. Biden, 67 F.4th 921, 932 (9th Cir. 2023) ("The [major questions] doctrine does not apply to actions by the President.").

128 Louisiana v. Biden, 55 F.4th 1017, 1038 (5th Cir. 2022) (Graves, Jr., J., dissenting) ("It is important to note that the major questions doctrine is only invoked when there are potential anti-delegation issues to agencies, and that is not the situation here.").

129 Georgia v. President of the U.S., 46 F.4th 1283, 1313 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part) ("While I agree this is a question of major economic and political significance, we are not dealing with delegation to an agency. Instead, the delegation is to the President who 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.").

130 *Louisiana*, 55 F.4th at 1031 n.40 ("However, the Supreme Court has never explicitly limited the major questions doctrine to delegations to agencies rather than to the President . . . delegations

The Eleventh Circuit's invocation of the doctrine is perhaps the most nuanced with regard to the agency/presidency distinction, finding the doctrine applicable through a unique framing of the issue based on its own interpretation of the statute.[131] The court viewed the Order as one directed at agencies to carry out, and read the Procurement Act as granting no additional power to the President beyond that granted to agencies.[132] Therefore, it framed the issue as whether the Procurement Act gives the agencies themselves the ability to insert the vaccine-mandate clause; if not, the President cannot create such authority whole cloth through the Procurement Act.[133] This reading of the statute and the Order thus seeks to justify the application of the major questions doctrine even if the doctrine is solely limited to agency actions.[134]

Another dispute over the applicability of the doctrine deals with whether the directive at issue can be categorized as regulatory or proprietary. By characterizing all procurement activities as falling under the President's proprietary authority, the Ninth Circuit majority and the dissenting opinions in the Fifth and Eleventh Circuits found that the major questions doctrine could not apply because there was no transformative expansion of *regulatory* authority at issue.[135] Meanwhile, the Fifth Circuit majority determined that this was a distinction without a difference, citing the vast scope of the mandate (including employees of covered contractors who are not themselves working on or in connection

to the President and delegations to an agency should be treated the same under the major questions doctrine.").

131 *Georgia*, 46 F.4th at 1296.

132 *Id.* at 1295 ("[T]he Procurement Act gives the President the authority to direct subordinate executive actors as they carry out its specific provisions . . . A presidential directive can stand only if those subordinate officials have the statutory authority that they are told to exercise.").

133 *Id.* ("That background leads us to the question here: whether Executive Order 14042 directs subordinates to carry out their own lawful statutory authority, or whether the Order instead exceeds the limitations imposed by the Procurement Act's text. The Order's core directive is aimed at all executive agencies. To assess whether the Procurement Act gives the President authority to issue that directive, we ask whether the Act gives those agencies the authority to insert a clause into all of their procurement contracts and solicitations requiring contractors' employees to be vaccinated against Covid-19." (citation omitted) (citing Exec. Order No. 14,042, § 2(a), 86 Fed. Reg. 50985 (Sept. 9, 2021)).

134 Even so, that uniquely framed application has been criticized for ignoring the existing jurisprudence dealing specifically with presidential delegations—namely, the *Youngstown* framework. *See* Case Comment, *supra* note 34, at 2024–26; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

135 Mayes v. Biden, 67 F.4th 921, 935 (9th Cir. 2023) ("[T]he Contractor Mandate is not an exercise of regulatory authority at all, but of proprietary authority. . . . [N]othing in the Mandate constitutes a regulation. And its broad scope alone does not make it regulatory."); *Louisiana*, 55 F.4th at 1036 (Graves, Jr., J., dissenting); *Georgia*, 46 F.4th at 1308 (Anderson, J., concurring in part and dissenting in part).

with a covered contract) as belying the contention that the government was acting in a merely proprietary manner.[136]

In the circuits' varied applications of the doctrine, two fundamental considerations triggering its application were the Order's substance (vaccination) and the Order's scope. On substance, the court's applying major questions were seemingly influenced by the Supreme Court's recent holding in the OSHA case, which viewed vaccination requirements themselves as a question of "vast economic and political significance."[137] The Fifth Circuit, for example, directly cites that case to support its application of the doctrine, glossing over the agency/presidency distinction.[138] Further, the Supreme Court's characterization of vaccination as a "medical procedure" set the stage for the Sixth Circuit to invoke that language in its argument that principles of federalism preclude the federal government from regulating public health through vaccination mandates.[139] This federalism argument allowed the Sixth Circuit to more easily bring the major questions doctrine into the fold based on the doctrine's purported justifications.[140]

With regard to the mandate's scope, both the Fifth and Sixth Circuit repeatedly cite the questionable Department of Labor figure[141] that workers employed by federal contractors amount to approximately one-fifth of the country's entire labor force.[142] The mandate's scope extending beyond those directly working on government contracts[143] led the Sixth Circuit to conclude that the reach of the mandate may actually affect even more than one-fifth of the workforce.[144] This estimate is neither directly

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136 *Louisiana*, 55 F.4th at 1032 ("As to the distinction between regulatory and non-regulatory power, on which the Government relied in its briefing to distinguish this action from the OSHA mandate, it is here a distinction without a difference.").

137 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117 (2022).

138 *Louisiana*, 55 F.4th at 1030.

139 Kentucky v. Biden, 23 F.4th 585, 610 (6th Cir. 2022) ("[States] certainly have a traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large.").

140 West Virginia v. EPA, 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring) ("At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice, federalism, and the separation of powers. . . . The major questions doctrine seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests." (quoting *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 125 (Gorsuch, J., concurring)).

141 Office of Federal Contract Compliance Programs, *supra* note 75.

142 *Louisiana*, 55 F.4th at 1028 ("The Department of Labor has suggested that roughly 'one-fifth of the entire U.S. Labor Force' is 'employed by federal contractors.'"); *Kentucky*, 23 F.4th at 591 ("First, according to the Department of Labor, 'workers employed by federal contractors' constitute 'approximately one-fifth of the entire U.S. labor force.'").

143 *Louisiana*, 55 F.4th at 1032–33; Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

144 *Kentucky*, 23 F.4th at 606–07 ("As we have detailed above, the contractor mandate sweeps in *at least* one-fifth of the American workforce. The true proportion may be even larger, given that the contractor mandate defines so capaciously who qualifies as a covered contractor.").

addressed nor disputed by the Ninth Circuit's opinion upholding the mandate.[145] The dissenting opinion in the Sixth Circuit was the only opinion that took issue with the oft-cited figure, but still accepted its premise in an exercise of judicial mathematics: deducing that the mandate could only affect about five percent of the workforce because of the high pre-existing vaccination rates, that dissent questioned whether the states even had standing to sue.[146]

Closely related is whether the contractor vaccine mandate is a "transformative expansion" of authority under the Procurement Act because the Order regulates the individual conduct of *employees*, as opposed to the higher-level conduct of the contracting entity itself.[147] The Fifth Circuit characterized the use of procurement authority in the vaccine mandate as "reach[ing] through" contracting businesses to impose regulations on the business' employees as opposed to regulating the employer itself, finding such an exercise of power to be unprecedented when compared with the historic examples.[148] In the Fifth Circuit's view, prior exercises of procurement authority (like antidiscrimination in employment,[149] E-Verify for immigration status of

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145 *See generally* Mayes v. Biden, 67 F.4th 921 (9th Cir. 2023).

146 *Kentucky*, 23 F.4th at 613 (Cole, J., concurring in part and dissenting in part) ("If federal contractors constitute one fifth of the American workforce, the executive order affects, at most, five percent of the workforce—a much smaller scale than the majority and the states implicate." (citation omitted) (citing Kentucky v. Biden, 571 F. Supp. 3d 715 (E.D. Ky. 2021))).

147 *Louisiana*, 55 F.4th at 1029, 1030 ("Most significantly, unlike [previous orders], which govern the conduct of employers, the vaccine mandate purports to govern the conduct of employees . . . ."); Georgia v. President of the U.S., 46 F.4th 1283, 1296 (11th Cir. 2022) (noting that the Procurement Act's language of creating a system for federal contracting is "worlds away from conferring general authority for every agency to insert a term in every solicitation and every contract establishing health standards for contractors' employees"); *Kentucky*, 23 F.4th at 606 ("[N]o one seems to have envisioned the [Procurement Act] as a latent well of authority to order the medical enhancement of contractor employees to make *them* more 'economical and efficient.'").

148 *Louisiana*, 55 F.4th at 1033 (historical exercises of the Procurement power are insufficient "to demonstrate a long-standing understanding that the Procurement Act could be used in this way. The President's use of procurement regulations to *reach through* an employing contractor to force obligations on individual employees is truly unprecedented." (emphasis added)).

149 Contractors Ass'n of E. Pa. v. Sec'y of Lab., 442 F.2d 159, 170 (3d Cir. 1971) ("[I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson's first category: action pursuant to the express or implied authorization of Congress."); *see also* Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) ("Since 1941 . . . the most prominent use of the President's authority under the FPASA has been a series of anti-discrimination requirements for Government contractors.").

employees,[150] and mandatory sick leave for employees[151]) all govern the conduct of the employing entity itself as opposed to the conduct of individual employees.[152] The Sixth Circuit similarly distinguished the historic examples, characterizing them as "work-anchored" measures with an "inbuilt limiting principle," while the vaccine mandate, by comparison, required vaccination "everywhere and all the time" and was not anchored to the specific work of federal contractors.[153] The Eleventh Circuit, meanwhile, took a slightly different stance by finding that none of the historic examples fell in the realm of public health except for the sick-leave order,[154] determining that sole example insufficient to establish a longstanding practice justifying the vaccine mandate.[155]

The Ninth Circuit disputed the employer/employee distinction made by the Fifth and Sixth Circuits.[156] Under that view, the employer/employee distinction framed the issue at the wrong level of generality—just like with E-Verify, the vaccination mandate was framed merely as a requirement for *employers* to verify the vaccination status of their employees, just as they must verify their employees' immigration status under E-Verify.[157] Thus, both Orders "touch" the employee in some sense, but the ultimate obligation is the employer's verification of their employee's compliance.[158] The Fifth Circuit majority criticized this argument for overlooking the fact that the vaccine mandate imposed an affirmative obligation on employees to take a specific act, while E-Verify imposed no such obligation on the employee themselves.[159] E-Verify

150 Exec. Order No. 13,465, 3 C.F.R. § 33286 (June 6, 2008). This order was later upheld in the district court. Chamber of Com. of U.S. v. Napolitano, 648 F. Supp. 2d 726 (D. Md. 2009).

151 Exec. Order No. 13,706, 80 Fed. Reg. 54697 (Sept. 7, 2015).

152 *Louisiana*, 55 F.4th at 1030 ("Most significantly, unlike the non-discrimination, E-Verify, Beck rights, and sick leave orders, which govern the conduct of employers, the vaccine mandate purports to govern the conduct of employees—and more than their conduct, purports to govern their individual healthcare decisions.").

153 Kentucky v. Biden, 23 F.4th 585, 608 (6th Cir. 2022).

154 Exec. Order No. 13,706, 80 Fed. Reg. 54697.

155 Georgia v. President of the U.S., 46 F.4th 1283, 1301 (11th Cir. 2022) ("We do not weigh in on [the sick leave Order's] validity here, and no other circuit court has done so either. For our purposes, that single order falls far short of establishing the kind of 'longstanding practice' that might support interpreting the Procurement Act to contemplate a vaccination power—if the text could bear that reading.").

156 Mayes v. Biden, 67 F.4th 921, 939 (9th Cir. 2023). This echoed the view of Judge Graves's dissent in *Louisiana*. 55 F.4th at 1036–37 (Graves, J., dissenting).

157 *Mayes*, 67 F.4th at 939; *Louisiana*, 55 F.4th at 1036–37 (Graves, Jr., J., dissenting) ("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.").

158 *Mayes*, 67 F.4th at 939; *Louisiana*, 55 F.4th at 1036–37 (Graves, Jr., J., dissenting).

159 *Louisiana*, 55 F.4th at 1030 n.39 ("To be clear: unlike the E-Verify order, this vaccine mandate requires employees to take an action not limited temporally or physically to their place of

additionally tracked with existing federal law that requires employees to adhere to immigration and work-authorization requirements.[160] The Ninth Circuit did little to address these distinctions.[161]

II. ANALYSIS

The primary disagreements that abound in the circuit split opinions largely revolve around a debate between a deferential application of the *Kahn* "close nexus" test versus the applicability of the major questions doctrine.[162] Central to this debate is the scope and substance of the mandate compared with its historical analogs, and the proper weight to afford the broad language of the presidential delegation when combined with the 'economy and efficiency' language of the Procurement Act's purpose statement.[163]

A. *The Faulty Application of the Major Questions Doctrine*

Existing judicial doctrines and frameworks do not adequately address the problems of private-public accountability and coercion that arise from the use of government contracts as a regulatory tool on individual conduct.[164] Yet, the circuits enjoining the mandate unnecessarily complicated their analysis by misapplying the major questions doctrine in this context.[165] The application of the doctrine in these cases rested on shaky doctrinal footing and did little to clarify the

employment and unrelated to any statutory scheme—that is, to get vaccinated or lose their job. No such action is required by employees under the E-Verify order.").

160 *Id.*

161 *Mayes*, 67 F.4th at 921.

162 *See generally Mayes*, 67 F.4th 921; Georgia v. President of the U.S., 46 F.4th 1283 (11th Cir. 2022); Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); *Louisiana*, 55 F.4th 1017.

163 *See generally Mayes*, 67 F.4th 921; *Georgia*, 46 F.4th 1283; *Kentucky*, 23 F.4th 585; *Louisiana*, 55 F.4th 1017.

164 Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 159–60 (2000) ("Whether one welcomes or fears the rise of contract as an administrative and regulatory tool, however, existing doctrines and theoretical frameworks will need to adapt to its emergence. Contractual instruments pose a host of doctrinal and theoretical problems for which administrative law provides no ready answers. . . . A conception of the government agency as 'contracting partner' fits comfortably with none of these accounts. As a result, the complement of oversight mechanisms currently envisioned by these theories to constrain agency action might be inadequate—or wholly inappropriate—for the problems that arise in the contracting state.").

165 *See Georgia*, 46 F.4th at 1295–97; *Kentucky*, 23 F.4th at 607; *Louisiana*, 55 F.4th at 1029–31. *But see Mayes*, 67 F.4th at 932–34 (holding that the major questions doctrine does not apply).

limits of presidential authority under the Procurement Act for future imponderable exercises of authority.

First, it is unclear why the major questions doctrine should apply to presidential delegations, given the doctrine's contextual development as an alternative to *Chevron* deference for agency interpretation of their own enabling statute.[166] In the contractor vaccine mandate cases, there is no question of *Chevron* deference at issue. Thus, the application of the doctrine in this context seems to be rather haphazard. The Eleventh Circuit comes the closest to making the case for the application of major questions due to its unique reading of the statute and characterization of the Order,[167] but that framing still does nothing to address the fact that the doctrine has historically been deployed solely as an alternative to *Chevron* and solely in the context of agency delegations. The Eleventh Circuit's analysis also elides the preexisting case law for presidential delegations—namely, the *Youngstown* framework.[168]

Second, when considering the scope of the contractor vaccine mandate[169] in conjunction with the modern growth of the procurement industry,[170] a continued application of the major questions doctrine risks a de facto judicial invalidation of the entire statute. On its face, imposing a regulation on the oft-cited "one-fifth of the workforce" figure seems enough to trigger the major questions doctrine's clear statement rule for regulations affecting a large sect of the nation's economy.[171] But that number is disputed, and there is no publicly available government data on the percentage of the workforce actually employed by government contractors.[172] Most importantly, even if the number was accurate, allowing the application of the major questions doctrine here might enable a future where all Procurement Act executive orders might be deemed a major questions issue, due to the sheer magnitude of today's procurement industry. Even an order solely binding government employees might as well affect an equally large sect of the nation's economy.

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166 Deacon & Litman, *supra* note 116, at 1020–24.

167 *Georgia*, 46 F.4th at 1296.

168 Case Comment, *supra* note 34, at 2024–26; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–39 (1952) (Jackson, J., concurring). *See generally Georgia*, 46 F.4th 1283.

169 *See supra* notes 141–161 and accompanying text; *see also Louisiana*, 55 F.4th at 1032–33; Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

170 *See supra* Section I.C.

171 West Virginia v. EPA, 597 U.S. 697, 700 (2022); Louisiana v. Biden, 55 F.4th 1017, 1028 (5th Cir. 2022) ("The Department of Labor has suggested that roughly 'one-fifth of the entire U.S. Labor Force' is 'employed by federal contractors.'"); Kentucky v. Biden, 23 F.4th 585, 591 (6th Cir. 2022) ("First, according to the Department of Labor, 'workers employed by federal contractors' constitute 'approximately one-fifth of the entire U.S. labor force.'").

172 *See infra* Section II.B.

Lastly, the application of the doctrine is potentially underinclusive with regard to the substance of the Order because it does little to signal toward future judicial outcomes. The Supreme Court's recent application of the major questions doctrine in the OSHA case provided the lower courts with immediate grounds to view vaccination mandates in general as major questions.[173] But the contractor vaccine mandate is a mandatory provision on a contract entered into by private parties, fundamentally different in nature from the legal question of whether a workplace safety agency was delegated authority to regulate public health in its enabling statute.[174] Future exercises of power under the Procurement Act are unlikely to have such a clear-cut analog on substance to prompt an application of the doctrine, thus leaving the door open to future varied applications among the circuits.

Despite these issues, the courts applying major questions were largely correct in viewing the contractor vaccine mandate as "transformative"—the examples of Procurement Act authority that have received the deference of the *Kahn* test since 1949 are not analogous to an order that imposes affirmative obligations on the employees of federal contractors.[175] But this conclusion, while prescient and undoubtedly relevant, does not necessitate such a shaky application of the major questions doctrine—consideration of statutory text, historic analogs, and congressional acquiescence can serve as sufficient grounds on their own.

B. *Categorizing the Historical Examples*

Jurists have criticized the vaccine mandate for improperly expanding authority under the Procurement Act to regulate the individual conduct of employees, as opposed to the higher-level conduct

[173] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 117 (2022) (The vax-or-test requirement entails a "significant encroachment into the lives—and health—of a vast number of employees"); *Louisiana*, 55 F.4th at 1030.

[174] *Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 117–18 ("The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures . . . Confirming the point, the Act's provisions typically speak to hazards that employees face at work . . . And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.").

[175] Kentucky v. Biden, 23 F.4th 585 (6th Cir. 2022); *Louisiana*, 55 F.4th at 1030; Georgia v. President of the U.S., 46 F.4th 1283, 1296 (11th Cir. 2022) ("An all-encompassing vaccine requirement is different in nature than the sort of project-specific restrictions contemplated by the Act."); *see also* Miller, *Government Contracts*, *supra* note 14, at 46 ("Early emphasis was on maximum hours; it was not until the twentieth century that minimum wage provisions appeared. At the present time, not only wages and hours, but also such matters as discrimination because of race or color are covered by various statutes and Executive Orders.").

of the contractor itself.[176] The Fifth Circuit characterized the use of procurement authority in the vaccine mandate as "reach[ing] through" contracting businesses to impose regulations directly upon the business' employees, finding such an exercise of power to be unprecedented.[177]

The text of the statute, standing alone, supports a conclusion that the President's authority to impose Procurement Act obligations is limited solely to government actors.[178] The purpose statement of the Act itself underwent some judicial remodeling to become the basis of the *Kahn* test: the explicit statutory wording says "the purpose of this subtitle is to provide the government with an economical and efficient system" for its procurement activities.[179] Under the *Kahn* test, however, "system" is typically dropped, and the tense of the adjectives is altered, morphing the stated purpose into merely providing the government with more "economy and efficiency."[180] By de-emphasizing the word "system," the *Kahn* test thus shifts the statute's focus beyond internal government

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[176] *Louisiana*, 55 F.4th at 1030 ("Most significantly, unlike [previous] orders, which govern the conduct of employers, the vaccine mandate purports to govern the conduct of employees . . . ."); *Georgia*, 46 F.4th at 1296; *Kentucky*, 23 F.4th at 605.

[177] *Louisiana*, 55 F.4th at 1033.

[178] The statutory language of the purpose statement connects the 'economy and efficiency' language to the following specifically enumerated activities:

> Procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies

40 U.S.C. § 101. Judge MacKinnon's 1979 dissent in *Kahn* adopted the most judicially textualist approach by limiting the presidential delegation to these specifically enumerated areas, consequently allowing the President to only bind internal government employees. *See* Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 800 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (explaining that the delegation of authority to the President "merely permits the President to oversee and to promulgate policies relating to procurement, warehousing, property, identification, supply, traffic management, and the like[,]" and thus reflecting Congress's intent to provide the President with "significant but comparatively narrow authority" for managing federal procurement). The modern iteration of Judge MacKinnon's perspective is provided by the Sixth Circuit. *See Kentucky*, 23 F.4th at 605 ("Section 101 thus authorizes the President to implement systems making *the government's* entry into contracts less duplicative and inefficient, but it does not authorize him to impose a medical mandate directly upon contractor employees themselves because he thinks it would enhance *their* personal productivity.").

[179] 40 U.S.C. § 101.

[180] *Kahn*, 618 F.2d at 797 (Tamm, J., concurring) (explaining the decision to uphold the order was "predicated upon the close nexus between the purpose of the voluntary guidelines and the goal of the Act to secure economy and efficiency in federal procurement").

affairs and opens the door to orders promoting the efficiency of the contractor itself.[181]

Historical practice preceding the 1949 presidential delegation, and subsequent congressional acquiescence to the *Kahn* test,[182] lend credence to the idea that *some* amount of control over the prospective contractor must be statutorily authorized. But the language of the *Kahn* test itself fails to articulate any limiting principle to the President's authority to promote "economy and efficiency" beyond government process and into the contracting party, risking its misuse as a mere Trojan horse to pursue social policy goals via executive orders.[183] As the federal procurement industry continues to grow,[184] locating this elusive limit is vital to determining the proper scope of executive Procurement Act authority. Directives binding internal government processes pose little issue for judicial interpretation.[185] The primary area of dispute lies in the

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181 *Id.* at 818 (Robb, J., dissenting) ("When the few words excerpted from [§ 101] by the majority are read in the context of the rest of that section it is apparent that the economy and efficiency to which Congress refers are related to the activities and functions described by Mr. Holifield in his explanation of the bill, that is to the housekeeping functions and activities of the federal government.").

182 Mayes v. Biden, 67 F.4th 921, 938 (9th Cir. 2023) ("[W]hen 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 . . . .").

183 *See* Clarke, *supra* note 14, at 1052 ("[T]he court relied on the language of the Act's goal and delegation provisions. It ignored the problem/solution character of the Act as revealed in its legislative history. The resulting interpretation is inconsistent with the principles underlying the delegation doctrine, as it defines the scope of delegated power so broadly as to make it virtually boundless."); *see also* Egerton, *supra* note 14, at 205–06.

184 *See supra* Section I.C.

185 Executive directives regulating the conduct of government employees when entering into procurement contracts are directly authorized by the text of the Procurement Act and are the logical consequence of the act's legislative history. *See supra* Section I.B. A common example of clearly authorized exercise of procurement authority are "Buy American" policies, which direct government agencies to prioritize contracts from domestic companies. *See* DAVID H. CARPENTER & BRANDON J. MURILL, CONG. RSCH. SERV., THE BUY AMERICAN ACT AND OTHER FEDERAL PROCUREMENT DOMESTIC CONTENT RESTRICTIONS 1, 1 (2022) ("Over the years, pursuant to its broad power over federal spending, Congress has enacted a number of federal funding restrictions on the purchase of 'foreign' products. These domestic content restrictions require federal agencies to purchase covered items that are produced or manufactured in the United States, subject to various exceptions and exemptions."); *see also* Miller, *Government Contracts*, *supra* note 14, at 33–34. Such directives actually precede the executive delegation under the Procurement Act, having been previously exercised through congressional legislation like the 1933 Buy American Act. 41 U.S.C. §§ 8301–8305; Miller, *Government Contracts*, *supra* note 14, at 33–34. Today, similar directives can be found through largely noncontroversial Executive Orders like President Biden's "Ensuring the Future Is Made in All of America by All of America's Workers." Exec. Order No. 14,005, 86 Fed. Reg. 7475 (Jan. 25, 2021). Another example of explicitly authorized executive procurement directives requires agencies to give preferential treatment to small business considerations when entering into contracts. Miller, *Government Contracts*, *supra* note 14, at 43 ("[S]mall business has been singled out for special treatment by the Federal Government. And that

sometimes ambiguous line between directives binding contractors and directives binding *employees* of contractors.

Government procurement policies seeking to increase efficiency within private contractors have less direct statutory support than those binding internal government processes, yet both have been broadly upheld in judicial challenges.[186] This type of exercise of procurement policy can be understood as leveraging the terms and conditions of government contracts to enact social policy-oriented goals.[187] Antidiscrimination requirements in contractor hiring practices are an example of a prominent use of the President's Procurement Act authority in the decades immediately following the statute's enactment.[188] While the earliest court cases on this issue were unclear as to the precise source of the President's authority,[189] later cases found affirmative action hiring directives for contractors to be squarely within the delegation of the Procurement Act.[190] In upholding a 1961 Executive Order by President Kennedy that directed contractors to hire more minority workers, the

treatment has revolved generally around attempts to give preferential treatment to small firms when awarding federal contracts. Congress has often stated the policy of giving maximum assistance to small business through the medium of Government contracts."). Mandating such considerations by government actors is explicitly authorized by the text of the Procurement Act as well as by other congressional enactments passed around the same time period. 41 U.S.C. § 3104 ("[A] fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns."). Lastly, any directives upon government agencies that seek to ensure "full and open competition" in the government's procurement process are explicitly authorized by the Procurement Act, and executive orders promoting such competition are squarely within the congressional delegation of authority to the President. 41 U.S.C. § 3301 ("[A]n executive agency in conducting a procurement for property or services shall . . . obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and . . . use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.").

186 *See generally* Hoe & Merrill, *supra* note 87.

187 *Id.* ("[B]oth Republican and Democratic presidents have issued policy through executive orders based on their procurement power granted under the Procurement Act.").

188 *Id.*; Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 790 (D.C. Cir. 1979) ("Since 1941, though, the most prominent use of the President's authority under the [Procurement Act] has been a series of anti-discrimination requirements for Government contractors.").

189 Farmer v. Philadelphia Elec. Co., 329 F.2d 3, 8 (3d Cir. 1964) (concluding that the orders were proper under both § 205 of the Procurement Act and the "declaration of policy" in the Defense Production Act of 1950).

190 Farkas v. Texas Instrument, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967) ("We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of 'an economical and efficient system for the procurement and supply' of property and services that the order should be treated as issued without statutory authority." (citation omitted) (quoting 40 U.S.C. § 471 (current version at 40 U.S.C. § 101))); Contractors Ass'n of E. Pa. v. Sec'y of Lab., 442 F.2d 159, 171 (3d Cir. 1971) ("[T]he federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects.").

Third Circuit found that the Procurement Act authorized such an order given the government's interest in ensuring long-run procurement costs were not increased by the exclusion of minority workers.[191]

Carter's 1978 anti-inflationary provisions at issue in *Kahn* bore a sufficient nexus to promoting economy and efficiency in government procurement by passing potential savings to the government through its contracts.[192] This Order fits cleanly with other orders regulating contracting businesses in a top-down manner, since controls on wages and prices impose obligations on the business entity itself, as opposed to its employees. Given the significant history of courts approving exercises of procurement policy that impose conditions on contracting businesses and Congress's subsequent recodification of the Act,[193] this category is not inherently problematic under the Procurement Act, as long as it is connected back to likely cost-savings for the government.[194] Thus, *Kahn* merely considers effect on government costs; it does not inherently contain any inquiry regarding scope.

Other examples of orders binding the contracting entity exist in a more complicated gray area for judicial comparison—take President Bush's E-Verify Executive Order, which mandated that contracting businesses utilize electronic verification in hiring practices to determine employment eligibility based on immigration status.[195] The Ninth Circuit deployed this example to argue that distinctions between "reaching through" are essentially meaningless, because E-Verify necessarily

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191 *Contractors Ass'n of E. Pa.*, 442 F.2d at 170 ("[I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson's first category: action pursuant to the express or implied authorization of Congress.").

192 The *Kahn* court explains that by slowing overall inflation levels in the economy, the wage and price control program would allow the government to "face lower costs in the future than it would have otherwise." *Kahn*, 618 F.2d at 793.

193 In upholding the Order, the Ninth Circuit majority pointed to the recodification as an implicit approval of a broad statutory reading, presuming "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." Mayes v. Biden, 67 F.4th 921, 938 (9th Cir. 2023). The dissenting opinion in the Eleventh Circuit also echoed this principle of statutory analysis. Georgia v. President of the U.S., 46 F.4th 1283, 1312 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part). In contrast, the Eleventh Circuit majority pointed to Congress's lack of a substantive change in recodifying to support their textualist reading, stating that the "substance of the current language thus holds the same meaning as the earlier version: the President can issue policies to assist and direct the GSA Administrator and other executive actors as they carry out their authority under the Act." *Id.* at 1294.

194 *Kahn*, 618 F.2d at 793.

195 Exec. Order No. 13,465, 3 C.F.R. § 33286 (June 6, 2008).

"touched" the employees just as much as it did the employer.[196] However, this argument skirts over the important issue of who actually bears the affirmative obligation: under E-Verify, the contractor bore the obligation to affirmatively verify its employees' pre-existing work authorization status. E-Verify did not, by comparison, require employees to themselves take an affirmative step or else forgo their interest in continued employment.[197]

The Fifth and Sixth Circuits are thus correct in characterizing procurement policy that imposes obligations on individual employees, rather than the business itself, as fundamentally dissimilar to previous exercises of Procurement Act authority.[198] Imposing affirmative obligations on individual employees is the most extreme instance of "reaching through" the government contract to regulate the relationship between employer and employee. Orders of this type pose the largest risk of blurring the distinction between public and private accountability,[199] obviating consensus for conditions imposed on contracting parties,[200] and undermining competition among firms in the procurement process.[201]

Orders that "reach through" the government contract to impose obligations on employee conduct, not connected to contractual performance and in pursuit of social policy goals, are a novel phenomenon. There are only two exercises of Procurement Act power that arguably fit into this category: President Trump's now-defunct 2020 Executive Order regulating discussions of race in the workplace[202] and President Biden's vaccine mandate.[203]

President Trump relied on the Procurement Act in an attempt to prohibit federal contractors from discussing certain "divisive concepts" in the contractor workplace.[204] The Order "reached through" contracting entities to regulate their internal management of employees beyond the scope of contractual performance, prohibiting workplace trainings

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196 *Mayes*, 67 F.4th at 939; Louisiana v. Biden, 55 F.4th 1017, 1036–37 (5th Cir. 2022) (Graves, Jr., J., dissenting).

197 *See supra* notes 156–161 and accompanying text.

198 Kentucky v. Biden, 23 F.4th 585, 607–08 (6th Cir. 2022); *Louisiana*, 55 F.4th at 1033.

199 Freeman, *supra* note 164, at 159 ("Contracts could also enable government agencies to accomplish indirectly what, for legal or political reasons, they cannot achieve directly. . . . [P]ublic-private contracts could be a means of extending government priorities and policies to private actors, and of exacting concessions and gains that might otherwise be beyond the government's regulatory reach.").

200 Miller, *Government Contracts*, *supra* note 14, at 57.

201 *See* 41 U.S.C. §§ 3301(a)(1), 3306(a)(1).

202 Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020).

203 Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

204 Exec. Order No. 13,950, 85 Fed. Reg. 60683.

involving "stereotyping" or "scapegoating" based on sex or race and outright banning discussions of white privilege or critical race theory.[205] The lack of clarity in the Order led to a chilling effect in covered workplaces as employees became unsure about what they could and could not say under the rule.[206] The Order's purported effect of promoting economy and efficiency[207] was tenuous at best and pretextual at worst, yet its cookie-cutter insertion showcases the inherent lack of teeth offered by the *Kahn* test.[208] This level of "reaching through" the government contract to regulate conduct between individual contractor employees tramples a bidding contractor's freedom to manage its internal affairs in a way they believe will allow them to provide goods and services to the government at the lowest possible cost.[209] In this manner, it undermines the statute's explicit commitment to promoting competition between prospective bidders by foreclosing variability in workplace culture.[210]

III. Proposal

The circuit courts invalidating the mandate erred by applying the major questions doctrine to a presidential delegation; that doctrine was designed as a means of moderating the deference typically afforded to agency interpretation of their own enabling statutes under *Chevron*, and

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205 *Id.*; Felicia Kalkman, *Lessons from Executive Order 13950: The Dangers of Regulating Government Contractors Through Executive Orders*, 51 PUB. CONTRACT L.J. 89, 94–98 (2021).

206 Paige Smith & Jeff Green, *Trump Rule Leads Contractors to Cut Diversity, Bias Training*, BLOOMBERG L. (Oct. 30, 2020, 5:00 AM), https://news.bloomberglaw.com/daily-labor-report/trump-rule-leads-contractors-to-cut-diversity-bias-training [https://perma.cc/82V5-QT4X].

207 In the first few lines, Trump states that the goal of the Executive Order was "to promote economy and efficiency in Federal contracting . . . and to combat offensive and anti-American race and sex stereotyping and scapegoating." Exec. Order No. 13,950, 85 Fed. Reg. 60683. Executive Order 13950 never saw a Procurement Act challenge but was enjoined on First Amendment grounds by a district court. Santa Cruz Lesbian and Gay Community Ctr. v. Trump, 508 F. Supp. 3d 521 (N.D. Cal. 2020). The First Amendment issues are beyond the scope of this Note. This Order was later revoked by Biden. *See* Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

208 Louisiana v. Biden, 55 F.4th 1017, 1027–28 (5th Cir. 2022) (explaining that under *Kahn*, "the only practical limit on presidential authority in this sphere is the executive's ability to tie policy priorities to a notion of economy or efficiency").

209 *See generally* Moore, *supra* note 84.

210 41 U.S.C. § 3306(a)(1) ("In preparing for the procurement of property or services, an executive agency shall . . . specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement[.]"); 41 U.S.C. § 3301(a)(1) ("[A]n executive agency in conducting a procurement for property or services shall . . . obtain full and open competition through the use of competitive procedures."); Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 803 (D.C. Cir. 1979) (MacKinnon, J., dissenting); Moore, *supra* note 84.

simply does not fit in the context of the Procurement Act.[211] The courts missed a crucial opportunity to elaborate on the statutory and historical analyses underlying their decisions to articulate a clear limit on the scope of presidential authority under the Act. At its most basic level, the fundamental judicial inquiry must ask: *who will bear the affirmative obligation of this contractual provision?* This inquiry will allow a court to determine the extent to which a Procurement Act executive order is seeking to "reach through" the government contract to regulate the individual conduct of a private firm's employees beyond what is necessary for that firm's performance on the contract.[212]

Distinguishing between levels of "reaching through" is important because courts typically construe and interpret contracts with the federal government in accordance with the same principles of contract law as applied between private individuals.[213] This ignores the unique superior bargaining position of the federal government, whose sheer volume of purchases allow it to regulate the contracting entity by imposing particular terms and conditions that might not otherwise be accepted by parties to a standard private contract.[214] Thus, a government contract bears little resemblance to the consensual contract relationship formed between bargaining parties; the mandatory terms and conditions of the contract itself become an instrument of power over the contracting business.[215] The dissenting opinion in the Fifth Circuit ignores this power dynamic in justifying the vaccine mandate, stating that "no company has

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211 *See supra* Section II.A.

212 This test is derived from the observation in *Louisiana* that the "use of procurement regulations to reach through an employing contractor to force obligations on individual employees is truly unprecedented." *Louisiana*, 55 F.4th at 1033.

213 Miller, *Administrative Discretion*, *supra* note 15, at 783–84 ("[I]t has often been stated by courts that the contracts of the federal government are to be construed and interpreted in accordance with the same principles as those controlling contracts between private individuals."); Priebe & Sons v. United States, 332 U.S. 407, 411 (1947).

214 Miller, *Government Contracts*, *supra* note 14, at 49 ("The attempt to equate the Federal Government as a purchaser with any private individual or firm will not hold water. The difference is not merely one of degree, it is one of type. The Federal Government as a purchaser stands in a unique position; its very volume of purchases allows it to 'regulate' by attaching terms and conditions under which it 'will permit goods to be sold to it.' . . . . Taking advantage of its superior bargaining position, the Federal Government imposes its will on all who would contract with it."); Miller, *Administrative Discretion*, *supra* note 15, at 785 ("[I]t is clear that the national government, while contracting, operates from a superior bargaining position. This enables it to impose its desires, to a large extent at least, upon its contractors. . . ."").

215 Miller, *Government Contracts*, *supra* note 14, at 57 ("To a large extent, accordingly, the Government contract is an instrument of a power relationship, and only vaguely resembles the consensual agreement extolled by Maine and relied upon by Adam Smith. The significant decision is that of the Government in setting the terms and conditions of the proposed agreement.").

a right to a federal contract,"[216] reiterating a similar argument from the *Kahn* opinion.[217]

Ignoring the extent to which a government contract "reaches through" the contracting entity does a disservice to those employees whose connection with a contract is merely circumstantial and can obscure the traditional lines of political and corporate accountability.[218] Extensive "reaching through" may also threaten the cost-saving benefits of private contracting by removing a layer of competition between bidding firms, contravening the statute's textual emphasis on promoting competition.[219]

The vast majority of a contractor's employees are not themselves a party to contract negotiations with the government, nor are they necessarily employed for the purposes of performing a government contract. For many employees, their relation to the government contract is merely circumstantial; yet, under an order like the contractor vaccine mandate, such employees become subject to extra-statutory regulation on their personal conduct despite having no connection to the performance of the government contract.[220] Thus the employee is put in a position where they must either comply with the obligation or risk losing access to their financial livelihood. Such a dilemma brings to mind the language of Chief Justice John Roberts when considering the constitutionality of the Affordable Care Act's Medicaid expansion provisions in *National Federation of Independent Business v. Sebelius*.[221] The false choice on

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216 *Louisiana*, 55 F.4th at 1039–40 (Graves, Jr., J. dissenting) ("If the company does not want to abide by the clauses of the government contract, the government is not forcing companies to contract with it.").

217 Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 794 (D.C. Cir. 1979) ("[N]o one has a right to a Government contract.").

218 Freeman, *supra* note 164, at 156 ("Widespread contracting out of services or arguably 'public' functions could have dire consequences under some circumstances—if legislatures systematically outsource their traditional functions and use contracts with private parties to insulate decisions from constitutional scrutiny, for example. Contracting could obscure traditional lines of accountability, enabling legislatures to take credit for doing little, while blaming private contractors for program failures.").

219 *See supra* notes 62–66 and accompanying text; Press Release, Bureau of Lab. Stats., supra note 78; U.S. DEP'T LAB., *supra* note 75; Miller, *Government Contracts*, *supra* note 14, at 48 ("[T]he imposition of a concept of social justice on private businesses throughout the country . . . is accomplished by subordinating the normal policy of the Government to buy its necessities at the lowest price.").

220 As Judge Engelhardt in the Fifth Circuit explains, the contractor vaccine mandate may go even *beyond* the employer-employee relationship by "encompass[ing] 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." *Louisiana*, 55 F.4th at 1032–33 ("There 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 . . . .").

221 567 U.S. 519 (2012).

offer to the states in that case was to either adopt the ACA's newly increased minimum coverage provisions or else forego access to federal Medicaid funds entirely.[222] Thus, Roberts characterized the all-or-nothing "choice" as a "a gun to the head" of the states—far more coercive than a mild financial inducement, specifically because the latter option would consequently gut that state's entire Medicaid program.[223] Like the states in *Sebelius*, the "take-it-or-leave-it" nature of federal contracts[224] means employees of contractors are left with an even more extreme false choice—either comply with a potentially invalid exercise of power, or lose their jobs.[225]

This interpretative problem can be mitigated by categorizing executive orders relying on the Procurement Act into three distinct categories, based on the level of "reaching through": (1) directives binding government employees; (2) contractual provisions binding contractors; and (3) contractual provisions binding *employees* of contractors. For example, a category (1) order could direct government actors to prioritize certain considerations when granting government contracts, like paying special attention to small business concerns or prioritizing American-made goods and services.[226] Directives in categories (2) and (3), meanwhile, act as an external condition to the granting of a government contract. Category (2) provisions, for example, might require an employer to adhere to certain wage and price controls, as in *Kahn*, or to adopt antidiscriminatory hiring practices.[227] Category (3) provisions, which "reach through" the contractor to its employees, are more complicated. Contractually imposing an obligation on a private contractor's employee may be necessary to ensure their proper performance of the contract; this power might fall into the implicit authority of government as proprietor if appropriately limited.[228] On the other hand, contractual obligations on employees extending *beyond* what is necessary to perform the contract are more regulatory in nature by

222 *Id.* at 575–89.

223 *Id.* at 581 ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

224 Miller, *Government Contracts*, *supra* note 14, at 56 ("Conditions imposed by the Government in its contracts are on a take-it-or-leave-it basis, and give only an illusory freedom of choice to business concerns.").

225 *Louisiana*, 55 F.4th at 1031; Miller, *Government Contracts*, *supra* note 14, at 57 ("The decision of the contractor is that of accepting the conditions imposed, or of not accepting them and giving up the contract entirely.").

226 This specific example is explicitly authorized by the text of the Procurement Act. *See supra* Section I.B.

227 *See supra* notes 187–198 and accompanying text.

228 *See supra* notes 136–137 and accompanying text.

unduly meddling in a private company's internal affairs and putting the employee in a precarious position with only an illusion of choice.

Under this framework, the *Kahn* test's application should be limited to categories (1) and (2). When regulating the government's own internal contracting systems under category (1), an order can be upheld by a simple showing that directives imposed on government employees bear a close nexus to providing the government "with an economical and efficient system" for its procurement activities.[229] A deferential judicial framework is justifiable in this category because directives binding agencies and government officials are directly supported by the text and legislative history of the Procurement Act.[230] Category (2) contractual provisions that impose obligations on the contracting firm in pursuit of policy goals have less explicit support in the statutory text;[231] however, legislative practice prior to the presidential delegation,[232] subsequent judicial treatment of Procurement Act cases since 1949,[233] and congressional acquiescence in 2002[234] all support the validity of such orders as long as they satisfy the *Kahn* test.

Category (3) directives that explicitly "reach through" the government contract to impose affirmative obligations on non-consenting employees beyond what is necessary for performance on the contract should be treated with the highest degree of skepticism. Such orders cannot be facially supported by the text of the statute nor by the historical exercises of power since the enactment of the Procurement Act.[235] From a public policy standpoint, category (3) provisions may

229 40 U.S.C. § 101; Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 792 (D.C. Cir. 1979).

230 *See supra* note 179 and accompanying text; *Kahn*, 618 F.2d at 800 (MacKinnon, J., dissenting); Kentucky v. Biden, 23 F.4th 585, 605–06 (6th Cir. 2022) ("§ 101 refers to 'contracting' as a 'function[ ]' 'perform[ed]' by '*the Federal Government*'—not by the employees of federal contractors . . . The fear shortly after World War II 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 procure goods and services was not economical and efficient.").

231 This argument is most clearly articulated by Judge MacKinnon's *Kahn* dissent. *See Kahn*, 618 F.2d at 797–816 (MacKinnon, J., dissenting).

232 Congressional practice of imposing labor standards on contractors through government contracts predates the Procurement Act and thus can be seen as being implicitly delegated to the President in 1949. *See supra* notes 55–57, 98 and accompanying text.

233 *See supra* Section II.B.

234 Congress's 2002 recodification explicitly stated that it did not make any "substantive change in existing law." Pub. L. No. 107-217, 116 Stat. 1062, 1303 (2002). Thus, it may serve as implicit approval of lower courts' prior interpretation of the statute. *See* Mayes v. Biden, 67 F.4th 921, 942 (9th Cir. 2023).

235 *Kentucky*, 23 F.4th at 609; Louisiana v. Biden, 55 F.4th 1017, 1030 (5th Cir. 2022); Georgia v. President of the U.S., 46 F.4th 1283, 1296 (11th Cir. 2022) ("An all-encompassing vaccine

obscure political and corporate accountability,[236] offend traditional notions of consensual contracting principles,[237] and can even undermine the concept of competition in the procurement process that the statutory text purports to foster.[238] To be authorized under the Act, any such provisions must be directly connected to an employee's specific work on a government contract.

The contractor vaccine mandate is problematically distinct from category (2) orders because of the sheer scope of its reach.[239] The Order applied to all employees of federal contractors, regardless of whether those employees were even employed to work on a government contract.[240] It is this wide-reaching scope, where a government regulation "reaches through" to an employee merely by virtue of the company that employs them, which would thus place the Order into the inherently problematic category (3). While casting such a wide net might make logical sense when considering the contagious nature of the COVID-19 virus, the Order couched its authority for the mandate solely in the Procurement Act without relying on any other public health or emergency authority; it is clear the drafters of the Procurement Act never contemplated such authority.[241] The statutory responsibility of the President to promote efficient performance of government contracts cannot logically extend to a mandate that reaches *beyond* the private employees actually performing on the government contract.[242] It bears reiterating that the government keeps no official numbers on the actual amount of federal contractor employees,[243] making the potential impact of such orders impossible to reliably quantify. Regardless of the sheer number of people potentially affected, however, it is clear that no prior

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requirement is different in nature than the sort of project-specific restrictions contemplated by the Act."); *see also* Miller, *Government Contracts*, *supra* note 14, at 46.

236 Freeman, *supra* note 164, at 159.

237 Miller, *Government Contracts*, *supra* note 14, at 49, 57; Miller, *Administrative Discretion*, *supra* note 15, at 785.

238 *See* 41 U.S.C. §§ 3301(a)(1), 3306(a)(1); Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 803 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (arguing the Act reflects Congress's express determination that there shall be "full and free competition" for federal government procurement contracts); Moore, *supra* note 84.

239 Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

240 *Louisiana*, 55 F.4th at 1032–33.

241 The Order begins by stating: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act . . . ." Exec. Order No. 14,042, 86 Fed. Reg. 50985 (Sept. 9, 2021).

242 *Louisiana*, 55 F.4th at 1031 (Graves, Jr., J., dissenting).

243 Peck, *supra* note 8 ("[T]here are currently no official numbers on the size of the contract workforce . . . ."); LIGHT, *supra* note 7, at 19 ("The federal government may not know precisely how many employees work in this hidden pyramid, but it does know that millions of employees show up every day to do work once performed by federal employees.").

executive procurement order has attempted to impose affirmative efficiency obligations on individuals, wholly disconnected from one's specific contractual relation to the government contract.

CONCLUSION

The *Kahn* framework has been flawed since its inception.[244] The Ninth Circuit's application of *Kahn*'s "close nexus" test to uphold the novel contractor vaccine mandate showcases the continued inadequacies of that framework,[245] specifically given the new realities of the modern procurement industry.[246] However, the three circuits that enjoined the mandate further muddied the waters of Procurement Act jurisprudence by invoking the major questions doctrine on shaky doctrinal footing.[247] These circuits missed a crucial opportunity to articulate a clear limiting principle to the *Kahn* framework in a way that would benefit future judicial analyses of executive orders under the Procurement Act. Courts should distinguish between different types of Procurement Act executive orders by determining who will bear the affirmative obligation under the given order, and limiting the application of the deferential *Kahn* framework accordingly.[248] Where the affirmative obligation falls on employees generally, in a manner wholly disconnected from a private firm's ability to perform on a specific contract, such orders should be considered outside the scope of the President's statutory authority.[249] This examination will recenter Procurement Act jurisprudence closer to the original text and legislative intent of the statute. Furthermore, it will help to clarify the line between public and private power by placing limits on the executive's authority to alter private employment relationships through government contracts.

244 *See supra* notes 97–100, 181–186 and accompanying text.

245 *See supra* notes 102–105 and accompanying text.

246 *See supra* Section I.C.

247 *See supra* Section II.A.

248 *See supra* Part III.

249 *See supra* Part III.