IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORACLE AMERICA, INC.,

Plaintiff,

vs.

U.S. DEPARTMENT OF LABOR, *et al.*

Defendants,

and

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

Proposed Intervenor-Defendants.

Case No. 1:19-cv-3574 (APM)

PROPOSED-INTERVENOR DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Oracle's arguments aside, several facts remain inescapable. Oracle is a sophisticated party that has, in the last fifteen years alone, entered into at least 138 contracts with the federal government. Gov. Officials Amicus at 18 n.20, ECF No. 19-1. Each of these federal contracts incorporated the OFCCP regulations that Oracle challenges in this case: "Notwithstanding any other clause in this contract, disputes relative to [Executive Order 11,246] will be governed by the procedures in 41 CFR part 60-1." 48 C.F.R. § 52.222-26(d). In 2017, after finding evidence that Oracle had discriminated against its employees on the basis of race, sex, and ethnicity, OFCCP initiated an enforcement action in accordance with those regulations. Rather than waiting for those proceedings to conclude, Oracle balked and filed the present lawsuit, challenging the legality of the very procedures to which it agreed and that have been in operation for over half a century.

Oracle's challenge ultimately fails both on timeliness grounds and on the merits. As to timeliness, Oracle's challenge fails whether construed as facial or as-applied. If Oracle is bringing a facial challenge, it's about forty years too late. If Oracle is bringing an as-applied challenge, it was brought too early—as nothing more than an end-run around the pending administrative process. Oracle's challenge is therefore untimely, whether viewed through the lens of the statute of limitations, ripeness, finality, or exhaustion.

On the merits, Oracle's theories run headlong into several crucial points. ***First***, the D.C. Circuit has repeatedly held that the Procurement Act authorizes executive orders and implementing regulations in so far as they bear a nexus to "economy" and "efficiency" in government contracting, terms which are broadly construed. ***Second***, OFCCP's enforcement regime plainly bears such a nexus because it is efficient and encourages self-compliance. And

third, Congress has known about—and reinforced—that regime for more than fifty years. The Court should not upset that system lightly.

On any, or all, of these grounds, Oracle's challenge must fail.

ARGUMENT

I. This lawsuit is untimely.

Oracle's argument boils down to this: Oracle says that its lawsuit isn't time-barred because its cause of action only accrued once OFCCP initiated an enforcement action against it in 2017—*i.e.*, Oracle's lawsuit raises an as-applied challenge to that enforcement action. At the same time, however, Oracle claims that it need not wait for the conclusion of that enforcement action because the substance of Oracle's challenge deals only with OFCCP's regulations themselves—*i.e.*, Oracle asserts a facial challenge to those regulations.

This is a shell game. However construed, Oracle's challenge is untimely, and must be rejected.

A. Oracle's lawsuit is time-barred unless it raises an as-applied challenge, which is necessarily premature.

Despite Oracle's protestations to the contrary, its lawsuit can only reasonably be construed as incorporating an as-applied challenge to OFCCP's proceedings against it. Its lawsuit would otherwise violate the six-year statute of limitations applicable to actions against the United States. *See* 28 U.S.C. § 2401.

A facial challenge to agency regulations brought outside the six-year limitations period is time-barred if "unaccompanied by an as-applied challenge or an appeal of a petition for amendment or rescission that has been denied." *P&V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 142 (D.D.C. 2006); *see also Citizens Alert Regarding the Env't v. EPA*, 102 Fed. App'x 167, 168 (D.C. Cir. 2004) (dismissing a facial challenge to agency regulations

because it was filed outside the six-year limitations period); *accord Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) ("To sustain [a facial challenge to an agency rule more than six years after the rule's publication], the claimant must show some direct, final agency action involving the particular plaintiff within six years of filing suit."); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) ("[A] challenger contest[ing] the substance of an agency decision as exceeding constitutional or statutory authority … may do so later than six years following the decision by filing a complaint *for review of the adverse application of the decision to the particular challenger*." (emphasis added)).[1]

Accordingly, if Oracle's lawsuit is nothing more than a facial challenge to decades-old regulations, then it is time-barred. But if it isn't time-barred, then it must be because Oracle is, in fact, also raising an as-applied challenge—one which, according to Oracle, accrued when

[1] *See also Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959 ("[T]he statutory time limit restricting judicial review of [agency] action … does not foreclose subsequent examination of a rule *where properly brought before this court for review of further [agency] action applying it*." (emphasis added)); *P&V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) ("If the Corps applies the rule to [plaintiff's] property, or denies its petition to amend or rescind the rule, then [plaintiff] would be able to challenge the rule notwithstanding that the limitations period has run."); *Pub. Citizen v. Nuclear Reg. Comm'n*, 901 F.2d 147, 151-52 (D.C. Cir. 1990) ("[T]o the extent an agency's action necessarily raises the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred." (quotation omitted)); *NLRB Union v. Fed. Lab. Rel. Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987) (noting that a challenge to an agency action may be brought outside the statute of limitations period when it is raised "by way of defense in an enforcement proceeding"); *Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979) ("Had the Commission applied one or more of the 1972 regulations [which were not attacked during the statutory limitations period] to the detriment of some individual, he would clearly have been in a position to complain of the order doing so."). The D.C. Circuit's decision in *Genuine Parts Company v. EPA* is not to the contrary. *See* Pl.'s MTD Opp. 16-17. The claims at issue in that case *necessarily involved* an as-applied challenge: the final agency action that plaintiff challenged was EPA's decision to add the plaintiff to the National Priorities List of hazardous waste sites. 890 F.3d 304, 315-16, 341 (D.C. Cir. 2018).

OFCCP filed an administrative complaint against it. *See* Pl.'s Mem. Opp. Defs.' Mot. to Dismiss ("Pl.'s MTD Opp.") 13, ECF No. 22. And that would mean that, for the reasons explained in Proposed-Intervenors' opening brief, this case is premature under the doctrines of finality, ripeness, and exhaustion. *See* Mem. Supp. Proposed Mot. Summ. J. of Proposed Intervenors ("Prop. Intrvnrs.' MSJ"), pt. I, ECF No. 11-1.

Indeed, Oracle does not even attempt to identify a final agency action to which it could bring an as-applied challenge. Pl.'s MTD Opp. 29-31. Nor could it, given that the administrative proceeding against Oracle remains pending. An agency's complaint may start the administrative adjudicative process, but it is not final agency action. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 241-42 (1980). Here, the agency's action will only be final once the Administrative Review Board's ("ARB" or the "Board") issues its final Administrative Order, after the Board has considered the Administrative Law Judge's ("ALJ") findings and recommendations and any appellate arguments from either party. *See* 41 C.F.R. § 60-30.29. Thus, OFCCP's proceedings are plainly of a "tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Nor are the agency's actions to date those "from which legal consequences … flow." *Id.* Oracle claims that it has felt the "'legal consequences' of the agency's regulations applied to Oracle in the agency adjudication." Pl.'s MTD Opp. 30-31. But, as the D.C. Circuit has explained, time and again, "agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986). Mere "litigation cost saving" is insufficient to render a dispute timely and justiciable. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Stripping away the rhetoric, that is all Oracle can assert here.

As to exhaustion, Oracle wrongly asserts that it isn't "mandatory" and therefore that this Court cannot require it. Pl.'s MTD Opp. 34-39. To the contrary, OFCCP's regulations, 60 C.F.R. § 60-3.29, "suspend[] the finality of the ALJ decisions pending appeal to the [ARB]," which is the "equivalent of an agency rule stating, as a condition to judicial review, that an aggrieved party must first appeal to the [ARB]." *Marine Mammal Conservancy, Inc. v. USDA*, 134 F.3d 409, 411 (D.C. Cir. 1998) (analyzing 7 C.F.R. § 1.142(c)(4)).

Oracle's only other response to the prematurity of its as-applied challenge is that the Department purportedly cannot address the claims it raises here. *See* Pl.'s MTD Opp. 33, 36-37, 38, 39. Even if that were true, prudence would still dictate waiting until the end of the administrative proceeding when Oracle can raise *all* of its challenges, including those presented here and any additional challenges to the Department's final order, together.

But it's false. The Department of Labor, including ALJs, the ARB, and the Secretary of Labor, have on numerous occasions considered precisely the kinds of claims Oracle here raises. *See* 41 C.F.R. § 60-1.44 ("Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee."). As a general matter, the Department regularly considers claims involving interpretations of the Procurement Act, Executive Order 11,246, and OFCCP regulations. *See, e.g., OFCCP v. Bridgeport Hosp.*, 00-OFC-034, 2003 WL 244810 (ARB Jan. 31, 2003) (deciding whether an employer was properly deemed a "subcontractor" under Department regulations); *OFCCP v. UPMC Braddock*, 07-OFC-1, 2008 WL 413398 (ALJ Jan. 16, 2008) (deciding issues involving the scope of OFCCP's authority under the Procurement Act); *OFCCP v. Safeco Ins. Co.*, 83-OFC-7, 1984 WL 908487 (ALJ May 25, 1984) (same).

More specifically, the Department has in the past considered whether back pay awards are authorized, *see, e.g.*, *Dep't of Lab. v. St. Regis Corp.*, 78-OFCCP-1, 1994 WL 68484, at *4 (Sec'y of Lab. Mar. 2, 1994); *OFCCP v. Commonwealth Aluminum*, 82-OFC-6, 1994 WL 16197757, at *10 (Acting Ass't Sec'y for Emp. Standards Feb. 10, 1994); *OFCCP v. Honeywell, Inc.*, 77-OFCCP-3, 1993 WL 1506966 at *12 (Sec'y of Lab. June 2, 1993), and the applicability of statutes of limitations to OFCCP proceedings, *see OFCCP v. Goya de Puerto Rico, Inc.*, 98-OFC-00008, 1999 WL 33992439 (ALJ June 22, 1999); *OFCCP v. Am. Airlines*, 94-OFC-9, 1996 WL 33170032, at *2-13 (Ass't Sec'y for Emp. Standards Apr. 26, 1996).

The Department also recently published a rule providing procedures for the Secretary of Labor to review Board decisions made under Executive Order 11,246. 85 Fed. Reg. 30,608 (May 20, 2020). In doing so, the Department explained, "Congress has assigned the administration of various statutes to the Secretary of Labor, meaning that *the Secretary is obligated to ensure that those laws are administered, executed, interpreted, and enforced according to law*." *Id.* at 30,609 (emphasis added). The rule thus confirms that the Secretary can provide "authoritative pronouncements … on the statutes and regulations within the … ARB's jurisdiction[]." *Id.* at 30,611.

Because the Department can address at least some of Oracle's claims, and for the reasons set forth in Proposed Intervenors' opening brief, Oracle's as-applied challenge is premature.[2]

[2] It does not matter whether the Department lacks authority to adjudicate Oracle's constitutional nondelegation challenge because "limits on an agency's own ability to make definitive pronouncements about a statute's constitutionality do not preclude requiring the challenge to go through the administrative route." *Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 17 (2012)).

B. Oracle's facial challenge is premature.

Even if Oracle *could* bring a solely facial challenge outside the six-year limitations period, it would still be premature under the doctrines of ripeness and exhaustion.[3] The initiation of enforcement proceedings cannot possibly be a triggering event for a lawsuit.

1. Oracle's challenge is prudentially unripe.

As Oracle admits, the ripeness doctrine is intended to "avoid[] … premature adjudication" of "abstract disagreements." Pl.'s MTD Opp. 31 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In other words, it is intended to bar cases like this one, where Oracle has suffered no cognizable harm whatsoever and is currently in the middle of litigating a case through the administrative process that could moot the issue completely.

As to the fitness of the issues for review, Oracle insists that its challenge involves "purely legal questions" because its "claims are entirely unaffected by the facts of the enforcement action." *Id.* 32. But even "purely legal issues may be unfit for review." *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003). That is surely the case here, where the issues Oracle raises involve the interpretation of statutes and Executive Orders that the Department is tasked with implementing and therefore implicate multiple deference doctrines. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984) (deference to agency interpretations of statutes); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (deference to agency interpretations of Executive Orders). Therefore, "[i]t is more consistent with the conservation of judicial resources

[3] It bears noting that "facial challenges are disfavored," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), and that "a facial challenge … [is] the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987).

to make that deference-bound review after the agency has finalized its application of the relevant" law. *See Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 389 (D.C. Cir. 2012).

Moreover, this may be an entirely different case by the time the administrative proceeding has run its course. The ALJ or the ARB might find that Oracle is not liable. If not, the Secretary of Labor might agree with Oracle on some, or all, of the arguments it here raises and reverse the decision of the ARB. And the proceeding itself may bring up additional complaints that Oracle would want to raise to a reviewing court. "Staying [the Court's] hand until the conclusion of the ongoing administrative proceeding," rather than jumping in before these critical questions have been answered, thereby "avoid[s] a piecemeal, duplicative, tactical and unnecessary appeal which is costly to the parties and consumes limited judicial resources." *Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (quotation omitted).

Nor does Oracle face any cognizable hardship for waiting. Oracle seems to recognize that the cost of defending itself in the agency's proceeding is insufficient. *See Ohio Forestry Ass'n*, 523 U.S. at 735. Instead, Oracle says that it is harmed by "being forced to defend itself against highly publicized and disparaging claims before a regulatory body not authorized by law." Pl.'s MTD Opp. 33. That's just litigation costs by another name. However characterized, "the burden of participating in further administrative and judicial proceedings does not constitute sufficient hardship to overcome [a] challenge to ripeness." *AT&T Corp. v. FCC*, 349 F.3d 692, 702 (D.C. Cir. 2003); *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1421 (D.C. Cir. 1998) ("[T]he burden of participating in further administrative and judicial proceedings … do[es] not constitute sufficient hardship for the purposes of ripeness."); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1313 (D.C. Cir. 2004) (same); *Clean Air Impl. Project v. EPA*, 150 F.3d 1200, 1205 (D.C. Cir. 1998) (same).

The D.C. Circuit's decision in *Cohen* cannot save Oracle. *See* Pl.'s MTD Opp. 33. The plaintiffs there challenged an IRS regulation setting forth the process for taxpayers to request refunds for improperly levied taxes on long-distance phone calls. *Cohen v. United States*, 650 F.3d 717, 719-21 (D.C. Cir. 2011) (en banc). The Court held that the individual taxpayer plaintiffs could proceed on their challenge to that regulation without first needing to go through the refund-request process. *Id.* at 735. But that is a very different scenario from the one presented here: Oracle is *currently engaged* in an *ongoing* administrative proceeding that could resolve some, or all, of its claims—and is one that Oracle *agreed* to submit to *by contract*. *See* 48 C.F.R. § 52.222-26(d). Oracle cannot seriously suggest that such participation poses hardship, let alone enough hardship to render this case ripe. *Cf. Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 794 (D.C. Cir. 1979) (en banc) ("Those wishing to do business with the Government must meet the Government's terms; others need not.").

2. Oracle failed to exhaust its administrative remedies.

Oracle's challenge is also barred by the doctrine of prudential exhaustion because its "interests in immediate judicial review" do not "outweigh the government's interest in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004).

It's telling that Oracle's first response is to reject the prudential exhaustion doctrine entirely. Pl.'s MTD Opp. 35. But its argument is premised on an overreading of the Supreme Court's decision in *Darby*, which held only that, for *claims brought under the APA*, "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final.'" *Darby v. Cisneros*, 509 U.S. 137, 154 (1993). The Court was clear that "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA." *Id.*; *see also Benoit v. USDA*, 608 F.3d 17, 21 n.** (D.C.

Cir. 2010). Because Oracle's challenge includes claims that are not brought under the APA—namely, the nondelegation claim—this Court can, and should, require Oracle to exhaust its administrative remedies, like any other litigant, before filing suit.

Nor can Oracle excuse its failure to exhaust by claiming that "the agency lacks the authority to grant Oracle the relief it seeks." Pl.'s MTD Opp. 39. That simply isn't true. The agency plainly has the authority to give Oracle the *relief* it seeks—an end to the administrative proceedings. And, as discussed above, at least some of Oracle's claims could be addressed by the Department, like whether injunctive relief and back pay awards are authorized by the Executive Order. That makes a strong case for exhaustion as "one of the principal reasons to await the termination of agency proceedings is to obviate all occasion for judicial review." *Standard Oil*, 449 U.S. at 244 n.11. Even more so in a case, like this one, with "far-ranging and troubling constitutional implications." *Jarkesy*, 803 F.3d at 27 (quotation omitted).

On the other side of the ledger, Oracle fails to grapple with the essential purposes of the prudential exhaustion doctrine: "giving agencies the opportunity to correct their own errors, affording parties and courts the benefit of agencies' expertise, and compiling a record adequate for judicial review." *Avocados Plus Inc.*, 370 F.3d at 1247 (quotation omitted). Requiring Oracle to complete the administrative process would allow the Department the opportunity to decide whether Oracle's claims have merit. It would afford the Court the benefit of the agency's expertise by allowing the Department to decide questions regarding the proper interpretation and scope of its regulations and the Executive Order it is charged with implementing. And it would produce an administrative record demonstrating how OFCCP's regulations are applied in practice.

This Court should therefore require Oracle, as a prudential matter, to wait to bring its constitutional claim in federal court until the end of the administrative process. And to avoid piecemeal litigation, it should do the same with regards to Oracle's challenge under the APA to the regulations themselves.

II. Executive Order 11,246 and OFCCP's implementing regulations are legally authorized.

Oracle's broad assault on Executive Order 11,246 and its implementing regulations cannot be squared with controlling precedent or Oracle's own positions. As to the former, Oracle does not—and cannot—dispute that the D.C. Circuit has repeatedly held that Executive Order 11,246 and OFCCP's implementing regulations need only bear a "nexus" to the Procurement Act's goals of "economy" and "efficiency" in federal contracting. *Kahn*, 618 F.2d at 792. In doing so, the D.C. Circuit has already foreclosed Oracle's radical arguments that OFCCP lacks regulatory authority under the Procurement Act, Pl.'s Mem. Supp. Mot. Summ. J. ("Pl.'s MSJ") 15-17, ECF No. 23, that OFCCP's implementing regulations conflict with the Contract Disputes Act ("CDA"), *id.* at 30-32, and that interpreting the Procurement Act to authorize the Executive Order and OFCCP's implementing regulations would be a violation of the constitutional nondelegation doctrine, *id.* at 35-40.

Oracle's arguments are also inconsistent with its own acknowledgment that OFCCP *has* authority to demand nondiscrimination by federal contractors and to investigate potential discrimination. *See, e.g.*, *id.* 2. If OFCCP has the power under the Procurement Act to impose substantive nondiscrimination requirements, it must also have the power to enforce them. Oracle has made no principled argument as to how its challenges to OFCCP's authority would not fundamentally call into question much of federal nondiscrimination law.

In short, Oracle's arguments misunderstand the Procurement Act. If there were any doubt, it would be dispelled by decades of congressional acceptance—and, indeed, approval—of OFCCP's activities. The Court should reject Oracle's invitation to cast all of this aside.

A. The Procurement Act authorizes the Executive Order and OFCCP's implementing regulations.

As Proposed Intervenors explained at length in their opening brief, Executive Order 11,246 and OFCCP's implementing regulations have a nexus to the goals of the Procurement Act and are thereby authorized by the Act under binding D.C. Circuit precedent. Although Oracle largely ignores that point, it is dispositive.

1. Executive Order 11,246 is authorized by the Procurement Act.

To be authorized by the Procurement Act, Executive Order 11,246 need only bear a "nexus" with the Act's goals of promoting "economy" and "efficiency" in federal contracting. *Kahn*, 618 F.2d at 792. The test is a "lenient" one. *UAW-Lab. Empl. & Training Corp.* ("*UAW*") *v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003).

Executive Order 11,246 has the requisite nexus—as every court that Proposed Intervenors are aware of to have considered the issues has held. *See* Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971 (July 21, 2014) (amending Executive Order 11,246 to "take further steps to promote economy and efficiency in Federal Government procurement"); *see also Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971); *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1514 (11th Cir. 1985); *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466-67 (5th Cir. 1977), *vacated on other grounds by* 436 U.S. 942 (1978); *Farkas v. Tex. Instr., Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967), *cert. denied*, 389 U.S. 977

(1967); *Farmer v. Phil. Elec. Co.*, 329 F.2d 3 (3d Cir. 1964); *Legal Aid Soc. v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974).

Oracle makes no attempt to show that Executive Order 11,246 fails the nexus test but instead takes issue with the wealth of case law upholding the nondiscrimination mandate, insisting that the cases are "underdeveloped, decades-old, [and] almost entirely out-of-jurisdiction." Pl.'s MSJ 22-23. In so doing, Oracle ignores that the D.C. Circuit has repeatedly endorsed the conclusion reached by these courts, explaining that, for decades, the President's authority under the Procurement Act "has been interpreted to permit" Executive Order 11,246. *Chamber of Com. v. Reich*, 74 F.3d 1332, 1333 (D.C. Cir. 1996); *see also Kahn*, 618 F.2d at 790-91 ("Since 1941 … the most prominent use of the President's authority under the [Procurement Act] has been a series of anti-discrimination requirements for Government contractors.").

Moreover, Oracle ignores the fact that in developing and later applying the nexus test, the D.C. Circuit relied heavily on the very cases Oracle attempts to slough off. In *Kahn*, for example, the Court held that for the same sorts of reasons that *Contractors Association* had found Executive Order 11,246 to be authorized by the Procurement Act, the Executive Order there at issue was likewise authorized. *See also UAW*, 325 F.3d at 366 (applying the reasoning of *Kahn* to find the Executive Order there at issue to be authorized by the Procurement Act). Since then, the D.C. Circuit has described *Contractors Association* as "notable precedent," *Am. Fed'n of Gov. Emps. v. Carmen*, 669 F.2d 815, 821 (D.C. Cir. 1981) (Ginsburg, J.), and repeatedly relied on the decision and reasoning therein, *see, e.g.*, *United States v. Cohen*, 733 F.2d 128, 138 (D.C. Cir. 1984) (en banc); *Lutheran Church-Mo. Synod v. FCC*, 154 F.3d 487, 494 (D.C. Cir. 1998); *Chamber of Com. v. Reich*, 83 F.3d 430, 439 (D.C. Cir. 1996) (denying petition for rehearing); *Reich*, 74 F.3d at 1332-33; *Fl. State Conf. of Branches of NAACP v. FCC*, 24 F.3d 271, 272

(D.C. Cir. 1994); *U.S. Brewers Ass'n, Inc. v. EPA*, 600 F.2d 974, 984 (D.C. Cir. 1979); *Ne. Constr. Co.*, 485 F.2d 752, 758 (D.C. Cir. 1973).[4]

Nor was the reasoning in *Contractors Association* "underdeveloped." To the contrary, the Third Circuit there provided a detailed history of the nondiscrimination mandate and found it valid because of its nexus with the goal of economy and efficiency in federal contracting. *Contractors Ass'n*, 442 F.2d at 170. As the court explained, "it 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." *Id.*

And *Contractors Association* was only one of many such cases. The D.C. Circuit has made clear that courts should bear in mind "unanimous precedent" from "sister circuits," much of which was decided after the Supreme Court's decision in *Chrysler*, even if those decisions were "based on varying rationales and depths of analysis." *Jackson v. Modly*, 949 F.3d 763, 768 (D.C. Cir. 2020) (deciding whether Title VII applies to uniformed members of the U.S. military). The fact that this precedent is "decades-old," Pl.'s MSJ 22-23, substantially bolsters this precedent, rather than undercutting it, since such decisions have remained good law for decades without congressional override. *Id.* ("Congress has amended various parts of Title VII over the years … but has never sought to override our sister circuits' determination.") (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 (1982)).

Indeed, federal agencies have long concluded that OFCCP's enforcement regulations meet the nexus test. As a contemporaneous Attorney General Opinion explained, the policy of

[4] *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981) is not to the contrary. That case relied on the fact that Liberty was not a contractor at all, and so the *application* of OFCCP rules to it bore no relationship whatsoever to procurement. *See Trinity Industries, Inc. v. Herman*, 173 F.3d 527, 530 (4th Cir. 1999) (distinguishing *Liberty Mutual*); *Volvo GM Heavy Truck Corp. v. Dep't of Lab.*, 118 F.3d 205, 212 n.9 (4th Cir. 1997) (same).

nondiscrimination in federal contracting ensures "the fullest and most effective use of the Nation's manpower resources … by seeking to eliminate discriminatory practices which might tend to deprive the United States of the services of an important segment of the population in the performance of its contracts." 42 U.S. Op. Att'y Gen. 97 (1961), 1961 WL 4913 (describing the immediate predecessor to Executive Order 11,246, which that Order mirrors). OFCCP has thus explained that Executive Order 11,246 "reduces the Government's costs and increases the efficiency of its operations by ensuring that all employees and applicants … are fairly considered and that, in its procurement, the Government has access to, and ultimately benefits from, the best qualified and most efficient employees." 81 Fed. Reg. 39,108, 39,109 (June 15, 2016). The General Services Administration ("GSA") has agreed. 80 Fed. Reg. 19,504, 19,505 (Apr. 10, 2015) (Executive Order 11,246 "promote[s] economy and efficiency in Federal Government procurement.").[5]

Those determinations—reached by the agencies charged with responsibility for administering the Procurement Act and Executive Order 11,246—must be afforded significant deference by this Court. *See, e.g.*, *Chevron*, 467 U.S. at 842-843; *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 24 (D.D.C. 2011) ("[A]n agency is presumed to have special expertise in interpreting executive orders charged to its administration, and so judicial review must afford considerable deference to agency interpretations of such orders." (citing *Udall v. Tallman*, 380 U.S. 1, 16-17

[5] Oracle claims that the nondiscrimination regulations "creates an enormous disincentive for contractors to maintain or pursue government contracts notwithstanding a commitment to strong equal employment opportunity policies." Pl.'s MSJ 19 n.6 (quotation omitted). Oracle provides no support for that bare assertions, and it would be hard-pressed to do so. Notwithstanding that Executive Order 11,246 and OFCCP's implementing regulations have been in effect for more than fifty years, the federal government continues to spend billions of dollars on government contracts each year. See Gov. Officials Amicus 5. In fact, since 2005, Oracle has itself entered into at least 138 separate contracts with the federal government. *Id.* 18 n.20.

(1965)); *Contractors Ass'n*, 442 F.2d at 175 ("[C]ourts should give more than ordinary deference to an administrative agency's interpretation of an Executive Order … which it is charged to administer." (citing *Udall*, 380 U.S. at 1)).

2. OFCCP's nondiscrimination regulations are authorized by the Procurement Act.

Because the Executive Order is authorized by the Procurement Act, this Court should be especially hesitant to hold that OFCCP's regulations implementing that Order are not also legally authorized. *See Ass'n for Women in Sci. v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977) (citing *Farkas*, 375 F.2d at 632 & n.1 (5th Cir. 1967) (an executive order with a "statutory basis" is to be accorded "the force and effect of a statute")).

Indeed, courts in this Circuit and others have consistently deferred to OFCCP's construction of the Executive Order and treated its regulations as lawful and binding. *See Ne. Constr. Co.*, 485 F.2d at 760-61 (bidding disclosure requirements); *Contractors Ass'n*, 442 F.2d at 171 ("Philadelphia Plan" regulations); *New Orleans Pub. Serv., Inc.*, 553 F.2d at 468 (substantive nondiscrimination regulations); *First Ala. Bank of Montgomery v. Donovan*, 692 F.2d 714, 721 (11th Cir. 1982) (administrative searches); *Miss. Power & Light Co.*, 638 F.2d at 98 (administrative searches); *Rossetti Cont. Co. v. Brennan*, 508 F.2d 1039, 1045, n.18 (7th Cir. 1974) (bidding disclosure requirements); *Beverly Enters., Inc. v. Herman*, 130 F. Supp. 2d 1, 20 (D.D.C. 2000) (expedited hearings); *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 368 (D.D.C. 1979) (pre-discovery hearings); *United States v. Duquesne Light Co.*, 423 F. Supp. 507, 509 (W.D. Pa. 1976) (back pay regulations); *United States v. Whitney Nat'l Bank of New Orleans* 671 F. Supp. 441, 442 (E.D. La. 1987) (back pay regulations).

Of course, Oracle is never clear precisely *which* of OFCCP's regulations it challenges, instead referring repeatedly to the "administrative system to prosecute, adjudicate, and remediate

employment-discrimination claims and affirmative-action violations." Pl.'s MSJ 17. But as a general matter, those regulations simply put meat on the bones of what the Executive Order itself prescribes. Pursuant to the Order, the Secretary of Labor, and by extension, OFCCP, has the authority to "investigate the employment practices of any Government contractor or subcontractor," "hold hearings … for compliance, enforcement, or educational purposes," and impose "sanctions and penalties." Exec. Order. No. 11,246 §§ 201, 205-06, 208-09; *see also* 48 C.F.R. § 22.802(d) (disputes under Executive Order 11,246 "shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor"). OFCCP's regulations merely set forth the "procedure[s]" and "methods" to be used in carrying out those duties, and thus should be presumed valid. *See Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 543 (1978).

Moreover, and as Proposed Intervenors explained in their opening brief, each of OFCCP's regulations establishing the procedures for administrative enforcement of, and remediation under, the Executive Order promote economy and efficiency in government contracting. Oracle has no responses.

a. Administrative Hearings.

OFCCP's use of an administrative adjudication process provides the agency with a "speedier and more efficacious means of redressing discrimination than was thought possible through other means, including federal court litigation." *Uniroyal*, 482 F. Supp. at 372 ("To require the government to go to federal court … would not only subvert the process of Executive Order 11246 but turn government contract law on its head."); *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 99 (D.D.C. 2011) ("[T]he public interest lies in the efficient enforcement of Executive Order 11246."); *Beverly Enters.*, 130 F. Supp. 2d at 20 ("The government has a strong

interest in speedy enforcement of its affirmative action program [under Executive Order 11,246] to provide full equal employment opportunity.").

As OFCCP has itself explained, a "major advantage inherent in the Executive Order Program is that its requirements are enforced primarily through administrative hearings rather than judicial proceedings." A Preliminary Report on the Revitalization of the Federal Contract Compliance Programs 16, OFCCP (Sept. 1977) [hereinafter OFCCP Report]. That is because "[u]nder administrative proceedings decisions are arrived at rather promptly and efficiently." *Id.* The Supreme Court has likewise acknowledged the efficiency of agency, as opposed to judicial, proceedings, in the realm of federal contracting. *See United States v. Adams*, 74 U.S. 463, 478 (1868) (observing that resort to the courts for the resolution of contract disputes "would have occasioned delay and involved much expense").

Accordingly, courts in this district have on numerous occasions upheld various aspects of OFCCP's procedures for administrative adjudications. *See, e.g.*, *Uniroyal*, 482 F. Supp. at 370-71 (use of discovery procedures was valid under the Procurement Act); *United Space All.*, 824 F. Supp. 2d at 99 (ALJ's discovery orders did not violate contractor's due process rights); *Beverly Enters.*, 130 F. Supp. 2d at 20 (OFCCP's use of expedited hearing procedures did not violate contractor's due process rights).

Because administrative hearings promote economy and efficiency in federal contracting by enabling OFCCP to more expeditiously prosecute violations of the Executive Order, the regulations providing the procedures for such are authorized by the Procurement Act.

b. Back pay.

OFCCP has sought back pay for violations of the Executive Order since, at least, 1967. *See* 47 Fed. Reg. 17,770, 17,773 (Apr. 23, 1982); *Honeywell, Inc.*, 77-OFCCP-3, at *11-12 (noting that OFCCP has had regulations governing back pay awards under the Executive Order

since 1971). And the only time Congress has weighed in on the matter was to express concern with certain regulations proposed by OFCCP that would *limit* the use of back pay awards to enforce the Executive Order. *See Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations: Hearings Before H. Comm. on Educ. & Lab., Subcomm. on Emp. Opportunities*, 98th Cong. 2 (Apr. 15, 1983) [hereinafter 1983 Oversight Hearings].

Back pay awards promote economy and efficiency in federal contracting in at least two ways. First, they prevent a "continuing violation" of the Executive Order's nondiscrimination mandate, which, as discussed, itself promotes economy and efficiency in federal contracting. *See* 40 Fed. Reg. 13,311, 13,313 (Mar. 26, 1975). As OFCCP has explained, "[a] contractor's failure to reimburse its employees who have been subjected to discriminatory employment practices may perpetuate the discrimination against them and may constitute a continuing violation of the equal employment opportunity clause." *Id.*

Second, back pay awards promote voluntary compliance with the Order's mandate by providing 'the spur or catalyst which causes employers … to self-examine and to self-evaluate their employment practices." *OFCCP v. Greenwood Mills, Inc.*, 80-OFC-0039 (Sec'y of Lab. Feb. 24, 2000) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)); *Honeywell, Inc.*, 77-OFCCP-3, at *14 (Sec'y of Lab. June 2, 1993) (without the possibility of a back pay award employers "would have little incentive to shun practices of dubious legality") (quoting *Albermarle*, 422 U.S. at 417); *see also Duquesne Light Co.*, 423 F. Supp. at 509 (OFCCP could reasonably "believe that the availability of restitutionary relief, by providing an incentive to eliminate discriminatory practices, would dec[r]ease government costs as effectively as would affirmative action programs"); *Whitney Nat'l Bank of New Orleans*, 671 F.2d at 442.

Oracle argues that back pay cannot be authorized by the Procurement Act because it is not authorized under the Executive Order. Pl.'s MSJ 40-42.

Not so. Section 201 grants OFCCP the authority to publish rules necessary to "achieve the purposes" of the Order. Exec. Order No. 11,246 § 201. And Section 202(6) of the Order explicitly acknowledges that such rules might include those establishing "remedies" to be "invoked" for violations of the Order. *Id.* § 202(6).

Those sections thus authorize OFCCP's rules establishing the availability of back pay awards for violations of the Executive Order. As OFCCP has explained, such awards are "a necessary means of achieving the objectives of the Executive Order." 40 Fed. Reg. at 13,312-13 (citing Exec. Order No. 11,246 § 202); *Honeywell, Inc.*, 77-OFCCP-3, at *14 (back pay awards are authorized by the Executive Order because they "further[] the purposes" of the Order). As the Secretary of Labor explained in deciding the precise question here raised, "[i]f the Secretary had no power to order back pay … either the nondiscrimination clause of the Executive Order would be eviscerated, or the Secretary's only recourse would be to debar a contractor for any violation of the order or the regulations." *Honeywell, Inc.*, 77-OFCCP-3, at *13; *see also id.* at *14 ("Without the authority to order relief for past violations … the nondiscrimination clause would lose all its teeth."); *id.* at *13-14 ("In numerous instances, the Supreme Court and the courts of appeals have recognized the concept of implied powers of administrative enforcement even though the means of enforcement were not expressly stated in the enabling statute." (quoting *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987))); OFCCP Report at 112 ("That remedies are authorized under Executive Order 11246 is unquestioned.") (citing Exec. Order. No. 11,246 § 202(6)).

Contrary to Oracle's argument, *see* Pl.'s MSJ 40-41, Section 209 of the Procurement Act is irrelevant here because it provides no limit on the *remedies* OFCCP may seek from a contractor found to have violated the Executive Order's nondiscrimination mandate. *See* 42 Fed. Reg. 3454, 3456 (Jan. 18, 1977) (noting the "critical distinction" between "the concepts of remedy and sanction"). Indeed, the Secretary of Labor has previously rejected the precise argument Oracle here raises. As he explained: "Defendant misconstrues Section 209 of the Executive Order by characterizing the powers granted there to the Secretary as 'remedies.' On its face, the section is entitled 'Sanctions and Penalties,' and, of course, there is a significant distinction between sanctions for noncompliance with a statutory or regulatory command, and remedies to redress an injury caused by that non-compliance." *Honeywell, Inc.*, 77-OFCCP-3, at *12.

The Department has thus determined that OFCCP's authority to impose remedial relief, like back pay, is authorized under Sections 201 and 202 of the Order. That decision is to be accorded deference. *See Udall*, 380 U.S. at 16-17; *Sherley*, 776 F. Supp. 2d at 24; *San Francisco*, 897 F.3d at 1242.

c. Injunctive relief.

Oracle claims that OFCCP has no authority under the Executive Order and the Procurement Act to order injunctive relief. Oracle never specifies what it means by "injunctive" relief. Regardless, whether its challenge is to OFCCP's authority to enjoin discriminatory practices, or to order injunctive relief in the form of an affirmative action program (or both), the same arguments for why back pay promote economy and efficiency in federal contracting apply with equal force here. Indeed, as Congress has recognized, the threat of injunctive relief—withholding a federal contract unless the contractor changes its discriminatory practices—"should constitute the Federal government's most effective weapon in the civil rights arsenal."

Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws, H. Subcomm. on Equal Opportunities, Comm. on Educ. & Lab., 94th Cong. 61 (Dec. 1976) [hereinafter 1976 Staff Report]. And injunctive relief in the form of affirmative action requirements work to "dismantle prior patterns of employment discrimination and to prevent discrimination in the future." *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 474 (1986); *see also Contractors Ass'n*, 442 F.2d at 175 (upholding an affirmative action plan under the Executive Order).

3. Oracle's arguments belie the breadth of its challenge.

Oracle's attacks on OFCCP's regulations ignore Circuit precedent and are also wrong on their own terms. But they are also internally inconsistent—and in ways that reveal the profound ramifications that Oracle's arguments could have for federal antidiscrimination law.

To wit, Oracle insists that it is not challenging OFCCP's regulations prohibiting discrimination in federal contracting, nor OFCCP's authority to engage in "compliance, audit, and conciliation programs" to enforce that mandate, *see* Pl.'s MSJ 2, and that the consequences of ruling in its favor would therefore be limited. That distinction is central to Oracle's position. For example, Oracle responds to arguments of *amici* by stating that "[r]equiring OFCCP to act pursuant to statutory authority … would not 'gut' OFCCP." *Id.* at 44.

Yet Oracle simultaneously argues that OFCCP has no statutory authority to regulate and remediate discrimination by federal contractors. Pl.'s MSJ 14, 17-22, and that interpreting the Procurement Act to give it such authority would be unconstitutional, *id.* at 35-40. That makes no sense. If, as Oracle says, OFCCP could still conduct audits and investigations, engage in conciliation efforts, and have a role in enforcing breach-of-contract claims or imposing remedies like backpay, then that must be because OFCCP has the statutory and constitutional authority to do so (which it does). But then Oracle's broadside attacks of OFCCP's authority cannot be right

because the activities in which it says OFCCP can continue to engage are based on the same sources of authority as those Oracle here challenges. Even with respect to Oracle's attacks on OFCCP's adjudicative system, Oracle at times acknowledges that the system is fine so long as it's used for what Oracle calls "contract-based remedies." Pl.'s MSJ 35.

That fundamental contradiction underlies many of Oracle's other arguments. For example:

- Oracle relies on the purported narrowness of its challenge when it casts aside as irrelevant the fact that Congress ratified OFCCP's enforcement regime by appropriating funds to OFCCP for the specific purpose of increasing enforcement. Oracle says that Congress may have desired (ratified) increased enforcement through "increase[ed] investigation and imposition of contract-based remedies or referrals to DOJ and EEOC," enforcement mechanisms other than the administrative adjudications Oracle is challenging as illegal. *Id.* But in accepting that Congress ratified these other enforcement mechanisms, Oracle undermines almost all of its substantive arguments, which are not limited to attacks on agency adjudication.

- Similarly, in responding to Defendants' statute-of-limitations argument, Oracle insists that its claims did not accrue when Oracle became subject to the nondiscrimination requirement because it is not challenging those requirements as illegal. MTD Opp. 14. Oracle says that its only legal challenge to OFCCP's rules is to those requiring administrative adjudication. *Id.*

- Likewise, in opposing intervention, Oracle asserts that if it prevails, intervenors will not suffer some of the injuries they allege because Oracle does not seek to prevent OFCCP from continuing to "investigate and audit contractors for employment discrimination, compile data, and refer matters to DOJ and the EEOC," or to engage in conciliation efforts" or "to enforce … Executive Order 11,246." Mem. Supp. Pl.'s Opp. to Mot. to Intervene 7, ECF No. 14.

By repeatedly contending that it is not contesting OFCCP's authority to do anything but engage in administrative adjudications (while suggesting that even these might be possible if the remedy is contract-based), Oracle is tacitly acknowledging what its broad attacks on OFCCP's enforcement regime could mean for the federal government's efforts to enforce antidiscrimination laws. Even more to the point, though, it is undermining its own position because very few of Oracle's arguments would apply *only* to OFCCP's use of administrative

adjudication—like, for example, its argument that OFCCP lacks rulemaking authority under the Procurement Act.

4. Oracle's other arguments about why the Procurement Act does not authorize OFCCP's enforcement regime are wrong.

Oracle also makes two additional arguments. It contends that any statutory authorization for OFCCP's regulations establishing an administrative adjudicative scheme for resolving disputes under the Executive Order must be "clear." Pl.'s MSJ 10-13. Oracle also argues that that OFCCP lacks rulemaking authority under the Procurement Act. *Id.* at 15-17. For the reasons discussed below, both arguments fail.

a. Oracle mischaracterizes the applicable test for determining whether OFCCP's regulations are authorized by the Procurement Act.

Oracle insists that the test for whether OFCCP's regulations are authorized by the Procurement Act is a burdensome one. According to Oracle, "[a]ny statutory authority for OFCCP's regime must be *clear*." *Id.* at 10 (emphasis added). That assertion is particularly misguided in the procurement context, where the President's authority is "broad-ranging." The D.C. Circuit has held that executive orders issued pursuant to the Procurement Act, and the agency regulations implementing those orders, are lawful so long as they bear a "nexus" to "the values of providing the government an 'economical and efficient system for … procurement and supply.'" *UAW*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 788, 792). That test is a "lenient" one, *id.* at 367, and, as discussed above, it is satisfied here.

The applicable analysis under *Kahn* does not, as Oracle contends, change simply because the agency regulations here at issue involve "a system of administrative adjudication." *See* Pl.'s MSJ 11. And the cases Oracle cites to support such a proposition are inapposite, *id.* at 11-12. For example, in *Coit Independence Joint Venture*, the *only* case Oracle cites having anything to do

with non-Article III adjudications, the Supreme Court held that the Federal Savings and Loan Insurance Corporation lacked the authority to adjudicate creditor's claims because "[t]he *statutory framework in which § 1729 appears* indicates clearly that when Congress meant to confer adjudicatory authority *on FSLIC* it did so explicitly." *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 573-74 (1989) (emphasis added). Oracle can point to no similar statutory evidence here.

Similarly, all the other cited cases rely on evidence of congressional intent that is unlike anything presented in this case. In *Newport News Shipbuilding & Dry Dock Co.*, the Supreme Court reasoned that, because the Black Lung Benefits Act granted the Director of the Office of Workers' Compensation Programs standing to sue under it, the statutory silence in the related Longshore and Harbor Workers' Compensation Act suggested that the Director did not there have standing to sue. *Dir., Off. of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129 (1995). In *Bauer*, the issue there was whether the Neutrality Act granted an informant a right to sue. *Bauer v. Marmara*, 774 F.3d 1026, 1033 (D.C. Cir. 2014). The D.C. Circuit reasoned that because "many bounty statutes … explicitly authorized informers to sue," the Neutrality Act's silence "suggest[ed] that Congress did not intend for such a right to be implied." *Id.* And this Court's decision in *Merck & Co. v. HHS* was similarly limited to the text, legislative history, and structure of the Social Security Act. 385 F. Supp. 3d 81, 84, 89-90 (D.D.C. 2019) (Mehta, J.).

None of these cases has any applicability to federal procurement, where agency adjudication has always been part and parcel of the federal scheme. *See* Report of the Commission on Government Procurement 14, Vol. IV, Comm'n on Gov. Procurement (Dec. 1972) (discussing the state of agency adjudication in the federal contracting process) [hereinafter

Procurement Comm'n Report]. Indeed, the Supreme Court has, since 1868, repeatedly confirmed the validity of agency adjudications in the context of federal contracting. *See Adams*, 74 U.S. at 478 (holding that an agency could appoint a board of commissioners to hear and decide disputes arising out of its contract, even though Congress and the Court of Claims were the only tribunals legally authorized to hear the disputes); *see also United States v. Moorman*, 338 U.S. 457, 460-61 (1950) (and cases cited therein); *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 236, 239-240 (Fed. Cl. 2009) ("For more than 100 years following the passage of the Tucker Act, contract disputes were generally settled within the procuring agency.").

Thus, by the time Congress passed the Procurement Act in 1949, agency adjudications were a central component of the federal contracting process and the settled practice for resolving disputes. Indeed, one year *after* the Procurement Act passed, the Supreme Court again reaffirmed that the executive can establish by contract the methods for resolving contractual disputes, observing that "[n]o congressional enactment condemns their creation or enforcement." *Moorman*, 338 U.S. at 460.

Moreover, when Congress intended to limit the authority of agencies to use administrative processes to adjudicate federal contract disputes, it did so explicitly. In 1950, the Supreme Court explained that "parties competent to make contracts are also competent to make … agreements" about dispute resolutions. *Id.* at 461. The Court thus held that, because the contractual disputes provision there at issue stated that an agency board's factual determinations would be "final," a contractor could not seek review of those determinations in federal court. *Id.* at 462-63. The Court confirmed that holding a year later in *United States v. Wunderlich*, 342 U.S. 98, 99-100 (1951).

Congress responded swiftly. In 1954, it passed the Wunderlich Act to solidify a role for federal courts in reviewing factual determinations made by the agency boards in deciding contractual disputes. Pub. L. No. 83-356, 68 Stat. 81 (1954). Notably, however, Congress did not question the authority of the executive branch to include disputes provisions in federal contracts directing that such disputes will be handled via agency adjudicative processes.

Given this extensive history, it is more than "reasonabl[e] … to conclude" that the Procurement Act "contemplate[d]," *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979), that the President could require that "policies and directives" issued pursuant to that Act be enforced through administrative adjudications—particularly when, as set forth above, the procedures themselves promote economy and efficiency in federal contracting.

b. OFCCP has rulemaking authority under the Procurement Act.

Oracle also argues that OFCCP's nondiscrimination regulations cannot be authorized by the Procurement Act because the Act does not authorize OFCCP to engage in any rulemaking whatsoever. *See* Pl.'s MSJ 18; *see also id.* at 13-15. That is flatly inconsistent with Oracle's acknowledgment that most of OFCCP's antidiscrimination activities are within the scope of its authority. It is also wrong.

The Procurement Act authorizes the GSA to regulate, 40 U.S.C. § 121(c), and the President to issue policies and directives, *id.* § 121(a). And both may delegate that authority. *See id.* §§ 121(c)(1), (d) ("[T]he Administrator may delegate authority conferred on the Administrator by this subtitle … to the head of another federal agency…. [and] may authorize successive redelegation."); 3 U.S.C. § 301 (the President may "designate and empower the head of any department or agency in the executive branch … to perform … any function which is vested in the President by law."); *Ass'n for Women in Sci.*, 566 F.2d at 344 (holding the President may delegate appropriate functions). Accordingly, Oracle's reliance on *Michigan v.*

EPA, 268 F.3d 1075, 1082 (D.C. Cir. 2001), is inapposite. *See* Pl.'s MSJ 10. Rather than a case of statutory silence or ambiguity, OFCCP's power to regulate under the Procurement Act is grounded in the text of that Act and the delegations made under it.

GSA incorporated the nondiscrimination and enforcement mandates of Executive Order 11,246 into its own procurement regulations, tasking the Secretary of Labor with the responsibility of "administrat[ing] and enforc[ing]" that Order, and *authorizing the Secretary to "[a]dopt[] … rules and regulations" and "issu[e] … orders necessary to achieve the purposes" of the Executive Order*. 48 C.F.R. §§ 22.803-.804 (emphasis added). Indeed, GSA's regulations make explicit the fact that "[c]ontractor disputes related to compliance with its obligation [under the Executive Order] shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor." *Id.* § 22.802(d) (citing 41 C.F.R. § 60-1.1).

Oracle asserts that GSA cannot delegate its authority in this manner because the Act prohibits GSA from delegating "the authority to prescribe regulations on matters of policy applying to executive agencies." Pl.'s MSJ 15 (quoting 40 U.S.C. § 121(d)(2)(A)). But GSA did not delegate such authority. GSA itself issued the regulations that apply to executive agencies—those requiring that every executive agency must include the nondiscrimination provisions in their government contracts, abide by OFCCP regulations, and refer cases of noncompliance to OFCCP. *See, e.g.*, 48 C.F.R. § 22.802(a) ("[A]ll agencies" must include the nondiscrimination clause "in all nonexempt contracts and subcontracts" and must "ensure compliance with the clause and the regulations of the Secretary of Labor"); *see also id.* §§ 22.802(c), 22.803(c). Oracle never explains why *OFCCP's* nondiscrimination regulations—which regulate government contractors, not executive agencies—come within the purview of this exception. Pl.'s MSJ 15.

Moreover, the exception Oracle cites does not apply to the President, who himself delegated enforcement authority to the Department of Labor. Oracle says that the President's delegation went beyond his authority to issue "policies and directives" and intruded on the GSA's rulemaking authority under the Act. Pl.'s MSJ 16. But if, as Oracle says, the Act "authorize[s] the President to centralize government contracting, [and] insist on inclusion of certain terms in government contracts to obtain more efficient contracting," *id.*, it follows that the President can direct the Secretary of Labor, the head of the relevant executive agency, to enforce these requirements. That is no more a directive about the "rights and obligations of private parties," Pl.'s MSJ 16, than the policies Oracle itself says the Act authorizes, *i.e.*, the nondiscrimination mandate itself, or those in the directives the D.C. Circuit has repeatedly upheld. *See Kahn*, 618 F.2d at 785-86 (upholding an executive order requiring contractors to comply with certain wage and price standards); *UAW*, 325 F.3d at 362 (upholding executive order that requires contractor to post notices informing employees of certain rights under labor law); *see also Nat'l Ass'n of Mfrs. v. Perez*, 103 F. Supp. 3d 7, 11 (D.D.C. 2015) (upholding executive order requiring contractors to post notices about workers' labor rights).

In any event, Oracle admits that "the President could order the GSA Administrator to delegate rulemaking authority" to OFCCP. Pl.'s MSJ 17. That concession undermines its argument, even on its own terms. By designating the Secretary of Labor with responsibility for implementing Executive Order 11,246, the President necessarily required GSA to delegate the authority to the Secretary to implement the requirements of that Order. As the D.C. Circuit observed, the Procurement Act granted to the President a "leadership role" in "setting Government-wide procurement policy on matters common to all agencies." *Kahn*, 618 F.2d at 788 & n.20. And Congress intended those policies to "govern[,] not merely guide," the actions of

both "the [General Services] Administrator and [other] executive agencies." *Id.* (quoting 95 Cong. Rec. 7441, 1452 (1949) (remarks of Rep. Holifield and Rep. Bolling)); *Am. Fed'n of Gov. Empl.*, 669 F.2d at 822. And the text, purpose, and legislative history of the Procurement Act all make clear that the President's authority under the Procurement Act is anything but "limited." *See Kahn*, 618 F.2d at 789 (the Act "grants the President particularly direct and broad-ranging authority"); *Reich*, 74 F.3d at 1330 ("[T]he Procurement Act does vest broad discretion in the President."); *UAW*, 325 F.3d at 366-67 (describing the President's "broad-ranging authority" under the Procurement Act); *Nat'l Ass'n of Mfrs.*, 103 F. Supp. 3d at 20.

In response, Oracle cites two cases that arise in the context of different statutory schemes and interpreting agency rather than presidential authority. Pl.'s MSJ 16. For instance, in *Adams Fruit Co. v. Barrett*, the Supreme Court held that the Department of Labor's congressional authorization to promulgate "standards" under the Agricultural Worker Protection Act did not permit it to "regulate the scope of the judicial power vested by the statute." 494 U.S. 638, 650 (1990). That case, too, has nothing to say, however, about the extent of the President's authority under the Procurement Act. Similarly, the issue in *National Mining Association v. McCarthy*, was whether a particular agency action was "final." 758 F.3d 243, 250 (D.D.C. 2014). In making that determination, the D.C. Circuit generally elaborated on the definitions of three categories of agency action under the Administrative Procedure Act: legislative rules, interpretive rules, and general statements of policy. *Id.* at 251-53. That case has nothing to do with the scope of the President's authority under the Procurement Act. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992) (the President is not an "agency" within the meaning of the APA).

B. Congress has ratified OFCCP's enforcement regime.

Executive Order 11,246 has been in effect since 1965, and OFCCP's regulations implementing that Order—including its regulations establishing an administrative adjudicatory

scheme for resolving disputes under the Order and authorizing injunctive and remedial relief—since, at least, 1977.[6] Yet, in the intervening half-century, Congress has done nothing to repeal Executive Order 11,246, rein in OFCCP's authority to enforce that Order, or overrule the cases upholding the executive order regime. To the contrary, it has evidenced its strong support for OFCCP's enforcement regime.

On this point, Oracle has no response to *Kahn.* That case explained that the President's view of his authority is entitled to "great respect" in the absence of congressional reversal for a substantial period of time, *Kahn*, 618 F.2d at 789 & n.27—a point even more relevant forty years later. Oracle ignores both *Kahn*'s holding and the length of congressional acquiescence in trying to waive away the importance of congressional inaction. Pl.'s MSJ 32. And the canon that longstanding congressional acquiescence is entitled to significant weight has become no less potent with time. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 106 (2007) ("Congress failed to act on a proposed amendment … in a high-profile area," which evidenced "tacit acceptance"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155-56 (2000) ('[A]ctions [taken] by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products."); *Jackson*, 949 F.3d at 773 (finding "Congress's inaction for over forty years" evidence of legislative intent); *id.* ("Congress has amended various parts of Title VII over the years … but has never sought to override our sister circuits' determination." (citing *Curran*, 456 U.S. at 382 n.66 (1982))).

It cannot reasonably be argued that Congress was unaware of OFCCP or its enforcement authorities. To the contrary, in the fifty or so years since the issuance of Executive Order 11,246,

[6] As Proposed Intervenors explained in their opening brief, Prop. Intrvnrs.' MSJ 29-30, OFCCP's enforcement regime pre- and post-1977 was largely the same, Oracle's arguments to the contrary notwithstanding.

Congress has at numerous points considered, debated, heard testimony about, and sought reports on that Executive Order and OFCCP's efforts to enforce it:

- In passing Title VII in 1964, Congress rejected a proposal to merge EEOC and OFCCP. *See* 110 Cong. Rec. 13,650-62 (1964).

- In 1969, Congress conducted hearings on the Philadelphia Plan—an affirmative action plan that OFCCP implemented as part of its enforcement efforts under Executive Order 11,246—and rejected a legislative proposal to transfer OFCCP's functions to EEOC. *Congressional Oversight of Administrative Agencies: Hearings on the Philadelphia Plan and S.931 Before the S. Subcomm. on Separation of Powers,* 91st Cong. 1 (1969) [hereinafter *Hearings on Administrative Agencies*]; 115 Cong. Rec. 40,738, 40,749 (1969). During those hearings, a senator referred to the authority for Executive Order coming from the Procurement Act. *Hearings on Administrative Agencies* at 101-02 (statement of Sen. Leonard) (citing *Farkas*, 375 F.2d 629)).

- In 1972, Congress rejected an amendment to Title VII that would have transferred OFCCP's functions to EEOC. *See* H.R. Rep. No. 920238, at *2,150 (June 2, 1971) (describing H.R. 1746); *see also* H.R. 947 (1971). As part of that debate, Congress specifically considered the fact that OFCCP had been "increas[ing]" its "readiness … to resort to formal proceedings as a means of assuring compliance." Legislative History of the Equal Employment Opportunity Act of 1972, Subcomm. on Lab., Comm. on Lab. & Pub. Welfare, 92 Cong. 941 (Nov. 1972) [hereinafter EEOA Legislative History]. Moreover, in passing the EEOA, Congress specifically referenced the Third Circuit's decision in *Contractors Association* and, by unanimous consent, voted to include the text of that decision into the Act's legislative history. *See* EEOA Legislative History at 1048-63.

- In 1972, Congress received a report from the congressionally chartered Commission on Government Procurement, which discussed OFCCP's procedures for enforcing Executive Order 11,246—including by holding "hearing[s]." Procurement Comm'n Report at 65-66.

- In 1975, the House Subcommittee on Equal Opportunities held three hearings on federal civil rights enforcement. *See* Oversight Hearings Before the Subcomm. on Equal Opportunities, Comm. on Educ. & Lab., 94th Cong. (Mar. 27, 1975, June 19 & 25, 1975, July 8, 1975). Following those hearings, a Staff Report was published, which, in part, reviewed OFCCP's enforcement of Executive Order 11,246. That Report found that OFCCP's enforcement was hampered by the fact that its regulations governing administrative hearings adhered more closely to the "rules of civil procedure for Federal courts rather than the simpler standards for administrative procedure utilized for hearings by most Federal agencies." 1976 Staff Report at 68. Moreover, it acknowledged OFCCP's use of back pay awards to enforce the Order. *Id.* at 92.

- In 1976, Congress amended the Procurement Act without repealing Executive Order 11,246, or otherwise expressing concern about the executive order program and OFCCP's enforcement efforts. *See* Pub. L. No. 94-519, 90 Stat. 2456 (1976).

- In 1981, Congress conducted hearings about the effectiveness of OFCCP. It heard testimony from various members of the business community arguing that OFCCP was unlawfully seeking back pay for violations of the Executive Order but took no action to alter OFCCP's course. *See Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Hearings Before the H. Subcomm. on Emp. Opportunities, Comm. on Educ. & Lab.*, 97th Cong. 249, 433-34 (Sept. 24, 1981).

- In 1983, Congress conducted oversight hearings on certain OFCCP's proposed regulations. The Subcommittee on Employment Opportunities registered its concern with "OFCCP proposals which *limit* back pay awards." 1983 Oversight Hearings at 2; *see also id.* at 7, 16-17. It further noted the "recent press reports" indicating that there was "widespread dissatisfaction with the OFCCP's announced intention to restrict remedial goals." *Id.* at 2. And it accepted testimony from members of the business community and the civil rights community about the issue of back pay. *See id.* at 237-38, 377-71.

- In 1987, Congress increased appropriations to OFCCP for FY 1988 in response to a House Committee staff report recommending more vigorous enforcement of Executive Order 11,246. *See* Pub. L. No. 1900-202, 101 Stat. 1329 (1987); *A Report on the Investigation of the Civil Rights Enforcement Activities of the Office of Federal Contract Compliance Programs*, H.R. Comm. on Educ. & Lab., 100th Cong. (Comm. Print. 1987); Letter from Augustus Hawkins, Chairman, H.R. Comm. on Educ. & Lab., to William Hatcher, Chairman, H.R. Subcomm. on Lab.-Health & Human Servs.-Educ. (May 5, 1988).

- In 2002, Congress amended the Procurement Act without repealing Executive Order 11,246, or otherwise reining in OFCCP's efforts to enforce that Order. *See* Pub. L. No. 107-217, 116 Stat. 1062 (2002).[7]

[7] Oracle argues that the amendment actually "confirms that Congress never authorized OFCCP's regime." Pl.'s MSJ 33. Section 122(a) of the Procurement Act, as amended, prohibits discrimination on the basis of sex in programs receiving federal assistance. But the provision says nothing about the nondiscrimination mandate set forth in Executive Order 11,246, which applies only to *federal contracts*, not *programs receiving federal assistance*. *See Venkatraman v. REI Systems, Inc.*, 417 F.3d 418, 421 (4th Cir. 2005) ("Title VI coverage turns on the receipt of 'federal financial assistance,' not the existence of a contractual relationship…. Market contracts between federal contractors and the government do not constitute such 'assistance.'"); *see also White v. Bank of America, N.A.*, 200 F. Supp. 3d 237, 246 (D.D.C. 2016) (holding that in the context of the Rehabilitation Act programs receiving federal assistance do not include federal procurement contracts). If anything, it suggests Congress wanted to broaden the reach of the

- In 2012, Congress conducted oversight hearings to review regulations that OFCCP had proposed that, in part, would have required contractors to report additional wage data that would have aided OFCCP in assessing back pay awards. *See Hearing Before the Subcomm. on Health, Emp., Lab. & Pensions*, 112th Cong. (Apr. 18, 2012).

- In 2016, GAO provided Congress with a Report on OFCCP's efforts to enforce Executive Order 11,246. *See* Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance (GAO-16-750), GAO (Sept. 2016) (report to congressional requesters). The Report detailed OFCCP's enforcement processes, including the agency's use of "administrative enforcement proceedings," *id.* 2, 10-14, and data on OFCCP's use of back pay remedies, *id.* at 25. It made recommendations on increasing the effectiveness of OFCCP's enforcement activities. *Id.* at 37.

- In 2017, Congress rejected a proposal by the White House to merge EEOC and OFCCP. *See* S. Rep. No. 115-150, at 30 (2017).

- In 2019, GAO provided testimony to Congress on OFCCP's progress in implementing the recommendations provided in GAO's 2016 Report on the agency's effectiveness in enforcing Executive Order 11,246. *See* Progress Made on GAO Recommendations to Improve Nondiscrimination Oversight, but Challenges Remain: Testimony Before the Subcomm. on C.R. & Human Servs., Comm. on Educ. & Lab., GAO (Sept. 19, 2019).

- In 2019, Congress increased appropriations to OFCCP to enable the agency to "expand enforcement" efforts under Executive Order 11,246. *See* H.R. Rep. No. 116-62, at 24 (2019).

This is an "unusually strong case of legislative acquiescence." *Bob Jones Univ.*, 461 U.S. 574, 600 (1983). It is incontrovertible that Congress, "by its own studies and by public discourse," has been well aware of OFCCP's enforcement regime. *Id*. at 599.

C. The language and history of Title VII and the EEOA further show Congress's support for OFCCP's implementation of Executive Order 11,246.

Rather than contravening the long history of congressional acquiescence in OFCCP's enforcement regime, the language and history of Title VII and the EEOA further bolster it.

mandate. Nor does the amendment say anything about how the executive branch can enforce the mandate against federal contractors—with whom it has a special relationship, *see infra* 36.

Title VII. As Proposed Intervenors explained in their opening brief (at 39-40), Title VII as originally enacted exempted employers that were required to make reports to OFCCP under the nondiscrimination mandate from similar reporting requirements to the EEOC. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 709(d), 78 Stat. 241 (1964). Thus, Congress expressly "contemplated continuance of the Executive Order Program." *Contractors Ass'n*, 442 F.2d at 171. Oracle has no response on this.

Instead, Oracle makes much of the fact that, during the drafting process, the House Judiciary Committee deleted a provision of the bill that would have stated: "The President is authorized to take such actions as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract." *See* Pl.'s MSJ 24-25 (citing H.R. Rep. No. 88-914, at 14, § 711(b) (1963)). But the debate surrounding this amendment makes clear that it had no effect on the President's then-existing authority. 110 Cong. Rec. 2575 (1964) ("[T]he adoption of this amendment and the striking out of this language from the bill would in no way affect substantive law as it is written on the books today.") (statement of Rep. Poff). Indeed, during the debate, the main proponent of the amendment was asked: "[I]is it not true that the President has this authority right now, judging from actions being taken by the Executive of late?" *Id.* (statement of Rep. Quie). The answer: "*The President has the authority*." *Id.* (statement of Rep. Cellick) (emphasis added).

Similarly, Oracle argues that "OFCCP's regime … flaunts a model of administrative adjudication that Congress rejected when enacting Title VII." Pl.'s MSJ 25-26. It raises the same argument with respect to the EEOA. *Id.* 27. But, again, Congress was clear that Title VII had no effect on the President's authority to issue the nondiscrimination mandate, nor on his authority to direct OFCCP on how to enforce that mandate. It is of no matter that the President authorized

procedures for OFCCP that Congress chose not to authorize for EEOC's enforcement of Title VII. OFCCP and EEOC are different agencies, regulating overlapping communities, but, critically, pursuant to different statutory authority. Moreover, it makes sense that the government would claim for itself more authority in enforcing against employers *with whom the government contracts*. *See U.S. Brewers Ass'n*, 600 F.2d at 984 ("It is settled that the federal government may exact, from those with whom it does business, compliance with standards or requirements different from those found in the marketplace generally.") (citing *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Contractors Ass'n*, 442 F.2d at 159). That has, after all, been the practice for resolving disputes with federal contractors since the 19th century.

Accordingly, and as was later explained, Title VII "ha[d] no effect … on the authority possessed by the President or Federal agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts." Interpretive Memorandum on Title VII (1964) (submission of Senators Clark (D., Pa.) & Case (R., N.J.), *reprinted in* Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 3046 (1968). Indeed, Congress recognized that authority when the Senate defeated an amendment that would have made Title VII the sole authority on discrimination. *See Hearings on Administrative Agencies* at 10d (statement of Sen. Leonard) ("[T]itle VII does not prohibit the executive branch of Government from establishing rules and regulations with respect to those who desire to do business with the Federal Government. The Senate specifically determined this … when it defeated the amendment that would have made title VII the sole authority for the Federal Government with respect to employment discrimination.").

EEOA. Oracle cannot explain why Congress would, on the one hand, think of OFCCP as a limited agency, with no authority to adjudicate disputes, while, on the other, explicitly

requiring such adjudications in certain circumstances. Section 2000e-17, added as part of the EEOA, prohibits OFCCP from denying, withholding, terminating, or suspending a contract, when it had previously approved the contractor's affirmative action plan, "without first according such employer *full hearing and adjudication*." 42 U.S.C. § 2000e-17 (emphasis added). Oracle contends that this provision was intended to ensure that contractors could get review of any such decision in court. True or not, what is clear is that Congress acknowledged OFCCP's authority to conduct administrative hearings in its enforcement of the Executive Order. *See* EEOA Legislative History at 954 (the "impact of the words 'under the provisions of Title 5, United States Code, section 554,'" means "an administrative hearing"). "[A]ll the court would have the power to consider would be the record already made in the Office of Contract Compliance." *Id.*

Oracle also ignores several of Proposed Intervenors' arguments. It has no answer to the fact that, in enacting the EEOA, Congress "resoundingly" defeated a proposal to restrict the affirmative action requirements imposed by Executive Order 11,246. Nor does it grapple with the fact that the Supreme Court relied on that amendment as evidence of congressional ratification of prior court decisions finding the affirmative action requirement in Executive Order 11,246 to be consistent with Title VII despite the absence of any explicit affirmative action requirement in the statute. *See Local 28*, 478 U.S. at 469.

Instead, Oracle claims that, in rejecting the proposal to merge OFCCP and EEOC, members of Congress made statements evidencing their understanding of OFCCP's role as a "limited" one. *See* Pl.'s MSJ 28-29. Quite to the contrary, Congress rejected the proposal in large part because it wanted OFCCP to enforce the Executive Order *more* aggressively—by, for example, "increas[ing]" its "readiness … to resort to formal proceedings as a means of assuring

compliance." EEOA Legislative History at 941 (citing several OFCCP matters that had proceeded to administrative hearings). The Secretary of Labor informed Congress by letter that he had recently appointed a new Secretary for Employment Standards in a "calculated move to really shake up the OFCC and to see to it that its management be made more aggressive than it has been." *Id.* at 936. And OMB had authorized OFCCP to increase state and expenditures so the agency could "develop a capability of handling over 400 conciliations *and 25 hearings per year itself*." *Id.* at 936, 943 (emphasis added)). Congress did not want to disturb these plans for increased enforcement by transferring OFCCP's authority. As the Eighth Circuit explained, "the legislative history of the 1972 Act makes it clear that the interagency merger was deleted from the law primarily because of fears that administrative burdens would weaken the contract compliance program." *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898, 904 (8th Cir. 1979).

D. The Contract Disputes Act does not apply to disputes under Executive Order 11,246.

It is irrelevant whether, as Oracle contends, Pl.'s MSJ 30-32, OFCCP's procedures for adjudicating and remediating violations of the Executive Order are different than those set forth in the Contract Disputes Act, 41 U.S.C. §§ 7101 *et seq.* That is because, quite simply, the CDA does not apply to claims arising under Executive Order 11,246.

The CDA "does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation *that another Federal agency is specifically authorized to administer, settle, or determine.*" 41 U.S.C. § 7103(a)(5) (emphasis added). For other suits that relate to a contract, the CDA prescribes adjudication by an officer at the contracting agency with a potential appeal by the contractor to either a contracting agency review board or the U.S. Court of Federal Claims. *Id.* § 7104.

Claims under Executive Order 11,246 come within the purview of the exception to CDA coverage set forth in Section 7103(a)(5). The Order "specifically authorize[s]" OFCCP to "settle" or "determine" claims against federal contractors for "penalties"—namely, debarment and contract cancellation. *See* Exec. Order No. 11,246 §§ 201, 202(6), 209; *see also Goya de Puerto Rico, Inc.*, 98-OFC-00008, 1999 WL 33992439 (ALJ June 22, 1999) (opining that the CDA did not "trump" the Department's regulations based on 41 U.S.C. § 7103(a)(5) because the "remedies sought by OFCCP … constitute 'penalties' and 'forfeitures' in that they consist essentially of the debarment of [the federal contractor] from having government contracts").

That claims under the Executive Order are not covered by the CDA is confirmed by the Act's legislative history. In passing the CDA, Congress sought to eliminate a jurisdictional split in which contracting agencies adjudicated claims expressly delegated to them by the contract and federal courts adjudicated any other claim that would be recognized under the common law of contracts. *See Hearings Before the Subcomm. on Admin. Law & Gov. Rel. of the Comm. on the Judiciary on H.R. 664*, 95th Cong. 84 (Nov. 10 & 11, 1977) [hereinafter November 1977 Hearing]; *see also* Procurement Comm'n Report at 15. Congress wanted to consolidate these two types of proceedings.

Executive Order 11,246 claims fall into neither category. Federal contracts have never granted the *contracting agencies* jurisdiction to decide claims under the Order. Instead, Executive Order 11,246 claims have always been subject to the jurisdiction of the Department of Labor. *See* Exec. Order No. 11,246 §§ 201, 202(6). And such claims would not be recognized under the common law of contracts, even if they tangentially involve the contractual provisions setting forth the nondiscrimination mandate. *See Com. Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 4, 7 (D.C. Cir. 1998) (finding that a claim by a contractor that GSA had

unlawfully "blacklisted" the contractor did not come within the ambit of the CDA because it was not "at its essence" a contract dispute); *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982) (find that a claim by a federal contractor seeking to enjoin the government from violating the Trade Secrets Act was not governed by the CDA). As the D.C. Circuit has explained, "the mere fact that a court may have to rule on a contract issue does not, by triggering some mystical metamorphosis, automatically transform an action" based on nondiscrimination law "into one on the contract." *Id.* at 968.

Accordingly, shortly after Congress passed the CDA, GSA—the agency tasked with its implementation—promulgated the FAR, in which it made clear that claims under the Executive Order are to be handled in accordance with OFCCP procedures—not the CDA. *See* 48 C.F.R. § 22.802(d) (disputes under the Executive Order are to be handled "according to the rules, regulations, and relevant orders of the Secretary of Labor"). In fact, under GSA regulations, most, if not all, claims by the federal government against a federal contractor regarding the application of labor and employment standards are handled, not in accordance with the CDA, but instead via Department of Labor procedures. *See* 48 C.F.R. § 52.222-55(h) (disputes concerning minimum wage requirements under Executive Order 13,658); *id.* § 52.222-27(g) (disputes concerning the nondisplacement of qualified workers); *id.* § 52.222-62(l) (disputes concerning paid sick leave under Executive Order 13,706); *id.* 52.222-14 (disputes concerning labor standards); *id.* § 52.222-41 (disputes concerning labor standards in service contracts). And courts have upheld such provisions because the contractor, like Oracle in this case, *agreed to them* in signing the contract. *See Emerald Maint., Inc. v. United States*, 925 F.2d 1426, 1428 (Fed. Cir. 1991) ("The Disputes provision of the contracts clearly provides that disputes arising out of the labor standards provisions of the contracts are not to be subject to the Contract Disputes Act.");

Herman B. Taylor Constr. Co. v. Barram, 203 F.3d 808, 811 (Fed. Cir. 2000) (same); *Collins Int'l Serv. Co. v. United States*, 744 F.2d 812 (Fed. Cir. 1984) (same).

In light of the Act's text and legislative history, that decision is eminently reasonable and should be accorded deference. *See Chevron*, 467 U.S. at 842-43. Indeed, if the CDA applied, that would mean the first adjudicator in every discrimination case related to a government contract would be the contracting agency. Every separate agency would have to engage in such adjudications, subjecting federal contractors to potentially divergent interpretations and applications of the Order, provided by agencies that lack any experience or expertise in handling discrimination cases. *See also* 1976 Staff Report at 63 (observing that the "[d]elegation of compliance responsibility" under Executive Order 11,246 "to 16 separate Federal agencies has resulted in difference in policies and procedures of enforcement"); *cf. Am. Fed'n of Gov. Emps. v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) ("Claims will be found to fall outside the scope of a special statutory scheme … when … the claims are beyond the expertise of the agency." (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208-08 (1994))).

Congress surely did not intend such an inefficient system, particularly when one if its primary purposes in enacting the CDA was to promote efficiency and "provide alternate forums *suitable to handle the different types of [contract] disputes*." S. Rep. No. 95-1118, pt. I (1978) (emphasis added). In fact, the same evidence of congressional acquiescence discussed above likewise supports an interpretation of the CDA whereby claims under the Executive Order are handled in accordance with OFCCP's procedures. As shown above, there is no question that Congress has been aware of OFCCP's adjudicatory regime since its inception. Yet, Congress has not stepped in override it, and, indeed, has continued to fund it—despite the fact that Congress has twice amended the CDA. *See generally* National Defense Authorization Act for Fiscal Year

1996, Pub. L. No. 104-106, 110 Stat. 186 (1996); Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

E. The Procurement Act's delegation of authority to authorize Executive Order 11,246 and OFCCP's implementing regulations is constitutional.

In a last-ditch effort to eviscerate OFCCP's longstanding system for enforcing the nondiscrimination mandate of Executive Order 11,246, Oracle turns to the nondelegation doctrine. But the *en banc* D.C. Circuit has already held that the Procurement Act is a constitutional delegation because it contains the requisite intelligible guiding principle under the Supreme Court's precedents.

The Supreme Court has held that "a delegation is constitutional so long as Congress has set out an intelligible principle to guide the delegee's exercise of authority." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (quotation omitted). Put differently, "a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of his authority." *Id.* (citation omitted). These standards "are not demanding," and the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* To the contrary, the Court has "[o]nly twice in this country's history" found a delegation constitutionally excessive. *Id.*

The D.C. Circuit has already held that the Procurement Act satisfies that lenient standard. It "requires the President to make procurement policy decisions based on considerations of economy and efficiency. Although broad, this standard can be applied generally to the President's actions to determine whether those actions are within the legislative delegation." *Kahn*, 618 F.2d at 793 n.51. Nor is the Act's delegation meaningfully different, or broader, than those that the Supreme Court has previously upheld. For example, the Court has upheld

"delegations to various agencies to regulate 'in the public interest,'" *Gundy*, 139 S. Ct. at 2129 (quoting *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)), "authorizations for agencies to set "'fair and equitable' prices and 'just and reasonable' rates," *id.* (quoting *Yakus v. United States*, 321 U.S. 414, 422, 427 (1944); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)), and "a delegation to an agency to issue whatever air quality standards are 'requisite to protect the public health,'" *id.* (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001)). Moreover, the Procurement Act specifies "who or what is to be regulated," Pl.'s MSJ 36—namely, federal contractors and federal contracting. The Act specifies "who is to do the regulating," *id.* at 37—namely, the President and GSA, both of which may delegate the authority. And the Act specifies "how the regulation is to be accomplished," Pl.'s MSJ 37—namely, by the issuance of rules, regulations, policies, or directives that promote economy and efficiency in federal contracting.

Oracle's nondelegation argument simply trades one radical challenge for another. Oracle brought this lawsuit before letting the administrative process run its course. In doing so, it mounted a broad attack on an administrative regime that has stood for over fifty years—one central to the federal government's nondiscrimination efforts. And it now seeks to impose a new, judicially crafted, limit on the authority of Congress and administrative agencies. None of Oracle's arguments finds any support in principles of justiciability, the Procurement Act and other federal statutes, or the Constitution. Oracle's challenge should therefore be rejected.

CONCLUSION

The Court should grant the Proposed Intervenors' Motion for Summary Judgment, deny Plaintiff's Motion for Summary Judgment, and, accordingly, enter judgment for Defendants.

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Respectfully submitted,

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