No. 21-14269

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STATE OF GEORGIA, et al.,

Plaintiffs-Appellees,

v.

PRESIDENT OF THE UNITED STATES, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF FOR APPELLANTS

Of Counsel:

SAMUEL R. BAGENSTOS
General Counsel

ARPIT K. GARG
Deputy General Counsel

SARAH R. SCHEINMAN
Associate Deputy General Counsel

SHRADDHA A. UPADHYAYA
Associate General Counsel
Office of Management and Budget

BRIAN M. BOYNTON
Acting Assistant Attorney General

JOSHUA REVESZ
Counsel to the Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DANIEL WINIK
ANNA O. MOHAN
DAVID L. PETERS
Attorneys, Appellate Staff
Civil Division, Room 7209
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-1673

AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for defendants-appellants certify that the following have an interest in the outcome of this appeal:

Ahuja, Kiran

Alabama Department of Agriculture and Industries

Alabama Department of Public Health

Alabama Department of Rehabilitation Services

Alabama, State of

American Academy of Allergy, Asthma & Immunology

American Academy of Family Physicians

American Academy of Pediatrics

American College of Chest Physicians

American College of Medical Genetics and Genomics

American College of Physicians

American Geriatrics Society

American Lung Association

American Medical Association

American Medical Women's Association

American Psychiatric Association

* Additions to previous certificate marked with an asterisk.

American Society for Clinical Pathology

American Society of Hematology

American Thoracic Society

Andrapalliyal, Vinita

Associated Builders and Contractors of Georgia, Inc.

Associated Builders and Contractors, Inc.

Austin, Lloyd

Bagenstos, Samuel R.

Baker, Honorable Stan R., U.S. District Court Judge

Becerra, Xavier

Biden, Joseph R.

Black, Gary W.

Boynton, Brian M.

Capers, Dunbar, Sanders & Belloti LLP

Caplan Cobb LLP

Caplan, Michael

Carnahan, Robin

Chavez, Richard

Collins, Francis S.

Criswell, Deanne

Democracy Forward Foundation

Dubner, Jeffrey B.

Dunbar, III, Paul H.

Epps, Honorable Brian K., U.S. Magistrate Judge

Fried, Rachel L.

Garg, Arpit K.

General Services Administration

Georgia Department of Agriculture

Georgia, State of

Granholm, Jennifer

Holyoak, Melissa A.

Hydrick, Thomas T.

Idaho State Board of Education

Idaho, State of

Ivey, Kay

Jennings, Kathleen J.

Josephson, Matthew Allan

Kane, Patrick*

Kansas, State of

Kemp, Brian P.

Kintz, JoAnn L.

Klein, Alisa B.

Klorfein, Jarred A.

LaCour, Jr., Edmund Gerard

Lambert, Wm. Grayson

Laue, Brant M.

Limehouse, Jr., Thomas A.

Little, Brad

McDonough, Denis

McMaster, Henry

Melton, Harold David

Mohan, Anna O.

Morton, Jessica Anne

Murray, James M.

National Aeronautics and Space Administration

National Institutes of Health

National Science Foundation

Nelson, Bill

Office of Management and Budget

Office of the Attorney General of Alabama

Office of the Attorney General of Georgia

Office of the Attorney General of Idaho

Office of the Attorney General of Kansas

Office of the Attorney General of South Carolina

Office of the Attorney General of Utah

Office of the Attorney General of West Virginia

Office of the Governor of Georgia

Office of the Governor of South Carolina

Office of the Solicitor General of Kansas

Panchanathan, Sethuraman

Parker, Jr., William Glenn

Patrick, Bradford Collins

Patterson, L. Eric

Peeler, Charles E.

Peters, David L.

Petrany, Stephen J.

Raimondo, Gina

Reed, Dayton P.*

Revesz, Joshua

Safer Federal Workforce Task Force

Scheinman, Sarah R.

See, Lindsay S.

Shedd, Michael G.

Smith, Jr., James Emory

Society of Interventional Radiology

South Carolina, State of

Stern, Mark B.

Stine, J. Larry

The Board of Regents of the University System of Georgia

Troutman Pepper

Tseytlin, Misha

Upradhyaya, Shraddha A.

U.S. Department of Commerce

U.S. Department of Defense

U.S. Department of Energy

U.S. Department of Health and Human Services

U.S. Department of Transportation

U.S. Department of Veterans Affairs

U.S. Office of Personnel Management

Utah, State of

Waldbeser, Drew F.

Walensky, Rochelle

West Virginia, State of

Wilson, Thomas A.

Wimberly Lawson Steckel Schneider & Stine PC

Winik, Daniel

Young, Shalanda

Zanzig, W. Scott

Zients, Jeffrey

STATEMENT REGARDING ORAL ARGUMENT

The Court has set oral argument in this case.

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INTRODUCTION

The United States is in the midst of an ongoing pandemic that has caused millions of Americans to become ill and hundreds of thousands to die. Beyond this human toll, the pandemic has also substantially disrupted the American economy. One study estimates that the cost of lost work hours associated with COVID-19 exceeds $100 billion. To reduce further economic loss, many private companies have chosen to require that their employees receive a COVID-19 vaccine. Those vaccines substantially reduce the risk that an employee will become sick, miss work, or pass the illness along to others, including coworkers.

The principal question in this case is whether the President of the United States may require federal agencies to do business only with contractors that impose the same type of vaccination requirement on their employees. The Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. § 101 *et seq.*, authorizes the President to "prescribe policies and directives" to ensure "an economical and efficient system" for federal contracting. *Id.* §§ 101, 121(a). This provision has consistently been understood, by both the Executive Branch and the federal courts, to give the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies reasonably related to the statute's aims. *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003). The President exercised that authority by issuing an

Executive Order directing federal agencies to include in certain contracts a clause requiring covered employees to follow certain COVID-19 safety protocols, which include vaccination requirements.

That Executive Order fell well within the terms of the Procurement Act. Requiring companies that enter into federal contracts to have a vaccinated workforce directly advances the economy and efficiency of the federal contracting system because a workplace free from COVID-19 is more efficient than a workplace in which employees become infected, transmit their infections to others, and miss work. Numerous private businesses have imposed their own vaccination requirements to advance similar considerations of economy and efficiency. The district court nevertheless enjoined the policy, concluding that the Executive Order constituted a public health regulation not clearly authorized by Congress. That conclusion was mistaken: the Executive Order is merely an exercise of the federal government's procurement powers and does not regulate any area outside of federal contracting.

The district court independently erred by enjoining the vaccination requirement on a nationwide basis. Article III and principles of equity require that an injunction sweep no further than necessary to address injuries to the plaintiffs. Litigation regarding the Executive Order is pending in six other district courts and three other courts of appeals, and the district court cited no sound basis for pretermitting their consideration of an issue of national importance.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. A150. The district court entered a preliminary injunction on December 7, 2021. A298. The federal government timely appealed on December 9, 2021. A326; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

The district court preliminarily enjoined the enforcement of the challenged Executive Order as to "all covered contracts in any state or territory of the United States of America." A324. This appeal presents three questions:

1. Whether the Executive Order is a lawful exercise of the President's authority under the Procurement Act.

2. Whether plaintiffs failed to establish the equitable requirements for preliminary injunctive relief.

3. Whether the scope of the preliminary injunction is overbroad.

STATEMENT

A. Federal Contracting And The Procurement Act

Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101 *et seq.*—known as the Procurement Act—with the aim of "provid[ing] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting." *Id.* § 101(1). The Act empowers the President to "prescribe policies

and directives that the President considers necessary to carry out" that objective. *Id.* § 121(a). Presidents have used this power to issue a wide variety of executive orders and directives relating to federal procurement and contracting. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965) (forbidding civilian contractors from discriminating on the basis of race, creed, color, or national origin); Exec. Order No. 12,800, 57 Fed. Reg. 12,985, 12,985 (Apr. 13, 1992) (requiring contractors to inform their employees that they have a right not to pay union dues).

Congress has also authorized the Office of Federal Procurement Policy, a subcomponent of the Office of Management and Budget (OMB), to "issue policy directives … for the purpose of promoting the development and implementation of the uniform procurement system." Pub. L. No. 96-83, § 4(e), 93 Stat. 648, 650 (1979). And Congress created the Federal Acquisition Regulation Council (FAR Council), chaired by the administrator of the Office of Federal Procurement Policy, to provide guidance on how agencies should obtain full and open competition in contracting. 41 U.S.C. § 1302. The FAR Council promulgates the Federal Acquisition Regulation (FAR), which contains standard clauses that are to be included in certain government contracts. *See* 48 C.F.R. pts. 1-53.

B. COVID-19 Safety Requirements For Federal Contractors

1. The COVID-19 pandemic

Since January 2020, the United States has been in a state of public health emergency because of COVID-19. U.S. Dep't of Health & Hum. Servs., *Determination That*

a Public Health Emergency Exists (Jan. 31, 2020), https://perma.cc/VZ5X-CT5R. In the two years since that emergency began, more than 63 million Americans have contracted COVID-19 and more than 800,000 Americans have died from the disease. Ctrs. for Disease Control & Prevention (CDC), *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker (last visited Jan. 14, 2022). Beginning in July 2021, cases, deaths, and hospitalizations due to COVID-19 began to rise dramatically due to the emergence of a "more infectious" strain of the virus known as the Delta variant. CDC, *Delta Variant* (Aug. 26, 2021), https://perma.cc/4RW6-7SGB. In December 2021, another strain, the Omicron variant, began to cause "a rapid increase in infections" due to its "increased transmissibility and … ability … to evade immunity conferred by past infection or vaccination." CDC, *Potential Rapid Increase of Omicron Variant Infections in the United States* (Dec. 20, 2021), https://perma.cc/6CWF-QZQW.

Apart from the countless personal tragedies it has caused, COVID-19 has led to massive economic disruptions in the public and private sectors. The global economy contracted by 3.5 percent in 2020. Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, at 1 (Brookings Inst., Brookings Global Working Paper #158, June 2021), https://perma.cc/4J2W-N83V. One study estimates that between March 2020 and February 2021 the pandemic cost $138 billion in lost work hours among U.S. full-time private-sector employees. Abay Asfaw, *Cost of Lost Work Hours Associated with the COVID-19 Pandemic—United States, March 2020 Through February 2021*, 65 Am. J. Indus. Med. 20 (2022). In the public sector, the Government Accountability

Office (GAO) reports that in the first six months of the pandemic a single federal agency, the Department of Energy, spent over $550 million reimbursing contractors for COVID-19-related paid leave. GAO, GAO-20-662, *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance and Use* 11 (Sept. 2020), https://perma.cc/TPF7-9VN4.

Once vaccines against COVID-19 became widely available in the United States, many private companies chose to mitigate the costs of the pandemic by imposing vaccination requirements on their workers and, in some cases, on visitors to their premises. 86 Fed. Reg. 63,418, 63,422 & n.13 (Nov. 16, 2021) (citing Jessica Mathews, *The Major Companies Requiring Workers to Get COVID Vaccines*, Fortune, Aug. 23, 2021, https://perma.cc/2WQZ-SUCA). Many companies have reported high rates of compliance with these requirements. For example, by October 2021, 99.7 percent of United Airlines' workforce had complied with its vaccination requirements, and Tyson Foods had reported that more than 96 percent of its workforce was vaccinated. *Id.* at 63,422.

2. The challenged federal actions

On September 9, 2021, President Biden issued Executive Order No. 14,042. 86 Fed. Reg. 50,985 (Sept. 14, 2021). The Executive Order instructs Executive departments and agencies, "to the extent permitted by law," to incorporate a COVID-19 safety clause into certain future contracts and solicitations. *Id.* § 2(a), 86 Fed. Reg. at 50,985. That clause requires that contractors and subcontractors comply with guidance developed by a federal task force, upon the OMB Director's determination that adherence

to the provisions "by contractors or subcontractors[] will promote economy and efficiency in Federal contracting." *Id.* The Executive Order further instructs the FAR Council to amend the FAR to include the same COVID-19 safety clause. *Id.* § 3(a), 86 Fed. Reg. at 50,986. It states that "agencies are strongly encouraged, to the extent permitted by law," to seek to modify existing contracts to include the COVID-19 safety clause. *Id.* § 6(c), 86 Fed. Reg. at 50,987. But the Executive Order by its terms does not apply to existing contracts absent the contractor's consent. *See id.* § 2(a), 86 Fed. Reg. at 50,985.[1] Nor does it apply even prospectively to contractors' workplaces that are unconnected to work on the federal contract. *See id.* ("This clause shall apply to any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument (as described in section 5(a) of this order).").

On November 10, 2021, the Acting OMB Director determined that the guidance prepared by the designated task force would promote economy and efficiency in federal contracting ("OMB determination"). 86 Fed. Reg. at 63,418; *see* Exec. Order No. 14,042, § 2(c), 86 Fed. Reg. at 50,985-986.[2] The approved guidance requires covered contractor employees to be fully vaccinated against COVID-19 unless they are legally

[1] Contractors can agree to bilaterally modify existing contracts to include the COVID-19 safety clause. The Executive Order also applies to existing contracts upon extension, renewal, or exercise of an option. Exec. Order No. 14,042, § 5(a), 86 Fed. Reg. at 50,986.

[2] This OMB determination "rescind[ed] and supersede[d]" a prior determination by the Acting OMB Director. 86 Fed. Reg. at 63,418.

entitled to an accommodation. 86 Fed. Reg. at 63,420. It also requires, among other things, that covered contractor employees wear masks and physically distance while at workplace locations where work on or in connection with federal contracts is being performed. *Id.* at 63,420-21. The Acting OMB Director explained that, "[j]ust as … private businesses have concluded that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market, … the Guidance will realize economy and efficiency in Federal contracting." *Id.* at 63,421. She further noted that the benefits achieved in reducing extended employee absences would outweigh any "cost associated with replacing" unvaccinated employees, as "the experience of private companies" indicated that the overwhelming majority of employees comply with vaccination requirements. *Id.* at 63,422 & n.13.

On September 30, 2021, the FAR Council issued guidance advising agencies on how to seek to include the COVID-19 safety clause in new contracts and solicitations ("FAR Council guidance"). Memorandum from FAR Council to Chief Acquisition Officers, et al., re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021), https://perma.cc/9BQ8-XBT6. That guidance contains a sample clause that implements the Executive Order.

C. Prior Proceedings

In October 2021, the States of Georgia, Alabama, Idaho, Kansas, South Carolina, Utah, and West Virginia, as well as various state officials and agencies, filed this suit challenging the Executive Order, the OMB determination, and the FAR Council

guidance. Plaintiffs moved for a preliminary injunction in November 2021. The same month, Associated Builders and Contractors, Inc. (ABC), a construction industry trade association, sought to intervene as a plaintiff.

On December 7, the district court granted ABC's motion to intervene and entered a preliminary injunction that bars the federal government "from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America." A324. As a threshold matter, the court concluded that two plaintiffs have standing. A310-312. The court determined that the Board of Regents of the University System of Georgia has standing because one of its institutions is a finalist for a contract that will contain the challenged contract clause if awarded. A310. The court further concluded that ABC has standing because two of its members attested that they decided not to bid on upcoming federal construction projects because of the contract clause. A311. The court reasoned that, because only one plaintiff needs to have standing when multiple parties seek injunctive relief, it would allow the suit to proceed. A312.

The court identified constitutional and statutory concerns that, in its view, provided a basis for injunctive relief. The court first opined that the Executive Order is likely unlawful on the theory that it "bring[s] about an enormous and transformative expansion in … regulatory authority without clear congressional authorization." A316 (alterations in original) (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Next, although the court recognized that Presidents have "typically been afforded deference" in exercising their Procurement Act authority, A318, it expressed doubt that the statute authorized what the court described as "a regulation of public health," A317, A319. Finally, the court noted other courts' concerns that vaccination requirements might conflict with nondelegation and federalism principles. A320.

The court determined that plaintiffs satisfied the equitable requirements for a preliminary injunction. A320-323. The court found that the "time and effort" plaintiffs spent on measures to identify and track employees covered by the challenged provisions constituted irreparable "compliance costs resulting from" the Executive Order. A322. The court also asserted that the balance of harms and public interest weighed in favor of preliminary relief. A322-323. Expressing concern that, absent an injunction, plaintiffs would be forced to reassign or terminate employees who refused to be vaccinated, the court stated that enjoining the Executive Order would "essentially, do nothing more than maintain the status quo." A322.

The court concluded by addressing the scope of relief. The court had received evidence from the Board of Regents regarding one contract under consideration and from only two ABC members who declined to compete for government contracts because of the Executive Order's requirements. The court declined, however, to limit "relief to only those before the Court" and instead issued "an injunction with nationwide applicability." A324.

The government timely appealed, A326, and sought a stay pending appeal. On December 17, this Court denied the government's motion for a stay pending appeal on the view that the government had not shown that it would "be irreparably injured absent a stay." Order 2 (Dec. 17, 2021).

D. Standard Of Review

"The district court's grant of a preliminary injunction is reviewed for abuse of discretion." *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014). Its "findings of fact underlying the grant of an injunction are reviewed for clear error, and its conclusions of law are reviewed *de novo*." *Id.*

SUMMARY OF ARGUMENT

I. The Procurement Act authorizes the President to "prescribe policies and directives" that he considers "necessary" to ensure "an economical and efficient system" for procurement and contracting. For decades, Presidents and courts of appeals have understood this broad language to give the President flexibility to impose contracting requirements that have a sufficiently close nexus to the statutory objectives, including policies that improve the economy and efficiency of federal contractors' operations.

That nexus is evident here. The Executive Order responds to the exigencies of the COVID-19 pandemic, which has caused significant disruption in many sectors of the economy. As the President explained in issuing the Executive Order, requiring contractors' employees to become vaccinated decreases the likelihood that those employees

will miss work or transmit the virus to their coworkers. The requirement therefore advances the economy and efficiency of contractor operations, as private companies have recognized in imposing their own vaccination requirements. And ensuring that federal contractor performance is more efficient in turn enhances the economy and efficiency of the overall federal procurement system.

The district court did not take issue with the self-evident connection between the vaccination requirement and the statutory goal of an "economical and efficient system" for federal contracting. Instead, the court invoked "major questions" principles, and concluded that the Executive Order exceeded the President's authority because Congress did not specifically authorize using the Procurement Act to impose vaccination requirements on the federal contracting workforce. But the cases cited by the district court apply only when the Executive Branch exercises regulatory authority, which the Executive Order here does not. And they apply only when it is not clear that the statute delegates power to the Executive Branch; the Procurement Act unquestionably does so. Moreover, the Act delegates authority not to an agency but to the President, who is directly accountable to the people and has inherent power over the operations of the Executive Branch. In short, requiring the federal contractor workforce to be vaccinated in response to a pandemic emergency is the type of decision that Congress has entrusted the President to make.

For similar reasons, the district court erred in suggesting that the Executive Order implicates nondelegation and federalism principles. As every appellate court to

consider the question has held, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that guides the President's discretion. And because federal contracting is not a matter reserved to the States, this Executive Order raises no federalism concerns.

II. Plaintiffs have also failed to establish that they face irreparable injury in the absence of an injunction and that the balance of the equities favors preliminary relief. Although plaintiffs principally assert that they will be irreparably injured by the costs of complying with the Executive Order, it is settled law that such compliance costs do not constitute irreparable harm. Nor do plaintiffs' other asserted injuries entitle them to preliminary injunctive relief. The Executive Order has no effect on plaintiffs' existing agreements with the federal government. And plaintiffs' prediction that they will be forced to terminate scores of employees who will refuse vaccinations is speculative and at odds with the experience of private sector employers.

The pandemic's effects on the contractor workforce, on the other hand, are anything but conjectural. Enjoining the Executive Order will cause concrete and irreparable harm to the federal government and American taxpayers stemming from significant productivity losses in the performance of federal contracts, including contracts critical to maintaining national security and public health. In accepting plaintiffs' assertions without scrutiny, and in dismissing the impact of an Executive Order designed to minimize disruption of federal contracts, the district court improperly substituted its policy judgment for that of the President.

III. Finally, the district court independently erred in enjoining the Executive Order on a universal basis, with respect to countless contractors who were not before the court and have not challenged the Order. As Justices of the Supreme Court have recently observed, such injunctions transgress bedrock Article III and remedial principles, and they deprive the judiciary of the benefits of percolation. The district court provided no reasoned basis to disregard those principles. At a minimum, therefore, the district court's injunction should be vacated to the extent it covers entities that are not parties to this suit and that have not demonstrated any actual or imminent injury caused by the Executive Order.

ARGUMENT

I. THE EXECUTIVE ORDER IS LAWFUL

A. The Executive Order Is A Proper Exercise Of Authority Under The Procurement Act

1. The text of the Procurement Act states that the Act's objective "is to provide the Federal Government with an economical and efficient system" for its procurement activities, including "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. § 101. That statement of purpose "is 'an appropriate guide' to the 'meaning of the … operative provisions'" found later in the statute. *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012)). As relevant here, the Procurement Act authorizes the President to

"prescribe policies and directives that the President considers necessary to carry out" the Act, as long as those policies are "consistent" with the remainder of the statute. 40 U.S.C. § 121(a).

As the courts have long recognized, orders that improve the economy and efficiency of contractors' operations advance the economy and efficiency of the federal government's contracting "system," 40 U.S.C. § 101. In the first decades after the Procurement Act's enactment, for example, "the most prominent use of the President's authority under the [statute]" was "a series of anti-discrimination requirements for Government contractors." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc). Presidents Dwight Eisenhower, John F. Kennedy, and Lyndon Johnson each issued orders forbidding contractors from discriminating on the basis of race, creed, color, or national origin, *id.* (citing orders)—all in an effort to prevent the federal government's suppliers from "increasing its costs and delaying its programs by excluding from the labor pool available minority workmen," *Contractors Ass'n of E. Pa. v. Secretary of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971). "[T]he government's early, longstanding, and consistent interpretation of a statute"—especially without any resistance from Congress over many decades—is "powerful evidence of its original public meaning." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) (emphasis omitted).

More recently, Presidents have continued to exercise their Procurement Act authority to impose contract requirements that they determined enhanced the economy

and efficiency of federal contractor operations. President Bush, for example, issued an order requiring federal contractors to use the E-Verify system to verify the lawful immigration status of employees, reasoning that "[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions" and thus are "generally more efficient and dependable procurement sources." Exec. Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 6, 2008). And President Obama issued an order requiring federal contractors to provide their employees with paid sick leave based on his determination that doing so would "improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees." Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015). This "longstanding practice" is a strong indication that the challenged exercise of the President's Procurement Act authority, in line with these earlier invocations of that power, is legitimate. *See Biden v. Missouri*, __ S. Ct. __, 2022 WL 120950, at *3 (2022) (relying on an agency's "longstanding practice" in sustaining its exercise of authorities to combat the pandemic).

For decades, the courts of appeals have endorsed this view of the Procurement Act as affording the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies. *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *Kahn*, 618 F.2d at 789). Courts have accordingly

recognized that an order issued by the President is a proper exercise of his Procurement Act authority if there exists a "sufficiently close nexus" between the order and the statutory goals of economy and efficiency, *Kahn*, 618 F.2d at 792; *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981) ("[A]ny application of the Order must be reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement … in order to lie within the statutory grant." (citing *Contractors Ass'n of E. Pa.*, 442 F.2d at 170)), and the order is otherwise consistent with the law, *cf. Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (enjoining application of Procurement Act order because it conflicted with the National Labor Relations Act).

That standard is a "lenient" one, *Chao*, 325 F.3d at 367, and courts have respected the President's judgment that policies will enhance economy and efficiency in federal procurement, including by increasing the efficiency and productivity of federal contractor operations. In *Chao*, for example, the D.C. Circuit upheld an order requiring government contractors to post notices of certain labor rights on the basis of President Bush's judgment that "'[w]hen workers are better informed of their rights, … their productivity is enhanced,'" and that "'[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.'" *Id.* (quoting Exec. Order No. 13,201, 66 Fed. Reg. 11,221, 11,221 (Feb. 17, 2001)). Similarly, in *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d

726 (D. Md. 2009), a district court upheld President Bush's order requiring federal contractors to use the E-Verify system on the basis of his judgment that contractors with "rigorous employment eligibility confirmation policies" would be "more efficient and dependable procurement sources." *Id.* at 738 (quoting 73 Fed. Reg. at 33,285). And in *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), the former Fifth Circuit observed that President Kennedy's antidiscrimination order was not "so unrelated to the establishment of 'an economical and efficient system for … the procurement and supply' of property and services that [it] should be treated as issued without statutory authority." *Id.* at 632 n.1 (quoting 40 U.S.C. § 101).[3]

Congress has repeatedly revised the Procurement Act against the background of this longstanding consensus among the courts of appeals, and it has never modified or restricted the President's power. *See, e.g.*, Pub. L. No. 99-500, 100 Stat. 1783, 1783-345 (1986); Pub. L. No. 99-591, 100 Stat. 3341, 3341-345 (1986); Pub. L. No. 104-208, 110 Stat. 3009, 3009-337 (1996). In fact, Congress recently recodified—without substantive change—both the Procurement Act's statement of purpose and the operative provision authorizing the President to set procurement policies to achieve the statute's goals. *See* Pub. L. No. 107-217, 116 Stat. 1062, 1063 (2002) (recodifying statement of purpose at

[3] Decisions of the former Fifth Circuit prior to 1981 are binding precedent in this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

40 U.S.C. § 101); *id.* at 1068 (recodifying grant of authority at 40 U.S.C. § 121(a)); *id.* at 1303 ("This Act makes no substantive change in existing law").

As the en banc D.C. Circuit explained in *Kahn,* in sustaining the order in that case, when "the President's view of his own authority under a statute … has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect'" and "'should be followed unless there are compelling indications that it is wrong.'" 618 F.2d at 790 (quoting *Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), and *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979)). And as this Court has repeatedly emphasized, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it *re-enacts a statute without change*." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1280 (11th Cir. 2021) (emphasis added by this Court) (quoting *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1340 (11th Cir. 2017)); *see also Texas Dep't of Hous. & Cmty. Affairs 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." (alterations in original) (quoting Scalia & Garner, *supra*, at 322)); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 n.11 (2009) (holding that Congress "implicitly

adopted" the Supreme Court's "construction of the statute" when it amended the statute "without altering the text of" the provision in question).[4]

2. The Executive Order at issue here manifestly reflects the required nexus to the statutory objective of "an economical and efficient system" for contracting and procurement, 40 U.S.C. § 101. The Executive Order directs Executive departments and agencies to include in certain future contracts and solicitations a clause requiring contractors to provide adequate COVID-19 safeguards to their workers. Those safeguards, the Executive Order explains, "will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." 86 Fed. Reg. at 50,985. Those efforts, in turn, help to avoid schedule delays and reduced performance quality in critical federal contracts. The safeguards also minimize the leave and health care costs that, in some contracts, might be passed along to the federal government. By ensuring that the federal government is entering into contracts that will be performed efficiently, the Executive Order contributes directly to establishing "an economical and efficient system," 40 U.S.C. § 101, for "[p]rocuring … property and nonpersonal services" and "performing related functions including contracting," *id.* § 101(1).

[4] In denying the government's motion for a stay pending appeal in another challenge to the Executive Order at issue here, a motions panel of the Sixth Circuit announced a highly constricted understanding of Procurement Act authority at odds with the otherwise uniform view of the courts. *See Kentucky v. Biden*, __ F.4th __, 2022 WL 43178, at *12-14 (6th Cir. Jan. 5, 2022). That decision is mistaken on several grounds, including its misunderstanding of the principles discussed here.

As the Acting OMB Director noted, the Executive Order's beneficial effect on the economy and efficiency of contractor operations is confirmed by measures taken by private employers in the interests of their own economy and efficiency. The pandemic has had devastating effects on employers and their employees. As explained above, one study estimates that between March 2020 and February 2021, the pandemic cost $138 billion worth of lost work hours among U.S. full-time workers. Asfaw, *supra*. And in many cases, the effects of employees' COVID-19 infections are not limited to the absences of those employees; infected employees pose an increased risk of transmitting the virus to the coworkers, customers, and clients with whom they interact. To address those concerns, large numbers of private employers—including AT&T, Bank of America, Google, Johnson & Johnson, and Microsoft—have established vaccination requirements for their workforces, recognizing "that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market." 86 Fed. Reg. at 63,421-422, 63,422 n.13. The Procurement Act empowers the President to use the same means as private enterprises in making a judgment about how best to promote economy and efficiency in the federal government's contracting and procurement.

3. It is immaterial that Presidents have not previously directed inclusion of a vaccination requirement in federal contracts. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2261 (2021) ("[T]he non-use[] of a power does not disprove its existence."

(citation omitted)). Presidents have previously exercised their Procurement Act authority in novel ways, and courts have upheld those orders. *See supra* pp. 15-18. In any event, Presidents have not, for as long as the Procurement Act has existed, had to confront the impact of a pandemic like this one. What is relevant is that Presidents have exercised their authority under the Procurement Act in a way that reflects the broadly worded text and the responsibilities of managing the Executive Branch. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[T]he fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command" (cleaned up)). Indeed, the Supreme Court recently rejected a similar effort to "offer a narrow[] view" of "seemingly broad [statutory] language," where "the longstanding practice of" the Executive Branch "in implementing the relevant statutory authorities [told] a different story." *Missouri*, 2022 WL 120950, at *3.

Nor is it relevant that the Executive Order extends to employees of a federal contractor who are not themselves working on a federal contract but who physically interact with colleagues who are. COVID-19 spreads quickly in closed indoor spaces, *see* 86 Fed. Reg. at 63,421-422, and any unvaccinated employee can easily transmit the virus to federal contract employees in a shared workspace. For that reason, many private and public entities have required proof of vaccination for all employees, contractors, vendors, and guests at a given workplace. Mathews, *supra*. Nothing in the Pro-

curement Act disables the President from taking the same measures for those participating in government procurement under the Spending Clause and providing services to the federal government. And, by its terms, the Executive Order does not apply to a contractor's workplaces in which no "individual is working on or in connection with a Federal Government contract or contract-like instrument." 86 Fed. Reg. at 50,985.

It is likewise immaterial whether, as the district court noted, one "practical" effect of the Executive Order will be the general public-health benefit resulting from the vaccinations. A316. Exercises of proprietary authority under the Procurement Act and related statutes have often had effects in addition to the promotion of economy and efficiency. For example, in *American Federation of Government Employees, AFL-CIO v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (R.B. Ginsburg, J.), the D.C. Circuit observed that the Executive Order sustained in *Kahn*—which had the principal purpose of lowering the government's procurement costs by requiring adherence to price and wage guidelines—had the "additional goal of slowing inflation in the economy as a whole." *Id.* at 821 (citing *Kahn*, 618 F.2d at 792-793). Much the same was true of the antidiscrimination requirements addressed in cases like *Contractors Association*. As the D.C. Circuit noted, these requirements had the "additional goal of promoting enhanced employment opportunities for minorities." *Id.* (citing *Contractors Ass'n*, 442 F.2d at 171). And it was equally true of the order at issue in *Chamber of Commerce*, in which President Bush required federal contractors to use the E-Verify system to verify the lawful immigration status of their employees; that order had significant effects on the implementation of

immigration laws in addition to its impact on the economy and efficiency of federal procurement. *See supra* pp. 16. The President's determination of how best to achieve economy and efficiency in federal operations does not "become[] illegitimate," the D.C. Circuit explained, simply because, "in addition to" advancing those goals, it "serves other, not impermissible, ends as well." *Carmen*, 669 F.2d at 821.

Ultimately, what matters is not whether a President's exercise of his authority under the Procurement Act has broader effects but whether that exercise of authority bears a reasonable nexus to the Procurement Act's objective of economy and efficiency in federal contracting and procurement. And here, for the reasons explained, the requirement's nexus to economy and efficiency is clear.

That logic does not give the President "the right to impose virtually any kind of requirement on businesses that wish to contract with the Government," A319-320. Orders must still be reasonably related to "an economical and efficient system" of procurement, 40 U.S.C. § 101. Moreover, as noted above, many private companies require their workers to be vaccinated against COVID-19 for reasons paralleling those that led the President to issue the challenged order. *See supra* p. 20. And becoming vaccinated against serious illnesses has long been a "common requirement[]" of American life, including at educational institutions. *See Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (discussing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). Whatever the

outer limits of the President's Procurement Act authority may be, measures by the government that have also been imposed by entities of all types in analogous situations fall comfortably within the President's power to manage federal contracting.

B. Major Questions Principles Do Not Cast Doubt On The Legality Of The Executive Order

The district court did not explain why measures critical to achieving workplace safety and efficiency fell outside of the statute's grant of authority. Nor did the court attempt to reconcile its ruling with decades of decisions sustaining a variety of orders promulgated under the Procurement Act. The court instead expressed doubt that the Procurement Act authorized the President "to direct the type of actions" at issue here. A316. The court pointed to "the major questions doctrine"—that is, the proposition that "Congress is expected to 'speak clearly' when authorizing the exercise of powers of 'vast economic and political significance.'" *Id.* (quoting *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). That reasoning misunderstands both the nature of the Executive Order and the nature of the interpretive principles at issue.

1. The district court was incorrect to regard the Executive Order as working "an enormous and transformative expansion in … regulatory authority." A316 (alteration in original) (quoting *Utility Air*, 573 U.S. at 324). The Executive Order is not an exercise of "regulatory authority" at all. It is an exercise of the President's proprietary authority, as the purchaser of goods and services from federal contractors and subcon-

tractors—and one that applies only to those workplaces where work on federal contracts is taking place. As the Supreme Court recognized eighty years ago, "[l]ike private individuals and businesses, the Government enjoys the unrestricted power … to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). The Executive Order thus does not regulate employers generally (or even federal contractors generally, because it does not reach workplaces that are unrelated to federal contracting work) but rather reflects the President's decision—as part of his power to manage public funds—to impose contract terms on companies that elect to do business with the federal government.

That fundamental distinction sets the Executive Order apart from the COVID-19 vaccination-or-testing standard promulgated by the Occupational Safety and Health Administration (OSHA). *See National Fed'n of Ind. Bus. v. OSHA*, __ S. Ct. __, 2022 WL 120952 (2022) (per curiam) (concluding that plaintiffs were likely to succeed on the merits of their challenge to OSHA's standard). The standard there directly regulated employers, pursuant to authority granted by Congress under the Commerce Clause. *See id.* at *1. In contrast, the Procurement Act is an exercise of Congress's power under the Spending Clause, and the Executive Order challenged here invokes only the President's power to impose conditions in workplaces involved in performing federal contracts. Congress routinely employs general terms when authorizing the Executive to manage and expend public funds. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308,

322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."). And the legality of those general authorizations "has never seriously been questioned." *Clinton v. City of New York*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part). In short, Congress was not required to specify the precise means appropriate for the Executive to improve efficiency of federal contracts in the midst of a global pandemic, even if would be required to do so in certain contexts involving direct regulation.

2. Even assuming the district court's mistaken premise that the Executive Order is an exercise of "regulatory authority," the court's understanding of major questions principles and their application to this case was fundamentally mistaken. Major questions principles do not call into question presidential actions where, as here, statutory text and history confirm the breadth of the authority that Congress has conferred.

a. The interpretive principles invoked by the district court reflect the idea that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)), *quoted in Alabama Ass'n of Realtors*, 141 S. Ct. at 2489); *see National Fed'n of Indep. Bus.*, 2022 WL 120952, at *3 (similar).

In *Brown & Williamson*, for example, the Supreme Court held that a "cryptic" statutory provision should not be understood as "delegat[ing]" to the FDA the authority

to resolve the question whether cigarettes and smokeless tobacco should be banned; that was a question for Congress, not the FDA, the Court concluded. 529 U.S. at 159-160; *see id.* at 141, 156 (explaining that the agency's interpretation would be "incompatible" with other aspects of the statute). Likewise, the Court in *Utility Air* rejected the EPA's interpretation of ambiguous provisions of the Clean Air Act—which would have allowed the agency to set standards for emissions of greenhouse gases from new motor vehicles—on the ground that "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 573 U.S. at 324; *see id.* at 321 (explaining that the agency's position was "inconsistent with—in fact, would overthrow—the Act's structure and design"). In *King v. Burwell*, 576 U.S. 473 (2015), the Supreme Court held that Congress did not clearly delegate to the IRS the determination whether tax subsidies for health insurance plans purchased on an Exchange created by the Affordable Care Act were available for Exchanges run by the federal government; the Court accordingly resolved that statutory question de novo. *Id.* at 485-486. In *Alabama Association of Realtors*, the Supreme Court held that a provision of the Public Health Service Act did not delegate to the CDC the authority to institute a moratorium on evictions. 141 S. Ct. at 2489. And in *National Federation of Independent Business*, the Supreme Court concluded that the Occupational Safety and Health Act authorizes OSHA to regulate only "*occupational* hazards" and not "the hazards of daily life," and that therefore it was not "clear" that Congress had given OSHA the authority

"to regulate the hazards of daily life … simply because most Americans have jobs and face those same risks while on the clock." 2022 WL 120952, at *3

b. Those decisions underscore why—for at least three reasons—no consideration of "major questions" principles precludes the Executive Order here. *First*, the text of the Procurement Act makes plain that Congress delegated the authority to determine what "policies and directives" are "necessary to carry out" the Procurement Act's objective of ensuring "an economical and efficient system" for federal contracting and procurement, 40 U.S.C. § 121. If an Executive Order bears a reasonable nexus to that objective, there is no question that Congress authorized its issuance.

Second, the fact that the authority here is delegated to the President himself distinguishes this case from those where courts have questioned whether Congress intended to delegate authority over a "major question" to an administrative agency. Whereas courts have expressed the concern that agencies lack political accountability, *Brown & Williamson*, 529 U.S. at 150 ("Congress—the body elected by the people—must make the policy determinations … and not some agency made up of appointed officials"), the President is unquestionably "accountable to the people," *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513 (2010). There is much less concern, then, that an action undertaken by the President will escape political consequence than one undertaken by an agency.

Third, one of the other concerns animating major questions principles—the prospect of agencies overreaching their authority, *see National Fed'n of Indep. Bus.*, 2022 WL

120952, at *4 (expressing concern that the standard "extend[ed] beyond the agency's legitimate reach")—is inapplicable here because the President's authority to undertake the challenged action is arguably not dependent on congressional authorization. The President has inherent power under Article II to exercise general administrative control "throughout the Executive Branch of government of which he is the head." *Building & Construction Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002). Whether or not that power would have allowed the President to issue this Executive Order had the Procurement Act never been enacted—a question not presented here, as the Executive Order is framed solely as an exercise of power given by the Procurement Act—it certainly weighs against the district court's invocation of major questions principles.

3. The Procurement Act does not list the types of concerns that a President may determine are relevant to economy and efficiency, or the types of measures to be employed in pursuing those ends. But to insist that Congress specifically address a vaccination requirement in these circumstances would require it to have oracular powers. "Economical" and "efficient" are terms of great breadth, *see Kahn*, 618 F.2d at 789; *Farkas*, 375 F.2d at 632 n.1 (describing President's "broad" authority under Procurement Act), and in using them, Congress gave the President authority to deal with unforeseen contingencies as well as familiar concerns. "[T]he presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1277 (11th Cir. 2020) (quoting Scalia & Garner, *supra*, at 101). The President's longstanding practice of using the

Procurement Act to address a wide range of concerns related to federal contractor operations confirms the breadth of this authority. The President might not previously have had occasion to adopt a vaccination requirement to address those concerns. "But he has never had to address an infection problem of this scale and scope before." *Missouri*, 2022 WL 120950, at *3.

Although "[t]he challenges posed by a global pandemic" are serious and were unanticipated, "such unprecedented circumstances provide no grounds for limiting the exercise of authorities" the Executive Branch "has long been recognized to have." *Missouri*, 2022 WL 120950, at *5. Just as the Supreme Court recently concluded that the Executive Branch may "impose[] conditions of participation" on recipients of Medicare and Medicaid that include a vaccination requirement, *id.* at *2, so, too, should this Court uphold the President's imposition of the same vaccination requirements as a condition of participation in federal contracting.

C. The Executive Order Does Not Raise Nondelegation Or State Sovereignty Concerns

To bolster its atextual analysis, the district court noted that two other courts have expressed concern that policies requiring vaccination might run afoul of the nondelegation doctrine and "intrude on state sovereignty." A320 (first citing *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021); and then citing *Kentucky v. Biden*, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021)). Those concerns betray a fundamental misunderstanding of the Procurement Act and the Executive Order.

1. The district court's speculation regarding nondelegation principles rests on many of the same errors underlying its major questions discussion. The nondelegation doctrine recognizes that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy*, 139 S. Ct. at 2123 (plurality op.) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)). But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944) (citation omitted). On the contrary, "in our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Thus, the Court has only twice held statutes invalid on nondelegation grounds and has concluded that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (second alteration in original) (citation omitted).

That standard is easily met here. The Procurement Act sets forth specific statutory goals—the promotion of "an economical and efficient system" of federal procurement of property and services, 40 U.S.C. § 101—and authorizes the President to issue orders reasonably related to those statutory goals in the particular context of federal procurement, *see id.* § 121(a). As every court of appeals to consider the question

has recognized, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that "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; *see City of Albuquerque v. Department of Interior*, 379 F.3d 901, 914-915 (10th Cir. 2004).

Even if more specific statutory guidance might be required in some circumstance, it is not required here. As explained, the Procurement Act does not authorize the President to directly regulate private conduct. *Cf. Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (observing that the nondelegation doctrine requires that "Congress makes the policy decisions when regulating private conduct"). It concerns only the exercise of the government's proprietary authority to manage public funds by imposing conditions on those who seek and obtain government contracts that are reasonably related to the performance of such contracts. Congress regularly uses general delegations in those circumstances without raising nondelegation concerns, *see supra* p. 26-27, because the "powers granted to manage government property" relate to the President's inherent authority to manage the Executive Branch, and are generally not considered "an abdication of the 'law-making' function," David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance*?, 83 Mich. L. Rev. 1223, 1266-1267 (1985) (citation omitted); *cf. National Fed'n of Indep. Bus.*, 2022 WL 120952, at *7 (Gorsuch, J., concurring)

("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its *legislative* powers to unelected officials." (emphasis added)).

2. The Executive Order also does not intrude on an area that is traditionally reserved to the States. Federalism concerns may be relevant in interpreting the reach of a federal statute, but it is settled law that the government does not "invade[]" areas of state sovereignty "simply because it exercises its authority … in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). In any event, federal contracts are not an area traditionally reserved to the states. On the contrary, the Constitution expressly provides that "*Congress* has authority under the Spending Clause to appropriate federal moneys to promote the general welfare" and "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605 (2004) (emphasis added). And when it comes specifically to the federal government's power to regulate the performance of federal contracts, the Supreme Court and courts of appeals have repeatedly held that "federal contractors cannot be required to satisfy state 'qualifications in addition to those that the [Federal] Government has pronounced sufficient.'" *United States v. Virginia*, 139 F.3d 984, 990 (4th Cir. 1998) (alteration in original) (quoting *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956)).

The President's exercise of Procurement Act authority does not invade state sovereignty simply because "in addition to promoting economy and efficiency," it may also protect the health and safety of some of their citizens. *Carmen*, 669 F.2d at 821. Courts have routinely upheld executive orders that advance non-economic policy interests—preventing workplace discrimination, deterring illegal immigration, and so on—as well as promote economy and efficiency in federal procurement. *See supra* pp. 15-18. And Presidents have previously exercised Procurement Act authority in ways that affect areas traditionally regulated by States, like public health. *See, e.g.*, 80 Fed. Reg. at 54,697 (requiring federal contractors to allow employees to earn up to seven days or more of paid sick leave annually in order to "improve the health and performance of employees of Federal contractors").

II. PLAINTIFFS HAVE NOT ESTABLISHED THE EQUITABLE FACTORS FOR PRELIMINARY INJUNCTIVE RELIEF

The preliminary injunction should be vacated for the independent reason that plaintiffs have not carried their burden of "clearly establish[ing]" the remaining preliminary injunction factors. *Horton v. City of St. Augustine*, 272 F.3d 1318, 1326 (11th Cir. 2001) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)). Plaintiffs have not shown that they will suffer immediate and irreparable harm absent the injunction. Nor have they demonstrated that the balance of harms and public interest—factors that merge where, as here, the federal government is the opposing party, *Swain*

v. Junior, 961 F.3d 1276, 1293 (11th Cir. 2020)—weigh in favor of preliminary relief, especially in light of the injunction's nationwide scope, *see infra* pp. 40-44.

A. Plaintiffs Have Not Established Irreparable Harm

"A showing of irreparable injury is the *sine qua non* of injunctive relief." *Siegel*, 234 F.3d at 1176 (citation omitted). The asserted injury "must be neither remote nor speculative, but actual and imminent." *Id.* (citation omitted). Plaintiffs failed to make that showing.

1. The district court concluded that plaintiffs had established what "appear[ed] to be irreparable" injury based on the "compliance costs resulting from [the Executive Order]." A322. The court described these costs as "the time and effort" plaintiffs spent "in the past" and will spend "going forward" to identify and track employees covered by the challenged provisions. A322. But "[o]rdinary compliance costs are typically insufficient to render harm irreparable." *LabMD, Inc. v. FTC*, 678 F. App'x 816, 821 (11th Cir. 2016); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (same). A contrary rule would threaten to encompass every case in which a litigant complains of a new contract requirement, or, more typically, the cost of complying with a regulation or defending against an enforcement action, thus transforming "the extraordinary and drastic remedy" of equitable relief from the "exception" into the "rule." *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983).

This Court in *LabMD* recognized that compliance costs could amount to an irreparable injury for entities with financial outlooks so "bleak" that the cost of compliance would force them out of business. 678 F. App'x at 822. That exception has no application here, however. Most plaintiffs are sovereign States or their agencies, none of which faces the threat of economic insolvency. And although ABC complains about the costs of compliance to its members generally, A138, nothing in the record suggests that any members are about to be forced out of business by the cost of complying with the vaccination requirements. *See, e.g.*, *Freedom Holdings*, 408 F.3d at 115 (finding "the record does not support the [plaintiffs'] contention that compliance … would force [them] out of business, or would fundamentally change the nature of their operations").

The district court disregarded this well-established precedent, and instead premised its irreparable harm holding on the Fifth Circuit's assertion in *BST Holdings* that "'"complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance"' costs. A321-322 (quoting 17 F.4th at 618). This Court, however, recently declined to accept that argument in *Florida v. HHS*. *See* 19 F.4th 1271, 1292 n.6 (11th Cir. 2021). Plaintiffs' "compliance costs" are therefore "insufficient to render [their claimed] harm irreparable." *LabMD*, 678 F. App'x at 821.

2. Plaintiffs' other asserted injuries—the threat that some of their employees may quit or be fired rather than be vaccinated, and the potential that they may lose existing federal contracts—are insufficiently imminent and irreparable to support injunctive relief.

a. Plaintiffs introduced no evidence to substantiate their claim that they will be forced to undertake mass firings absent an injunction. The only evidence plaintiffs offered in support of their dire prediction was a handful of declarations stating that "enforcement [of the challenged provisions] may include disciplinary measures, such as removal," A252, or that some employees may quit rather than be vaccinated, A291-292; A296. Taken at face value, the declarations show, at most, that some employees of some employers might quit rather than be vaccinated. But "declarations say[ing] nothing more than that 'some employees' may resign rather than be vaccinated" are "entirely speculative" and do not "show[] an irreparable injury is likely." *Florida*, 19 F.4th at 1292. And as the Acting OMB Director noted, there is "no systematic evidence" that "vaccine mandates may lead some workers to quit their jobs rather than comply … or that it would be likely to occur among employees of Federal contractors." 86 Fed. Reg. at 63,422. In fact, "the experience of private companies is to the contrary," *id.*, with one recent study noting that only "1% of all adults … say they left a job because an employer required them to get vaccinated," Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE.

b. Nor have plaintiffs established that the Executive Order imminently and irreparably imperils their existing federal contracts. As explained above (at 6), the Executive Order requires that only certain *future* contracts include the vaccination require-

ment. And although some agencies have proposed modifying certain of plaintiffs' existing contracts to include the vaccination requirements, A256, such modifications, where accepted, have been the product of bilateral agreement.[5]

B. The Balance Of Harms And The Public Interest Weigh Heavily Against An Injunction

The district court also abused its discretion in holding that the balance of harms and public interest weighed in favor of an injunction. A322-323.

Delaying the implementation of the Executive Order will lead to productivity losses in the performance of federal contracts from schedule delays as well as leave and health care costs for workers who are sick, isolating, or quarantined. *See* 86 Fed. Reg. at 63,421-422; *Observations on Contractor Paid Leave Reimbursement Guidance and Use, supra* (finding that federal contractors for the Department of Energy alone incurred nearly $550 million in paid leave costs related to COVID-19 during the first half of 2020). These productivity losses will jeopardize economy and efficiency in the performance of hundreds of billions of dollars in federal contracts, including contracts critical to maintaining national security and to combatting the current COVID-19 pandemic.

[5] To the extent that a dispute arises over a provision in an existing contract, plaintiffs, like federal contractors generally, may seek monetary redress under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.* The availability of that relief negates plaintiffs' irreparable harm claims related to their existing contracts. *See Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("An injury is 'irreparable' only if it cannot be undone through monetary remedies.").

GAO, *A Snapshot of Government-Wide Contracting for FY 2020* (June 22, 2021), https://perma.cc/62H8-8EYL.

The district court, believing it was maintaining what it deemed to be the "status quo," A322, gave no weight to these concerns. But there is no stable "status quo" in this pandemic, as the emergence of new variants, including the more transmissible and immune-evasive Omicron variant, illustrates. *See supra* p. 5. The pandemic continues to pose complex and dynamic challenges to the government's ability to deliver essential services to the American people. The harm the injunction inflicts on this essential government work far outweighs plaintiffs' speculative claims of injury.

III. THE SCOPE OF THE PRELIMINARY INJUNCTION IS OVERBROAD

The district court independently erred in enjoining the Executive Order on a universal basis, covering countless contractors who are not parties to this case. Such universal injunctions transgress both Article III and equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to the parties in the case. They also frustrate the development of the law. Even assuming that it could otherwise be sustained, the district court's injunction should be vacated to the extent that it reaches beyond the plaintiffs who have demonstrated that they have standing to challenge the Executive Order.

"Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1650 (2017). A federal court may entertain a suit only by a plaintiff who has suffered a concrete "injury

in fact," and the court may grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1929-1930 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Accordingly, the Supreme Court has narrowed injunctions that extended relief beyond the harms to "any plaintiff in th[e] lawsuit." *Lewis*, 518 U.S. at 358.

Principles of equity reinforce those limitations. A court's authority to award relief is generally confined to relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999). And it is settled that injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (explaining that English and early American "courts of equity" typically "did not provide relief beyond the parties to the case"). In some cases, such as properly certified class actions, relief may extend to a broad range of plaintiffs. *Califano*, 442 U.S. at 702. But in those cases, courts are adjudicating only the rights of the parties before them, not passing on laws or issues as a general matter. *See Florida*, 19 F.4th at 1281-1282 (noting that the "appropriate circumstances" for issuing a nationwide injunction "are rare").

Universal injunctions also "take a toll on the federal court system." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). As this Court recently noted, universal "injunctions may have a detrimental effect by foreclosing adjudication by a number of different

courts and judges." *Florida*, 19 F.4th at 1283 (citation omitted); *see also id.* ("The hasty imposition of a nationwide injunction undermines the judicial system's goals of allowing the 'airing of competing views' and permitting multiple judges and circuits to weigh in on significant issues." (quoting *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring))). Particularly when a case "involves important and difficult questions of law, it is especially vital that various courts be allowed to weigh in so that the issues can percolate among the courts." *Id.*

The district court contravened those limitations in multiple respects. Most fundamentally, it expressly declined to limit its "relief to only those before the Court." A324. Instead, it enjoined the Executive Order as to all contractors nationwide, whether or not they are plaintiffs in this suit. But non-parties are "not the proper object of th[e court's] remediation," *Lewis*, 518 U.S. at 358, and awarding them relief transgresses the boundaries of relief "traditionally accorded by courts of equity," *Grupo Mexicano*, 527 U.S. at 319. While the district court sought to justify this step on the theory that a plaintiff-specific injunction would "prove unwieldy" and "cause more confusion," A324, the principle that the remedy should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs" does not contain a convenience exception, *Califano*, 442 U.S. at 702. In entering universal relief, the district court also short-circuited the consideration of the same issues in other courts, the decisions

of which now lack practical effect because the district court here already enjoined enforcement of the Executive Order in every application.[6] Indeed, in the time since the district court issued its universal injunction, a district court in the State of Washington reached the opposite conclusion on the legality of the Executive Order challenged here, but that ruling has no meaningful effect even as to the plaintiffs in that suit as a result of the overbroad relief entered below. *See Donovan v. Vance*, 2021 WL 5979250, at *6 (E.D. Wash. Dec. 17, 2021).

The district court also erred to the extent it concluded that the presence of a nationwide trade group of builders as a plaintiff compelled universal relief. The district court found only two members of ABC to have established an imminent injury. Plaintiffs offered no evidence concerning how many other ABC members face imminent harm or even oppose the policies announced in the Executive Order. Granting ABC relief on behalf of members who cannot demonstrate an injury subverts the rule that each plaintiff must "demonstrate standing separately for each form of relief sought." *Town of Chester*, 137 S. Ct. at 1650 (citation omitted). And the district court offered no

[6] *See Association of Gen. Contractors of Am. v. Biden*, No. 4:21-cv-1344 (N.D. Tex.); *Brnovich v. Biden*, No. 2:21-cv-1568 (D. Ariz.); *Conner v. Biden*, No. 6:21-cv-74 (N.D. Tex.); *Florida v. Nelson*, No. 8:21-cv-2524 (M.D. Fla.), *appeal filed* (11th Cir.); *Hollis v. Biden*, No. 1:21-cv-163 (N.D. Miss.), *appeal filed*, No. 21-60910 (5th Cir.); *Kentucky v. Biden*, No. 3:21-cv-55 (E.D. Ky.), *appeal filed*, No. 21-6147 (6th Cir.); *Louisiana v. Biden*, No. 1:21-cv-3867 (W.D. La.), *appeal filed,* No. 22-30019 (5th Cir.); *Missouri v. Biden*, No. 4:21-cv-1300 (E.D. Mo.), *appeal filed* (8th Cir.); *Oklahoma v. Biden*, No. 5:21-cv-1069 (W.D. Okla.); *Texas v. Biden*, No. 3:21-cv-309 (S.D. Tex.); *Unified Sys. Div. BMWED-IBT v. Biden*, No. 2:21-cv-700 (D. Utah).

reason why providing relief to ABC contractors throughout the country—some of whom may agree with the challenged requirements—is necessary to afford these plaintiffs complete relief. In any event, the court's injunction is hardly limited to ABC's members—it applies to every potential federal contractor, whether or not they belong to a plaintiff organization in this case.

The court thus erred in issuing a universal injunction instead of limiting its ruling to contracts and solicitations involving the plaintiffs who demonstrated standing before the district court: the State of Georgia and two ABC members.[7] *See* A300-311. Unless any other plaintiff can make out an imminent and irreparable injury, no other plaintiff should benefit from the court's injunction. And if this Court concludes that relief is appropriate as to ABC generally, it should limit the injunction to existing ABC members who identify themselves and agree to be bound by the ultimate resolution of this litigation. *See Department of Homeland Sec.*, 140 S. Ct. at 601 (Gorsuch, J., concurring) (stating that injunctions should not benefit those who "are not bound by adverse decisions"). Accordingly, even if this Court does not otherwise vacate the district court's order, it should limit the preliminary injunction to its proper scope.

[7] Because the States cannot sue the federal government in their capacity as *parens patriae* of their citizens, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982), there is no basis to enjoin the Executive Order as to private contractors who do business within the plaintiff States.

CONCLUSION

The preliminary injunction should be vacated in full or, at a minimum, to the extent it extends beyond plaintiffs' own federal contracts.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

JOSHUA REVESZ
Counsel to the Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
DANIEL WINIK
ANNA O. MOHAN
/s/ David L. Peters
DAVID L. PETERS
Attorneys, Appellate Staff
Civil Division, Room 7209
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1673

Of Counsel:

SAMUEL R. BAGENSTOS
General Counsel

ARPIT K. GARG
Deputy General Counsel

SARAH R. SCHEINMAN
Associate Deputy General Counsel

SHRADDHA A. UPADHYAYA
Associate General Counsel
Office of Management and Budget

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,059 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in 14-point Garamond, a proportionally spaced typeface.

/s/ David L. Peters
David L. Peters

ADDENDUM

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40 U.S.C. § 101

§ 101. Purpose

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.

(2) Using available property.

(3) Disposing of surplus property.

(4) Records management.

40 U.S.C. § 121

§ 121. Administrative

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

(b) Accounting principles and standards.--

(1) Prescription.--The Comptroller General, after considering the needs and requirements of executive agencies, shall prescribe principles and standards of accounting for property.

(2) Property accounting systems.--The Comptroller General shall cooperate with the Administrator of General Services and with executive agencies in the development of property accounting systems and approve the systems when they are adequate and in conformity with prescribed principles and standards.

(3) Compliance review.--From time to time the Comptroller General shall examine the property accounting systems established by executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems. The Comptroller General shall report to Congress any failure to comply with the principles and standards or to adequately account for property.

(c) Regulations by Administrator.--

(1) General authority.--The Administrator may prescribe regulations to carry out this subtitle.

(2) Required regulations and orders.--The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

(d) Delegation of authority by Administrator.--

(1) In general.--Except as provided in paragraph (2), the Administrator may delegate authority conferred on the Administrator by this subtitle to an official in the General Services Administration or to the head of another federal agency. The Administrator may authorize successive redelegation of authority conferred by this subtitle.

(2) Exceptions.--The Administrator may not delegate--

(A) the authority to prescribe regulations on matters of policy applying to executive agencies;

(B) the authority to transfer functions and related allocated amounts from one component of the Administration to another under paragraphs (1)(C) and (2)(A) of subsection (e); or

(C) other authority for which delegation is prohibited by this subtitle.

(3) Retention and use of rental payments.--A department or agency to which the Administrator has delegated authority to operate, maintain or repair a building or facility under this subsection shall retain the portion of the rental payment that the Administrator determines is available to operate, maintain or repair the building or facility. The department or agency shall directly expend the retained amounts to operate, maintain, or repair the building or facility. Any amounts retained under this paragraph shall remain available until expended for these purposes.

(e) Assignment of functions by Administrator.--

(1) In general.--The Administrator may provide for the performance of a function assigned under this subtitle by any of the following methods:

(A) The Administrator may direct the Administration to perform the function.

(B) The Administrator may designate or establish a component of the Administration and direct the component to perform the function.

(C) The Administrator may transfer the function from one component of the Administration to another.

(D) The Administrator may direct an executive agency to perform the function for itself, with the consent of the agency or by direction of the President.

(E) The Administrator may direct one executive agency to perform the function for another executive agency, with the consent of the agencies concerned or by direction of the President.

(F) The Administrator may provide for performance of a function by a combination of the methods described in this paragraph.

(2) Transfer of resources.--

(A) Within Administration.--If the Administrator transfers a function from one component of the Administration to another, the Administrator may also provide for the transfer of appropriate allocated amounts from the component that previously carried out the function to the component being directed to carry out the function. A transfer under this subparagraph must be reported to the Director of the Office of Management and Budget.

(B) Between agencies.--If the Administrator transfers a function from one executive agency to another (including a transfer to or from the Administration), the Administrator may also provide for the transfer of appropriate personnel, records, property, and allocated amounts from the executive agency that previously carried out the function to the executive agency being directed to carry out the function. A transfer under this subparagraph is subject to approval by the Director.

(f) Advisory committees.--The Administrator may establish advisory committees to provide advice on any function of the Administrator under this subtitle. Members of the advisory committees shall serve without compensation but are entitled to transportation and not more than $25 a day instead of expenses under section 5703 of title 5.

(g) Consultation with federal agencies.--The Administrator shall advise and consult with interested federal agencies and seek their advice and assistance to accomplish the purposes of this subtitle.

(h) Administering oaths.--In carrying out investigative duties, an officer or employee of the Administration, if authorized by the Administrator, may administer an oath to an individual.