No. 22-30019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Louisiana; State of Indiana; State of Mississippi,

Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States; United States of America; Federal Acquisition Regulatory Council; General Services Administration; Robin Carnahan, in her official capacity as Administrator of General Services, et al,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

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
Principal Deputy Assistant Attorney General

JOSHUA REVESZ
Counsel, Office of the Assistant Attorney General

MARK B. STERN
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

CERTIFICATE OF INTERESTED PERSONS

State of Louisiana, et al. v. Joseph R. Biden, Jr., et al., No. 22-30019

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-appellees:

Louisiana, State of
Indiana, State of
Mississippi, State of

Defendants-appellants:

Biden, Jr., Joseph
Carnahan, Robin
Federal Acquisition Regulatory Council
General Services Administration
United States of America

Counsel:

For plaintiffs-appellees:

Murrill, Elizabeth Baker
Office of the Attorney General for the State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

For defendants-appellants:

Edwards, Jr., Jerry
U.S. Attorney's Office Western District of Louisiana
300 Fannin Street
Shreveport, LA 71101

Mohan, Anna O.
Peters, David L.
U.S. Department of Justice Civil Division
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Wynosky, Kevin J.
U.S. Department of Justice Civil Division
1100 L Street N.W.
Washington, DC 20530

/s/ David L. Peters
David L. Peters
Attorney of record for defendants-appellants

STATEMENT REGARDING ORAL ARGUMENT

The federal government respectfully requests oral argument. The district court preliminarily enjoined the federal government from enforcing in Louisiana, Indiana, and Mississippi an Executive Order providing that certain federal contracts include vaccination requirements analogous to those adopted by private employers. The government believes that oral argument would facilitate the Court's consideration of the 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. 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 and procurement. *Id.* §§ 101, 121(a). These provisions have 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) (citation omitted), including policies that in the President's judgment will improve the economy and efficiency of federal contractors' operations. The President

exercised that authority by issuing an Executive Order directing federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, which include vaccination requirements.

That Executive Order falls well within the terms of the Procurement Act. Requiring entities that enter into federal contracts to have a vaccinated workforce enhances the efficiency of federal contractor operations 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. Ensuring that federal contracts are performed in a timely and cost-sensitive manner, in turn, advances the economy and efficiency of the overall federal procurement system by lowering contracting costs and protecting the public fisc.

The district court acknowledged the nexus between the Executive Order and the statutory goal of an economic and efficient system for procurement. The court nevertheless enjoined the Executive Order, on the grounds that it violated the Tenth Amendment and that its implementing documents violated the procedural requirements of the Office of Federal Procurement Policy Act (Procurement Policy Act), 41 U.S.C. § 1707. Those rationales are mistaken. The Executive Order is an exercise of the federal government's procurement powers applicable only to certain federal contractors; it thus does not intrude on an area traditionally reserved for the states. And the Executive Order's implementing documents were procedurally valid because they were not subject to the Procurement Policy Act's notice-and-comment

requirements, and even if they were, the Procurement Policy Act's procedural requirements were satisfied.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 2201 and 5 U.S.C. §§ 701-709. ROA.203. The district court entered a preliminary injunction on December 16, 2021. ROA.629-630. The federal government timely appealed on January 11, 2022. ROA.654; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The district court preliminarily enjoined the enforcement of the challenged Executive Order as to "any contract, grant, or any other like agreement … between the Plaintiff States [i.e., Louisiana, Indiana, and Mississippi] or their agencies and the national government." ROA.652. This appeal presents three questions:

1. Whether plaintiffs are likely to succeed on their claim that the Executive Order is an unlawful exercise of the President's authority under the Procurement Act.

2. Whether plaintiffs are likely to succeed on their claim that the documents implementing the Executive Order violated the Procurement Policy Act's procedural requirements.

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

STATEMENT OF THE CASE

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. 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 long used this power to issue a wide variety of executive orders 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." Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, sec. 4(e), § 6(h)(1), 93 Stat. 648, 650. And Congress created the Federal Acquisition Regulatory Council (FAR Council), 41

U.S.C. § 1302, which is chaired by the administrator of the Office of Federal Procurement Policy and provides guidance on how agencies should obtain full and open competition in contracting. 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.

Pursuant to § 1707 of the Procurement Policy Act, an "executive agency" must publish certain "procurement polic[ies], regulation[s], procedure[s], or form[s] … for public comment in the Federal Register" for 60 days before they go into effect. 41 U.S.C. § 1707(a), (c). Section 1707's procedural requirements apply only to a "procurement policy, regulation, procedure, or form" that "has a significant effect beyond the internal operating procedures of the agency" or "has a significant cost or administrative impact on contractors or offerors," *id.* § 1707(a)(1)(B), and "may be waived … if urgent and compelling circumstances make compliance with the requirements impracticable," *id.* § 1707(d).

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 & Human Servs., *Determination That a Public Health Emergency Exists* (Jan. 31, 2020), https://perma.cc/VZ5X-CT5R. In the two years since that emergency began, there have been more than 80 million confirmed cases of COVID-19 in America and more

than 980,000 Americans have died from the disease. Ctrs. for Disease Control & Prevention (CDC), *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker (last visited Apr. 13, 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 also 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 more than $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. 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; *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359 (5th Cir. 2022) (Higginson, J., dissenting) (per curiam) (citing evidence showing that "[i]mmunization requirements have proven extremely effective in the private sector").

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 guidance "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 a federal contract. *See id.* ("This clause shall apply to any workplace locations … in which an individual is working on or in connection with a Federal Government contract or contract-like instrument … .").

On November 10, 2021, the Acting OMB Director, exercising the authority delegated to her by the President, determined that the guidance prepared by the designated task force would promote economy and efficiency in federal contracting (OMB Determination).[2] 86 Fed. Reg. at 63,418; *see* Exec. Order No. 14,042, § 2(c), 86

[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.

Fed. Reg. at 50,985-986. The approved guidance requires covered contractor employees to be fully vaccinated against COVID-19 unless they are legally entitled to an accommodation. 86 Fed. Reg. at 63,420. It also requires, among other things, that in some circumstances 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 63,420-421. 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. And she concluded that the Procurement Policy Act's notice-and-comment requirements should be waived in order to provide federal contractors and subcontractors needed regulatory certainty to implement the Executive Order's requirements. *Id.* at 63,424.

On September 30, 2021, the FAR Council issued a memorandum providing agencies with "initial direction" on how to include a COVID-19 safety clause in new contracts and solicitations (FAR Memo). ROA.334-338. The FAR Memo explained that the FAR Council had "opened a case … to make appropriate amendments in the

FAR to reflect the requirements of the [Executive Order]." ROA.336. Until those amendments were made, the FAR Memo advised agencies to temporarily deviate from the FAR and offered a sample clause they could use in doing so. ROA.336-338. The FAR Memo urged contracting officers to "follow the direction for use of the clause set forth in the deviations issued by their respective agencies." ROA.335. And the FAR Memo further encouraged agencies, "consistent with applicable law," to include the clause in existing contracts and "contracts that are not covered or directly addressed by the [Executive Order]" because they are "under the simplified acquisition threshold" or are "for the manufacturing of products." ROA.336.

C. Prior Proceedings

In November 2021, the States of Louisiana, Mississippi, and Indiana filed this suit challenging the Executive Order, the OMB Determination, and the FAR Memo. Plaintiffs then moved for a preliminary injunction.

On December 16, the district court entered a preliminary injunction that bars the federal government from enforcing the Executive Order and related guidance "in any contract, grant, or any other like agreement … between the Plaintiff States or their agencies and the national government." ROA.652. As a threshold matter, the court concluded that plaintiffs had established standing to sue based on their proprietary interest in maintaining existing and securing new contracts with the federal government. ROA.639-642.

On the merits, the district court concluded that the President likely exceeded his statutory authority under the Procurement Act in issuing the challenged Executive Order. ROA.644. The court recognized that a "reasonably sufficient nexus can exist between [the Executive Order] and the government's policy under [the Procurement Act] to procure and manage properties and services in an economical and efficient manner." ROA.644. The court concluded, however, that the Executive Order likely conflicts with the Tenth Amendment because, in the court's view, the Executive Order was "motivated by public health policy first and foremost." ROA.645.

The court also held that plaintiffs were likely to succeed on their Administrative Procedure Act (APA) challenges to the FAR Memo and the OMB Determination. The court acknowledged that the FAR Memo offers only "initial" directions for how agencies can implement the Executive Order. ROA.646 (citation omitted). The court nonetheless concluded that the FAR Memo was "ripe for review" because plaintiffs' challenges were purely legal, agencies were already "pushing for the inclusion of the contract clause into existing agreements," and resolution of the issues would "foster effective administration of [the Procurement Act]." ROA.646-647 (citing *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 920 (5th Cir. 1993)). The court then determined that the FAR Memo likely violated the notice-and-comment requirements in § 1707 of the Procurement Policy Act. *See* ROA.647 (citing 41 U.S.C. § 1707). Even if the FAR Memo complied with § 1707, the court further reasoned, it would still likely constitute an "abuse of discretion" "in excess of … authority," ROA.648

(alteration in original) (quoting 5 U.S.C. § 706), because it encourages agencies to apply the COVID-19 safety clause in contracts not covered by the Executive Order. ROA.647-648.

The court also held that the OMB Determination failed to comply with § 1707's procedural requirements. Without first evaluating whether those requirements apply to the OMB Determination, the court concluded that the Acting OMB Director failed to satisfy them because covered contractor employees would have to take action "weeks before the [OMB Determination's] effective date" in order "to obtain a fully vaccinated status" by that date. ROA.648. The court recognized that § 1707 authorizes agencies to waive its requirements if "urgent and compelling circumstances make compliance with the requirements impracticable." 41 U.S.C. § 1707(d); *see* ROA.647. But the court concluded that the exception was inapplicable, expressing doubt "that the pandemic makes compliance with a relatively short comment period impracticable two years into the pandemic." ROA.647 (citation omitted); *see* ROA.649.

The court next determined that plaintiffs satisfied the remaining requirements for a preliminary injunction. It opined that implementation of the Executive Order would irreparably harm plaintiffs by "requir[ing] the diversion of resources necessary" to comply with the vaccination requirement, forcing plaintiffs to potentially "releas[e] … employee[s]" who refuse to be vaccinated, and interfering with plaintiffs' "constitutionally reserved [police power] over public health." ROA.649-650 (citation

omitted). The court also asserted that the balance of harms and public interest weighed in favor of preliminary relief. *See* ROA.650.

The court limited the injunction's scope to plaintiffs' own contracts with the federal government, explaining that "under current Supreme Court precedent the Plaintiff States may not have *parens patriae* to defend their citizens from [the Executive Order]," and that "there are no named private entity plaintiffs other than the states of Louisiana, Mississippi, and Indiana." ROA.651.

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, Congress, and the federal courts 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 the federal procurement system by enhancing the 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.

Nothing required Congress to more clearly authorize the President to issue the Executive Order. Plaintiffs argued in district court that clearer authorization was necessary because the Executive Order implicates questions of economic and political significance. But the agency actions in the cases plaintiffs cite involve exercises of regulatory authority. The Executive Order, in contrast, involves an exercise of the federal government's proprietary authority to impose new conditions in government contracts. Plaintiffs' cases also reflect concerns about the risk of diminished accountability associated with the agency actions at issue. No such risk exists here. The Procurement Act vests authority in the President, who has inherent power to direct operations of the Executive Branch and is directly accountable to the people.

The district court did not conclude that the President's issuance of the Executive Order required clearer authorization from Congress. Nor did it take issue with the connection between the vaccination requirement and the statutory goal of an "economical and efficient system" for procurement. To the contrary, the court acknowledged that "[i]t is not unreasonable to assume that a vaccinated labor pool will be more reliable during surges of viral transmission than an unvaccinated labor pool." ROA.644. The court nevertheless expressed concern that the Executive Order is motivated by "public health policy first and foremost" and conflicts with the

powers reserved to the States under the Tenth Amendment. ROA.645. Those concerns lack foundation. Courts have repeatedly upheld exercises of proprietary authority under the Procurement Act, even though they have effects in addition to the promotion of economy and efficiency (e.g., antidiscrimination requirements). The Executive Order, moreover, does not conflict with the Tenth Amendment, as federal contracting is not a matter reserved to the States.

II. The district court erred in holding that the FAR Memo and the OMB Determination are procedurally deficient because they did not comply with the notice-and-comment requirements in § 1707 of the Procurement Policy Act.

Plaintiffs lack a cause of action to challenge the FAR Memo because the FAR Memo is not "final agency action" subject to judicial review. The FAR Memo, by its terms, offers agencies only initial guidance and provides a sample clause they can use to begin implementing the requirements of the Executive Order. The FAR Memo has no legal effect on its own and expressly contemplates further agency action—namely a forthcoming FAR amendment including a final COVID-19 safety clause. Even if the FAR Memo were final agency action, plaintiffs' challenge would still fail because the FAR Memo is not a "procurement policy, regulation, procedure, or form" subject to § 1707's requirements.

The OMB Determination also is not subject to § 1707, which applies only to "executive agenc[ies]." The Acting OMB Director was not acting as an executive agency when she issued the OMB Determination—she was exercising presidentially

delegated authority. Because the President is not an executive agency subject to § 1707, neither was the Acting OMB Director when she stood in his shoes and issued the OMB Determination. The OMB Determination complied with § 1707, in any event, as it expressly invoked § 1707(d), which permits agencies to waive procedural requirements when urgent and compelling circumstances make compliance impracticable.

III. Plaintiffs failed to establish that they face irreparable injury in the absence of an injunction and that the balance of the equities favors preliminary relief. Plaintiffs assert that they will be irreparably injured by the costs of complying with the Executive Order, but they introduced no evidence of the specific compliance steps they have taken or the cost of those measures. Plaintiffs similarly offered no evidentiary support for their entirely speculative prediction that significant numbers of employees will quit or be terminated rather than be vaccinated. And as noted, the Executive Order is not a public health measure that intrudes on the States' reserved police powers.

The pandemic's effects on the economy and efficiency of the contractor workforce, by contrast, are anything but conjectural. Enjoining the Executive Order will cause concrete harm to the federal government and American taxpayers stemming from significant productivity losses in the performance of federal contracts. 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.

STANDARD OF REVIEW

This Court reviews the district court's grant of a preliminary injunction for abuse of discretion. *Jones v. Texas Dep't of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018) (per curiam). "Factual findings are reviewed for clear error, while legal conclusions are reviewed de novo." *Id.* (citation omitted).

ARGUMENT

I. THE EXECUTIVE ORDER IS LAWFUL

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

1. 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). In determining what policies are consistent with the statute, the Act states that its "purpose … is to provide the Federal Government with an economical and efficient system for," among other things, "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." *Id.* § 101. The link between that statement of purpose and the operative provision is clear: The statement of purpose in § 101 "is 'an appropriate guide' to the 'meaning of the … operative provision[]'" in § 121(a). *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)). The Procurement Act thus empowers the President to "prescribe policies and directives that the President considers necessary" to "provide the Federal Government with an economical and efficient system" for "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. §§ 101, 121.

That express grant of statutory authority permits the President to issue, among others, orders that improve the economy and efficiency of contractors' operations. 40 U.S.C. § 101. Establishing a "system"—i.e., a "formal scheme or method," *System*, Webster's New International Dictionary 2562 (2d ed. 1959))—for "procuring … nonpersonal services" and "performing related functions including contracting" necessarily includes setting the terms on which those services are to be acquired and contracts are to be performed. In fact, it is impossible even to enter into a contract without agreement on its terms. *See* 1 Williston on Contracts § 3.2 (4th ed.) (noting that, for a contract to be enforceable, there must be agreement on essential terms); *cf. Bilski v. Kappos*, 561 U.S. 593, 607 (2010) (explaining that term "'method' … include[s] at least some methods of doing business"). Thus, one primary way to ensure that a "system" for procurement and contracting is "economical and efficient" is to ensure that the system purchases services that are performed in a cost-efficient and timely manner.

2. That plain text interpretation of the Procurement Act is confirmed by "the government's early, longstanding, and consistent interpretation of [the] statute"— without any resistance from Congress over many decades—all of which 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).

a. Presidents routinely have used their Procurement Act authority to issue orders that improve the economy and efficiency of federal contractors' operations. 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 D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson each issued orders forbidding contractors from discriminating on the basis of race, creed, color, or national origin, *id.* at 790-791, 791 n.33 (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 Labor*, 442 F.2d 159, 170 (3d Cir. 1971).

More recently, Presidents have exercised their Procurement Act authority to impose contract requirements that they determined enhanced the economy and efficiency of federal contractor operations. President George W. Bush, for example, issued an order requiring federal contractors to use the E-Verify system to verify the

lawful immigration status of employees, stating 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). President Barack 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).

b. 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 … ." (citing *Contractors Ass'n*, 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 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 based on 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 based on his judgment that contractors with "rigorous employment eligibility confirmation policies" would be "more efficient and dependable procurement sources." *Id.* at 738 (quoting Exec. Order No. 13,465, 73 Fed. Reg. at 33,285). And in *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629 (5th Cir. 1967), this Court 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

(first alteration in original) (quoting 40 U.S.C. § 101); *see Contractors Ass'n*, 442 F.2d at 170-171 (agreeing that antidiscrimination orders were "authorized by the broad grant of procurement authority" because "the *federal government* has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects" (emphasis added)).

c. 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). Indeed, Congress 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 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 there, 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 (first quoting *Board of Governors of the*

Fed. Reserve Sys. v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978); and then quoting *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979)). And as this Court has emphasized, "where there exists a longstanding judicial construction, 'Congress is presumed to be aware of the interpretation … and to adopt that interpretation [if] it re-enacts a statute without change.'" *Silva-Trevino v. Holder*, 742 F.3d 197, 202 (5th Cir. 2014) (alterations in original) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *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).

d. The Supreme Court recently emphasized the importance of an agency's "longstanding practice" in concluding that the government was likely to succeed in defending a vaccination requirement "impose[d]" as a "condition[] of participation" on recipients of Medicare and Medicaid. *Biden v. Missouri*, 142 S. Ct. 647, 652-653 (2022) (per curiam). The governing statute there "authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Id.* at 652 (quoting 42 U.S.C. § 1395x(e)(9)). The Court rejected a

"narrow[] view" of that "seemingly broad language" that would "authorize[] the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid." *Id.* In doing so, the Court explained that "the longstanding practice of [the agency] in implementing the relevant statutory authorities tells a different story." *Id.* That is equally the case here, where the "longstanding practice" encompasses decades of Executive Branch practice and courts of appeals decisions interpreting the statute—without resistance from Congress—to authorize a variety of orders improving the economy and efficiency of contractors' operations.[3]

3. The Executive Order manifestly reflects the required nexus to the statutory objective of "an economical and efficient system" for procurement, 40 U.S.C. § 101. The Executive Order directs Executive departments and agencies to include in certain contracts and solicitations a clause requiring contractors to provide 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." Exec. Order No. 14,042, § 1, 86 Fed. Reg. at 50,985.

[3] 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 this longstanding practice and the otherwise uniform view of the courts. *See Kentucky v. Biden*, 23 F.4th 585, 603-610 (6th Cir. 2022). That decision is mistaken on several grounds, including its misunderstanding of the principles discussed here.

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).

As noted 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*. The extent of the impact stems in part from the highly transmissible nature of the virus. Contracting the virus may result in lost work hours not only for that employee, but also for the coworkers with whom they interact and to whom they may transmit the virus. 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—acting as the Chief Executive Officer of the Executive Branch—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.

The nexus to an "economical and efficient system" of procurement is not diminished because 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)). As the Supreme Court recently noted, Presidents have "never had to address an infection problem of this scale and scope before." *Missouri*, 142 S. Ct. at 653. The virus is readily transmitted and is particularly insidious because it can be communicated by asymptomatic carriers. And while the impact of the virus varies, it is often debilitating for extended periods and has been fatal in more than 980,000 cases to date. "[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Id.* at 654; *see also 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)).

B. The Procurement Act Is Clear And Broad Enough To Authorize The Executive Order

Plaintiffs cannot advance their case by arguing, as they did in the district court, that Congress was required to speak more clearly if it intended to give the President the power to issue the Executive Order. 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. To insist that Congress specifically address a vaccination requirement in these circumstances would require it to have oracular powers. "Econom[ical]" and "efficien[t]" are terms of great breadth, *see Kahn*, 618 F.2d at 789, 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." Scalia & Garner, *supra*, at 101.

Plaintiffs previously have suggested that a clearer authorization was required on the ground that the Executive Order implicates a question of "economic and political significance." *See* ROA.139 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). The district court did not invalidate the Executive Order on that ground, and those considerations are, in any event, inapplicable here.

1. As the cases plaintiffs cited in district court make clear, the economic and political significance of an issue can be relevant only when agency action threatens an "enormous and transformative expansion in … regulatory authority." *Utility Air*, 573 U.S. at 324; *see National Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). That principle has no application here.

The Executive Order does not exercise "regulatory authority" at all. Instead, it is an exercise of the federal government's proprietary authority, as the purchaser of services from federal contractors and subcontractors—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); instead, it reflects a management decision to insist on, from companies that elect to do business with the federal government, contract terms that reflect the same type of requirements that private sector employers impose on their employees.

The contract conditions addressed by the Executive Order thus stand on a very different footing from the COVID-19 vaccination-or-testing standard promulgated by the Occupational Safety and Health Administration (OSHA). *See National Fed'n of Ind. Bus.*, 142 S. Ct. at 664-665 (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 662-663. In contrast, the Procurement Act is an exercise of Congress's powers under distinct constitutional provisions, including 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. When the government acts "in its capacity as 'proprietor'" and "manager of its 'internal

operation,'" it "has a much freer hand" than when it "exercise[s] its sovereign power 'to regulate.'" *NASA v. Nelson*, 562 U.S. 134, 148 (2011). Congress, moreover, routinely employs general terms when authorizing the Executive to manage and expend public funds in that role. *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 it would be required to do so in certain contexts involving direct regulation.

2. Even on their own terms, the cases cited by plaintiffs suggest a need for special clarity only when a court must determine whether Congress has "assign[ed] 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 v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *see National Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (similar). Those considerations cast no doubt on the validity of the Executive Order.

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 Ass'n 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* hazard[s]" 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." 142 S. Ct. at 665.

The Executive Order—and its cited source of authority, the Procurement Act—differ in crucial respects.

First, the text of the Procurement Act makes plain that Congress assigned the President 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. §§ 101, 121. That authority is stated in unquestionably broad terms. *See Kahn*, 618 F.2d at 789 (noting that "[e]conom[ical]" and "efficien[t]" are terms of great breadth). If an Executive Order bears a reasonable nexus to that objective, there is no question that Congress authorized its issuance. *Cf. Missouri*, 142 S. Ct. at 652 (concluding that rule fell "within the authorit[y] that Congress … conferred" where definitional provisions authorized Secretary to impose conditions he "'finds necessary in the interest of health and safety'" (quoting 42 U.S.C. § 1395x(e)(9))).

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, *National Fed'n of Ind. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (allowing Congress to "hand off all its legislative powers to unelected agency officials" would

replace "government by the people" with "government by bureaucracy" (citation omitted)), the President is unquestionably "accountable to the people," *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010); *see Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359 (5th Cir. 2022) (Higginson, J., dissenting) (per curiam) (noting that the President is "the most singularly accountable elected official in the country"). There is little chance that the President will not be held accountable for actions he directs in an executive order.

Third, one of the other concerns animating these cases is the prospect of agencies overreaching their authority. *See National Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (expressing concern that the standard "extend[ed] beyond the agency's legitimate reach"). That concern applies here with diminished force in light of the President's inherent power under Article II to exercise general administrative control "throughout the Executive Branch of government, of which he is the head," *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), including by managing the performance of employees and contractors alike, *see Nelson*, 562 U.S. at 150 (rejecting argument that, "because they are contract employees and not civil servants, the Government's broad authority in managing its affairs should apply with diminished

force"). Congress would have understood that it was legislating in an area in which the President already exercises powers pursuant to his constitutional responsibilities.[4]

C. The Executive Order Does Not Violate The Tenth Amendment

The district court did not conclude that the President needed clearer statutory authority to issue the Executive Order. Nor did the court question the President's determination that the Executive Order would advance economy and efficiency in federal procurement. To the contrary, the district court "agree[d] … that a reasonably sufficient nexus can exist between [the Executive Order] and the government's policy under [the Procurement Act] to procure and manage properties and services in an economical and efficient manner." ROA.644; *see also* ROA.645 (recognizing that the Executive Order is "supported upon a nexus of economy and efficiency"). The court also recognized that "[i]t is not unreasonable to assume that a vaccinated labor pool will be more reliable during surges of viral transmission than an unvaccinated labor

[4] The same principles underscore why the Procurement Act does not violate the nondelegation doctrine. Congress regularly uses general delegations when authorizing the Executive to expend public funds because powers granted to manage government property and enter into contracts relate to the President's inherent authority to manage the Executive Branch. *Cf. Jessup v. United States*, 106 U.S. 147, 151-152 (1882) (collecting cases for the proposition that "the United States can, without the authority of any statute, make a valid contract"). Those powers generally do not involve "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. Gundy*, 139 S. Ct at 2144 (Gorsuch, J., dissenting) ("Congress may assign the President broad authority regarding … matters where he enjoys his own inherent Article II powers.").

pool." ROA.644. The court nevertheless enjoined the Executive Order on the ground that it "conflicts with the Tenth Amendment." ROA.644. That reasoning fundamentally misunderstands Tenth Amendment principles and the nature of the Executive Order.

The Tenth Amendment ensures that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Supreme Court decisions applying the Tenth Amendment establish that the federal government may not "commandeer" or "conscript" state governments in furtherance of a federal program. *See New York v. United States*, 505 U.S. 144, 161, 178 (1992); *Printz v. United States*, 521 U.S. 898, 935 (1997). But the Court "long ago rejected the suggestion" that the federal government "invades areas reserved to the States by the Tenth Amendment 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). As long as the federal action is authorized by the Constitution, "the Tenth Amendment gives way." *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013); *see United States v. Comstock*, 560 U.S. 126, 144 (2010) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States … ." (alteration in original) (quoting *New York*, 505 U.S. at 156). The only question, therefore, is whether the

Executive Order is a proper exercise of the President's authority under the Procurement Act. And for the reasons already explained, it is. *See supra* pp. 17-33.

Reference to Tenth Amendment principles is particularly anomalous in the context of federal contracting. In that area, it has long been understood that even state statutes of general applicability must give way when they would affect 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)); *see Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (invalidating state hazardous waste law aimed at protecting "public health and safety" because it "regulate[d] not only the federal contractor but the effective terms of federal contract itself" (citation omitted)).

Noting that the President had strongly supported vaccinations more generally as a means of combatting the pandemic, the district court suggested that the Executive Order came into conflict with the Tenth Amendment because it was "clearly and unequivocally motivated by public health policy first and foremost." ROA.645. The President's exercise of Procurement Act authority is not an invasion of state authority, simply because "in addition to promoting economy and efficiency" in federal contracting, it also protects the health and safety of citizens, *American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815, 821 (D.C. Cir. 1981). As discussed (at 20-22),

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. 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"). In any event, courts generally decline "to consider the President's motivation[s] in issuing [an] Executive Order." *Reich*, 74 F.3d at 1333; *see also Kentucky v. Biden*, __ F. Supp. 3d __, 2021 WL 5587446, at *1 (E.D. Ky. Nov. 30, 2021) (rejecting argument based on President's statements about vaccination rates that the Executive Order's economy-and-efficiency rationale was impermissibly pretextual); *Brnovich v. Biden*, __ F. Supp. 3d __, 2022 WL 252396, at *22 (D. Ariz. Jan. 27, 2022) (similar).

II. THE FAR MEMO AND THE OMB DETERMINATION ARE NOT PROCEDURALLY DEFECTIVE

The district court independently erred in concluding that plaintiffs are likely to succeed in their APA challenge to the FAR Memo and the OMB Determination because those documents did not undergo the notice-and-comment procedures described in the Procurement Policy Act, 41 U.S.C. § 1707. The FAR Memo is not final agency action subject to APA review and is not subject to the Procurement

Policy Act's requirements, in any event. The Procurement Policy Act's requirements also do not apply to the OMB Determination, and even if they did, the Acting OMB Director voluntarily complied with those requirements.[5]

A. The FAR Memo Is Not "Final Agency Action" And Is Not Subject To § 1707's Requirements

1. At the threshold, plaintiffs lack a cause of action to challenge the FAR Memo's purported procedural deficiencies because, as two other courts considering challenges to this vaccination requirement have concluded, the FAR Memo is not "final agency action" within the meaning of the APA. *See Kentucky*, 2021 WL 5587446, at *11 (concluding that the FAR Memo "is not subject to judicial review pursuant to the APA because the Guidance does not constitute final agency action"); *Brnovich*, 2022 WL 252396, at *23 (similar).

Agency action is final for purposes of APA review only if it marks "the consummation of the agency's decisionmaking process," and is action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citation omitted). The FAR Memo is neither. The Memo is not the consummation of the agency's decisionmaking because it "necessarily contemplates future agency action." *Louisiana*

[5] The FAR Memo and the OMB Determination are also not subject to the APA's notice-and-comment requirements, which do not apply to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2).

State v. U.S. Army Corps of Eng'rs, 834 F.3d 574, 584 (5th Cir. 2016). The Memo, by its terms, provides agencies only with "*initial* direction" for the incorporation of a *sample* COVID-19 safety clause into applicable contracts. ROA.334 (emphasis added). And it explains that the FAR Council will eventually "make appropriate amendments in the FAR" that will include the final COVID-19 safety clause. ROA.336. Those final FAR amendments, not the Memo's initial direction, are the culmination of the agency's decisionmaking. *See Kentucky*, 2021 WL 5587446, at *11 (concluding that FAR Memo is not "final agency action" because it instructs the FAR Council to "take *initial* steps to implement" the safety clause (citation omitted)).

The FAR Memo also does not spawn legal consequences. The FAR Memo alone does not bind any agency or any contractor. *See Brnovich*, 2022 WL 252396, at *23. Instead, it "'encourage[s]' agencies to use their independent authority to temporarily deviate from the FAR and includes a sample vaccination clause that agencies may use in doing so." *Id.* (alteration in original) (quoting ROA.336). It thus has no legal effect unless and until an agency issues a deviation, and a contracting officer, pursuant to that deviation, incorporates the COVID-19 safety clause into a procurement contract. ROA.335 (instructing agency's contracting officers to "follow the direction for use of the clause set forth in the deviations issued by their respective agencies"). If and when that occurs, the individual agency's incorporation of the clause into a particular contract is the action that determines rights and obligations, not the FAR Memo.

That logic also explains why it is irrelevant—for purposes of assessing the finality of the FAR Memo—whether some agencies have started asking contractors to modify their contracts to include the sample clause, *see* ROA.646-647. Those agency requests might be a *practical* consequence of the FAR Memo insofar as the Memo supplies the sample clause. But the only *legal* consequence will arise if, and only if, the contractor agrees to modify the contract to include the clause's language and that *legal* consequence will be the result of the agency's action, not the FAR Memo. The FAR Memo's failure to spawn any legal consequences in and of itself makes clear that it cannot be final agency action. *See Louisiana State*, 834 F.3d at 583 (concluding that agency action was not final where it "put pressure" on the state to comply but did not otherwise affect the state's "legal liability" or expose the state "to civil or criminal liability for non-compliance with the agency's view" and thus created only "practical, as opposed to legal," consequences).

2. Even if plaintiffs could challenge the FAR Memo under the APA, their challenge would still fail because the FAR Memo is not subject to the Procurement Policy Act's procedural requirements. The Procurement Policy Act applies only to "a procurement policy, regulation, procedure, or form" that "has a significant effect beyond the internal operating procedures of the agency" or "has a significant cost or administrative impact on contractors or offerors." 41 U.S.C. § 1707(a)(1). The FAR Memo does not satisfy those requirements: It does not direct an agency to take any specific action and instead merely points contracting officers to "the

direction[s] … issued by their respective agencies" for how to use the Memo's guidance. ROA.335. Thus, unlike a formal acquisition regulation, which is itself binding, *see* 41 U.S.C. § 1303(a)(2)(A), the FAR Memo has no effect, let alone a significant one. *See Kentucky*, 2021 WL 5587446, at * 11 (rejecting procedural challenge to FAR Memo "because it constitutes nonbinding guidance that does not rise to the level of a 'procurement policy, regulation, procedure, or form'" under § 1707); *Brnovich*, 2022 WL 252396, at *23 (same).

3. The district court appeared to acknowledge that the FAR Memo is not final insofar as it provides only "initial" directions to agencies, but the court mistakenly dismissed that fact as "not dispositive." ROA.646. Final agency action is not "merely a factor" in APA review, ROA.646; it is a "prerequisite," *Dalton v. Specter*, 511 U.S. 462, 469 (1994); *see Hawkins v. Dep't of Hous. & Urban Dev.,* 16 F.4th 147, 153 (5th Cir. 2021) ("[T]he APA provides judicial review of 'final agency action' only." (quoting 5 U.S.C. § 704)). The court's reliance on the framework set forth in *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911 (5th Cir. 1993), was misplaced. That case involved a pre-enforcement challenge to an agency policy statement. *See id.* at 919-920. To the extent the court considered other factors in addition to finality—like whether the case involved only purely legal issues or whether review would promote efficient resolution of those issues—it did so in the course of determining whether the pre-enforcement challenge was ripe and only after concluding that the policy statement was "final agency action." *See id.* at 920 (citation omitted). The court never

suggested that those other factors would permit review of an agency action that was not otherwise "final." *Id.* To the contrary, the court acknowledged that the APA "provides that *only* final agency actions are subject to judicial review." *Id.* at 920 n.14 (emphasis added).

The district court was also wrong to conclude that the FAR Memo exceeds the scope of the Executive Order and thus violates the APA, regardless of whether it is subject to § 1707's requirements, ROA.646-647. The FAR Memo summarizes the Executive Order's requirements, ROA.334-336, and then "strongly encourages" agencies to "apply the requirements of its guidance broadly" by including the clause in existing contracts and "contracts that are not covered or directly addressed by the [Executive Order] because the contract or subcontract is under the simplified acquisition threshold or is a contract or subcontract for the manufacturing of products," ROA.336. That guidance is entirely consistent with the Executive Order which likewise "strongly encourage[s]"—though does not require—agencies to incorporate the COVID-19 safety protocols into "all existing contracts and contract-like instruments." Exec. Order No. 14,042, § 6(c), 86 Fed. Reg. at 50,987. The FAR Memo did not, as the district court suggests, include grants in its coverage, ROA.647; rather, it encouraged agencies to apply the clause only in "contracts," ROA.336. In offering this encouragement, moreover, the FAR Memo makes clear that agencies should only incorporate the clause if "consistent with applicable law." ROA.336.

B. The OMB Determination Is Not Subject To § 1707 And Voluntarily Complied With Its Requirements

1. Plaintiffs' procedural challenge to the OMB Determination fails because the OMB Determination, like the FAR Memo, is not subject to the Procurement Policy Act's procedural requirements.

The Procurement Policy Act's requirements apply only to specifically enumerated "executive agenc[ies]." 41 U.S.C. § 1707(c); *see Brnovich*, 2022 WL 252396, at *21.[6] The Acting OMB Director, however, was not acting as an "executive agency" when she issued the OMB Determination. Instead, she was exercising authority delegated to her by the President under 3 U.S.C. § 301. *See* 86 Fed. Reg. at 50,985-986. When an agency exercises presidentially delegated authority, it "stands in the President's shoes," acting not as the agency, but as the President. *Natural Res. Def. Council, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 109 & n.5, 111 (D.D.C. 2009); *see also Detroit Int'l Bridge Co. v. Government of Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) (collecting cases "conclud[ing] that an agency's action on behalf of the President, involving discretionary authority committed to the President, is 'presidential'"), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017), *aff'd*, 883 F.3d 895 (D.C. Cir. 2018). Because the President is not listed among the executive agencies subject to § 1707's requirements, *see* 41 U.S.C. § 133, it follows that the Acting OMB Director

[6] The statute defines "executive agency" to include "executive" and "military department[s]," as well as "independent establishment[s]" and "wholly owned Government corporation[s]." 41 U.S.C. § 133.

also was not subject to those requirements when she exercised his delegated authority to issue the OMB Determination. *Cf.* GAO, B-333725, *Safer Federal Workforce Task Force—Applicability of the Congressional Review Act to COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* 6-7 (Mar. 17, 2022), https://go.usa.gov/xuacS (concluding that OMB was not acting as an "agency" within the meaning of the Congressional Review Act when it issued the OMB Determination because it was acting pursuant to presidentially delegated authority).

2. There is no need, however, to determine the applicability of the statute because the Acting OMB Director voluntarily complied with § 1707, and the district court erred in concluding that OMB had not satisfied its requirements.

Section 1707 provides that "a procurement policy, regulation, procedure, or form" ordinarily "may not take effect until 60 days after it is published for public comment in the Federal Register." 41 U.S.C. § 1707(a)(1). Those requirements "may be waived," however, "if urgent and compelling circumstances make compliance … impracticable." *Id.* § 1707(d). The Acting OMB Director correctly invoked that exception here, explaining that waiving § 1707's notice requirements was critical for several reasons. 86 Fed. Reg. at 63,423-424; *see Brnovich*, 2022 WL 252396, at *21-23 (concluding that Acting OMB Director "properly invoked the § 1707(d) waiver provision"); *Kentucky*, 2021 WL 5587446, at *12 (similar).

For one, the "broader economy-and-efficiency purpose" of the OMB Determination "would be severely undermined by the minimum delay" required

under § 1707's notice-and-comment provisions. 86 Fed. Reg. at 63,424. An important purpose of the guidance, the Acting OMB Director explained, was to "align[] the vaccination deadline for Federal contractors with the vaccination deadline for private companies under recent regulatory actions," including the OSHA standard, which at the time governed employers with 100 or more employees, and the Centers for Medicare & Medicaid Services (CMS) rule, which governed recipients of Medicare and Medicaid. *Id.* The Acting OMB Director described how certain employers could have workers or workplaces subject to each of those different vaccination requirements. *See id.* For those employers, having the same deadline across all requirements would "promote consistency and administrability" of the requirements and "eliminate potential confusion and frustration that disparate deadlines could produce." *Id.* Consistent deadlines would "also avoid needless costs in having multiple systems of records and internal accountability established for different deadlines," thereby "promoting economy and efficiency in Federal procurement." *Id.*

The Acting OMB Director further explained why waiving § 1707's comment period was vital to provide federal contractors with the regulatory certainty necessary to implement the Executive Order's requirements. *See* 86 Fed. Reg. at 63,424. If the OMB Determination underwent the requisite comment period, it could not have become effective until January 9, 2022 at the earliest—five days *after* the deadline for covered contractor employees to receive their final COVID-19 vaccination dose (January 4, 2022) and a little more than one week before contractors were expected to

have a fully vaccinated work force (January 18, 2022). *See id.* In other words, "absent an immediately effective determination of [the] deadline," contractors would not have known whether, at the conclusion of the 60-day comment period, they would be facing an imminent vaccination deadline or, as a result of the comment process, a delayed deadline. *Id.* Given the many weeks required to meet a vaccination deadline, contractors would have struggled to determine how to remain compliant. *Id.*; *see Kentucky*, 2021 WL 5587446, at *12 (concluding that OMB Determination "did not run afoul of proper administrative procedures" because the compliance date was set "to benefit federal contractors and ensure that they would have sufficient time to comply with the mandate").

The district court expressed doubt that "the pandemic makes compliance with a relatively short comment period impracticable two years into the pandemic." ROA.647 (citation omitted). That reasoning, however, ignores the Acting OMB Director's primary justifications for waiving § 1707's requirements: to align the deadlines with the CMS and OSHA rules and to promote regulatory certainty. In any event, as another court recently explained in rejecting a procedural challenge to the OMB Determination, "the mere fact of the pandemic's duration does not render its resolution any less urgent or compelling." *Brnovich*, 2022 WL 252396, at *22. "[T]he virus continues to claim American lives" and impair the economy and efficiency of federal contracts. *Id.* Thus, "inhibiting its progress remains vitally important." *Id.*

III. 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 made the requisite "clear showing" that the remaining preliminary injunction factors are satisfied. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs have not established 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, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh in favor of preliminary relief.

A. Plaintiffs Have Not Established Irreparable Harm

"When the movant fails to prove that, absent the injunction, irreparable injury will result … the preliminary injunction should be denied." *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985). "[S]peculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant." *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (citation omitted). Plaintiffs failed to make the requisite showing of irreparable harm here.

Plaintiffs claim that as a result of the Executive Order they will incur compliance costs related to "identify[ing] covered employees and manag[ing] their vaccination status." ROA.649. This Court has suggested that in certain

circumstances a "regulation later held invalid" may impose "the irreparable harm of nonrecoverable compliance costs." *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-221 (1994) (Scalia, J., concurring in part and in the judgment)). But as explained above, the Executive Order is not a regulation at all; rather, it is an exercise of the federal government's procurement authority. *See supra* pp. 27-29. And as other courts have recognized, "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). A contrary rule would encompass every case in which a litigant complains of a new contract requirement, thereby transforming "the extraordinary remedy" of equitable relief, *Winter*, 555 U.S. at 24 (citation omitted), from the exception to the rule.

Plaintiffs, moreover, have failed to identify the specific steps they have taken to "identify covered employees and manage their vaccination status." ROA.649. Nor have plaintiffs introduced evidence concerning the costs of those compliance measures. *Cf. Texas*, 829 F.3d at 431, 433 (detailing the compliance measures required by the new regulation and the "$2 billion in costs" that they would impose). And plaintiffs have not established that their compliance costs would necessarily be unrecoverable: At the preliminary injunction hearing, plaintiffs' witness Dr. James Henderson, President of the University of Louisiana System, testified that the University System would "[a]bsolutely" be able to recover "any new costs associated

with the modification" of an existing federal contract. ROA.749.[7] Plaintiffs' complained of compliance harms are entirely too "speculative" to warrant injunctive relief. *Daniels Health Scis.*, 710 F.3d at 585.

Plaintiffs similarly failed to introduce evidence substantiating their claim that the Executive Order will cause mass disruptions to their labor forces. Plaintiffs offered a handful of declarations stating that "[t]he Mandate could lead to increased employee turnover," ROA.274, and that certain state institutions "expect some … employees to resign or quit instead of comply with the mandate," ROA.270; ROA.277. Such conclusory declarations fail to establish that plaintiffs face more than "an unfounded fear" of harm. *Daniels Health Scis.*, 710 F.3d at 585 (citation omitted); *Florida v. Department of Health & Human Servs* , 19 F.4th 1271, 1292 (11th Cir. 2021) (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"). Further, 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 study noting that

[7] 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 Enterprise Int'l*, 762 F.2d at 472.

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.

The district court also mistakenly concluded that the Executive Order's purported intrusion into plaintiffs' reserved police powers constituted irreparable harm. As a threshold matter, the district court never concluded that plaintiffs established standing to assert their sovereign or quasi-sovereign interests, ROA.635-638, and, for that reason, it properly limited the injunction's scope to plaintiffs' own contracts with the federal government, ROA.651. In any event, for the reasons explained above (at 34-35), the Executive Order does not unconstitutionally infringe on plaintiffs' police powers, *Hodel*, 452 U.S. at 291, and thus does not inflict irreparable harm.

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. ROA.651. Delaying 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; *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance*

and Use, *supra*. These productivity losses will jeopardize the economy and efficiency of millions of dollars in federal contracts performed by plaintiffs. *See* ROA.640.

Having accepted plaintiffs' unsubstantiated allegations of harm, the district court casually dismissed these real and immediate injuries to the federal government and American taxpayers on the ground that "[w]e are now nearly two years into the COVID-19 pandemic … and the economy is recovering." ROA.650. But as the emergence of new variants starkly illustrates, *see supra* p. 6, the virus continues to pose complex and dynamic challenges to the delivery of services to the American people. How to address the evolving challenges the virus poses to this essential government work is a question best left to the President, as the politically accountable head of the Executive Branch, not to unelected courts.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JOSHUA REVESZ
Counsel to the Assistant Attorney General

MARK B. STERN
ANNA O. MOHAN
/s/ David L. Peters
DAVID L. PETERS
Attorney, Appellate Staff
Civil Division, Room 75209
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 SERVICE

I hereby certify that on April 13, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

s/ David L. Peters
David L. Peters

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,273 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 Garamond 14-point font, a proportionally spaced typeface.

s/ David L. Peters
David L. Peters