No. 22-1104

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI, et al.,

Plaintiffs-Appellees,

v.

JOSEPH BIDEN, Jr., et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Missouri

BRIEF FOR APPELLANTS

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

To enhance the economy and efficiency of the federal government's procurement system in the face of the unprecedented COVID-19 pandemic, the President issued an Executive Order requiring that certain new federal contracts include vaccination requirements analogous to those adopted by private employers. The district court preliminarily enjoined the federal government from enforcing the Executive Order in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming, on the ground that the Executive Order exceeded the President's authority under the Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. § 101 *et seq.*

Defendants-appellants challenge the issuance and scope of the district court's injunction, and believe that oral argument would facilitate the Court's consideration of the case. Defendants-appellants respectfully request 20 minutes per side for oral argument.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 4

A. Federal Contracting And The Procurement Act 4

B. COVID-19 Safety Requirements For Federal Contractors 5

1. The COVID-19 pandemic 5

2. The challenged federal actions 7

C. Prior Proceedings 9

SUMMARY OF ARGUMENT 12

STANDARD OF REVIEW 15

ARGUMENT 15

I. THE EXECUTIVE ORDER IS LAWFUL 15

A. The Executive Order Is A Proper Exercise Of Authority Under The Procurement Act 15

B. The Executive Order Reflects The Required Nexus To Economy And Efficiency In Federal Procurement 22

C. The Procurement Act Is Clear And Broad Enough To Authorize The Executive Order 28

II. PLAINTIFFS HAVE NOT ESTABLISHED THE EQUITABLE FACTORS FOR PRELIMINARY INJUNCTIVE RELIEF 36

A. Plaintiffs Have Not Established Irreparable Harm 36

B. The Balance Of Harms And The Public Interest Weigh Heavily Against An Injunction 39

III. THE SCOPE OF THE PRELIMINARY INJUNCTION IS OVERBROAD 40

CONCLUSION 43

TABLE OF AUTHORITIES

Cases: **Page(s)**

AFL-CIO v. Kahn,
618 F.2d 784 (D.C. Cir. 1979) 3, 17, 18, 20, 21, 26, 28, 33

Alabama Ass'n of Realtors v. Department of Health & Human Servs.,
141 S. Ct. 2485 (2021) 31, 32

Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,
458 U.S. 592 (1982) 41

American Fed'n of Gov't Emps. v. Carmen,
669 F.2d 815 (D.C. Cir. 1981) 3, 26, 27, 35

American Hosp. Ass'n v. Harris,
625 F.2d 1328 (7th Cir. 1980) 37

Biden v. Missouri,
142 S. Ct. 647 (2022) 21, 22, 25, 27, 33

Bilski v. Kappos,
561 U.S. 593 (2010) 16

Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.,
439 U.S. 234 (1978).....21

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 25

Building & Constr. Trades Dep't v. Allbaugh,
295 F.3d 28 (D.C. Cir. 2002) 34

Califano v. Yamasaki,
442 U.S. 682 (1979) 4, 40, 42

Chamber of Commerce v. Napolitano,
648 F. Supp. 2d 726 (D. Md. 2009) 19

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 19

Cincinnati Soap Co. v. United States,
301 U.S. 308 (1937) 30

Clinton v. City of New York,
524 U.S. 417 (1998) 31

Contractors Ass'n of E. Pa. v. Secretary of Labor,
442 F.2d 159 (3d Cir. 1971) 17, 19, 20, 26

Farkas v. Texas Instrument, Inc.,
375 F.2d 629 (5th Cir. 1967) 20

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000).....31

Feds for Med. Freedom v. Biden,
25 F.4th 354 (5th Cir. 2022) 7, 38

Florida v. HHS,
19 F.4th 1271 (11th Cir. 2021) 3, 38

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009) 21

Free Enter. Fund v. Public Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 33

Freedom Holdings, Inc. v. Spitzer,
408 F.3d 112 (2d Cir. 2005) 37

Gelco Corp. v. Coniston Partners,
811 F.2d 414 (8th Cir. 1987) 3, 36

Gill v. Whitford,
138 S. Ct. 1916 (2018) 40

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.,
527 U.S. 308 (1999) 4, 40, 42

Gundy v. United States,
139 S. Ct. 2116 (2019) 16, 34

Hein v. Freedom From Religion Found., Inc.,
551 U.S. 587 (2007) 28

Hodel v. Virginia Surface Mining & Reclamation Ass'n,
452 U.S. 264 (1981) 35, 41

Iowa Utils. Bd. v. FCC,
109 F.3d 418 (8th Cir. 1996) 37, 38

Jessup v. United States,
106 U.S. 147 (1882) 34

Kentucky v. Biden,
23 F.4th 585 (6th Cir. 2022) 22

King v. Burwell,
576 U.S. 473 (2015) 32

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 17

Leslie Miller, Inc. v. Arkansas,
352 U.S. 187 (1956) 35

Lewis v. Casey,
518 U.S. 343 (1996) 4, 40, 41, 42

Liberty Mut. Ins. Co. v. Friedman,
639 F.2d 164 (4th Cir. 1981) 18

Lorillard v. Pons,
434 U.S. 575 (1978) 21

Miller v. Honkamp Krueger Fin. Servs., Inc.,
9 F.4th 1011 (8th Cir. 2021) 15

Miller v. Youakim,
440 U.S. 125 (1979) 21

Morriss v. BNSF Ry. Co.,
817 F.3d 1104 (8th Cir. 2016) 21

NASA v. Nelson,
562 U.S. 134 (2011) 30, 34

National Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.,
142 S. Ct. 661 (2022) 29, 30, 31, 32, 33

Nken v. Holder,
556 U.S. 418 (2009) 36

PennEast Pipeline Co. v. New Jersey,
141 S. Ct. 2244 (2021) 25

Perkins v. Lukens Steel Co.,
310 U.S. 113 (1940) 29

Sabri v. United States,
541 U.S. 600 (2004) 35

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
576 U.S. 519 (2015) 21

Town of Chester v. Laroe Ests., Inc.,
137 S. Ct. 1645 (2017) 40

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 40

UAW-Labor Emp't & Training Corp. v. Chao,
325 F.3d 360 (D.C. Cir. 2003) 1, 3, 18, 19

United States v. Virginia,
139 F.3d 984 (4th Cir. 1998) 35

Utility Air Regulatory Grp. v. EPA,
573 U.S. 302 (2014) 29, 31, 32

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008) 3, 36, 37

Statutes:

Federal Property and Administrative Services Act,
40 U.S.C. § 101 *et seq.* 1, 4
40 U.S.C. § 101 ..... 1, 3, 4, 15, 16, 20, 22, 23, 27, 32-33
40 U.S.C. § 121 ..... 1, 3, 4, 15, 16, 20, 32-33

Office of Federal Procurement Policy Act Amendments of 1979,
Pub. L. No. 96-83, 93 Stat. 648 5

Pub. L. No. 99-500, 100 Stat. 1783 (1986) 20

Pub. L. No. 99-591, 100 Stat. 3341 (1986) 20

Pub. L. No. 104-208, 110 Stat. 3009 (1996) 20

Pub. L. No. 107-217, 116 Stat. 1062 (2002) 20

5 U.S.C. § 702 2

5 U.S.C. § 703 2

28 U.S.C. § 1292 3

28 U.S.C. § 1331 2

28 U.S.C. § 1361 2

28 U.S.C. § 2201 2

41 U.S.C. § 1302 5

42 U.S.C. § 1395x 22

Executive Branch Materials:

48 C.F.R. pts. 1-53 5

86 Fed. Reg. 63,418 (Nov. 16, 2021) 7, 8, 8-9, 9, 24, 38, 39

Exec. Order No. 11,246,
30 Fed. Reg. 12,319 (Sept. 24, 1965) 4

Exec. Order No. 12,800,
57 Fed. Reg. 12,985 (Apr. 13, 1992) 4

Exec. Order No. 13,201,
66 Fed. Reg. 11,221 (Feb. 17, 2001) 19

Exec. Order No. 13,465,
73 Fed. Reg. 33,285 (June 6, 2008) 18, 19

Exec. Order No. 13,706,
80 Fed. Reg. 54,697 (Sept. 7, 2015) 18, 36

Exec. Order No. 14,042,
86 Fed. Reg. 50,985 (Sept. 14, 2021) 7, 7-8. 8, 23, 24-25

Rule:

Fed. R. App. P. 4 3

Other Authorities:

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) 6, 23

CDC:
COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker (last visited Jan. 31, 2022) 5
Delta Variant (Aug. 26, 2021), https://perma.cc/4RW6-7SGB 5-6
Potential Rapid Increase of Omicron Variant Infections in the United States (Dec. 20, 2021), https://perma.cc/6CWF-QZQW 6

GAO, GAO-20-662, *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance and Use* (Sept. 2020), https://perma.cc/TPF7-9VN4 ..... 6, 39

Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE 38

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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 9

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System, Webster's New International Dictionary (2d ed. 1959) 16

U.S. Dep't of Health & Hum. Servs., *Determination That a Public Health Emergency Exists* (Jan. 31, 2020), https://perma.cc/VZ5X-CT5R 5

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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). 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 nevertheless enjoined the policy because, in the court's view, sustaining the Executive Order would permit the President to impose "virtually any public health measure that would result in a healthier contractor workforce." That conclusion was mistaken. The Executive Order imposes workplace requirements that are tailored to the unique threats the pandemic poses to government operations and that have been imposed by entities of all types in analogous situations. Those measures fall squarely within the Procurement Act's text and tradition.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1361, and 2201 and 5 U.S.C. §§ 702, 703. App.7; R. Doc. 1, at 7. The district court

entered a preliminary injunction on December 20, 2021. App.830; R. Doc. 36, at 1. The federal government timely appealed on January 14, 2022. App.844; R. Doc. 43, at 1; *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 "federal contractors and subcontractors in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming." App.842; R. Doc. 36, at 13. This appeal presents three questions:

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

The most apposite authorities are: the Federal Property and Administrative Services Act, 40 U.S.C. §§ 101, 121; *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc); *American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981); *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003).

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

The most apposite authorities are: *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Gelco Corp. v. Coniston Partners*, 811 F.2d 414 (8th Cir. 1987); *Florida v. HHS*, 19 F.4th 1271 (11th Cir. 2021).

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

The most apposite authorities are: *Califano v. Yamasaki*, 442 U.S. 682 (1979); *Lewis v. Casey*, 518 U.S. 343 (1996); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

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.

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, 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. 11, 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 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; *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359 (5th Cir. 2022) (Higginson, J., dissenting) (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 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 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 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

[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 50,986-987.

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

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 Alaska, Arkansas, Iowa, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming filed this suit challenging the Executive Order, the OMB determination, and the FAR Council guidance. Plaintiffs then moved for a preliminary injunction.

On December 20, the district court preliminarily enjoined the federal government "from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa,

Montana, New Hampshire, North Dakota, South Dakota, and Wyoming." App.842; R. Doc. 36, at 13.

As a threshold matter, the court determined that plaintiffs had established standing to sue. The court concluded that Missouri, Alaska, Arkansas, and Montana had standing to assert their sovereign interests in protecting their own vaccination policies from federal interference. App.834; R. Doc. 36, at 5. The court further held that Missouri, Wyoming, and Iowa had standing to assert their proprietary interests in their own contracts with the federal government, App.834-835; R. Doc. 36, at 5-6, but it rejected plaintiffs' contention that they had "quasi-sovereign" standing to litigate as *parens patriae* on behalf of their citizens, App.833; R. Doc. 36, at 4.

On the merits, the district court concluded that the Executive Order likely did not violate the Spending Clause or the Tenth Amendment. App.839; R. Doc. 36, at 10. The court concluded, however, that the President likely exceeded his statutory authority under the Procurement Act in issuing the challenged Executive Order. App.837; R. Doc. 36, at 8. The court recognized that "Congress granted to the president a broad delegation of power that presidents have used to promulgate a host of executive orders." App.836; R. Doc. 36, at 7. But according to the court, the Executive Order "diverges, both in scope and in kind," App.838; R. Doc. 36, at 9, from past orders because the President's rationale for issuing the Executive Order would allow "virtually any public health measure that would result in a healthier contractor workforce," App.837; R. Doc. 36, at 8. The court further noted that the

President has never previously used Procurement Act authority to require federal contractors to ensure that their employees are vaccinated against a disease and that the Executive Order applies to workers who "are not themselves working on or in connection with a covered contract," but who physically interact at work with employees who are. App.838; R. Doc. 36, at 9 (citation omitted).

The court also determined that plaintiffs satisfied the equitable requirements for a preliminary injunction. Although the court concluded that plaintiffs were unlikely to suffer irreparable harm to their sovereign interests, App.840; R. Doc. 36, at 11, it opined that as federal contractors, plaintiffs would likely suffer "business and financial effects" from implementing the Executive Order in the form of "lost or suspended employee[s], as well as nonrecoverable compliance and monitoring costs," App.841; R. Doc. 36, at 12. The court also concluded that the balance of harms and public interest weighed in favor of preliminary relief, reasoning that it would not "harm the federal government to maintain the status quo." App.842; R. Doc. 36, at 13.

As to the injunction's scope, the district court acknowledged that "[o]nly the injuries alleged by the plaintiff-States are properly before the Court," but it nevertheless enjoined the federal government from enforcing the Executive Order as to "federal contractors and subcontractors in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South

Dakota, and Wyoming." App.842; R. Doc. 36, at 13. The government appealed. App.844; R. Doc. 43, at 1.

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, courts of appeals, and Congress 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 connection between the vaccination requirement and the statutory goal of an "economical and efficient

system" for federal contracting. Instead, the court expressed concern that the Executive Order is a "public health measure" that will open the door for Presidents to enact virtually any measure "that would result in a healthier contractor workforce." Those concerns lack foundation. Courts routinely uphold similar exercises of proprietary authority under the Procurement Act, even though they have effects in addition to the promotion of economy and efficiency. And the President does not exercise limitless authority when he imposes a condition on federal contractors that is aimed at addressing the distinct and real threats of a pandemic to government operations and that has been imposed by analogous private and public entities.

Plaintiffs cannot advance their case by arguing that Congress was required to more clearly authorize the Executive Order on the ground that it implicates questions of economic and political significance and affects federal-state relations. Unlike the Executive Order, which involves an exercise of the federal government's proprietary authority to impose new conditions in government contracts, the agency actions in the cases plaintiffs cite involve exercises of regulatory authority. Those 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 Executive Order also does not raise federalism concerns. Federal contracting is a matter reserved to the federal government, not the States.

II. Plaintiffs have 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 such compliance costs do not constitute irreparable harm; in any event, plaintiffs introduced no evidence of the specific compliance steps they have taken or the cost of those measures. Similarly, 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, by contrast, 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. 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. The district court independently erred by issuing an overbroad injunction. Article III and principles of equity require that an injunction sweep no further than necessary to address the injuries identified to the court. The district court concluded that only a fraction of plaintiffs were irreparably harmed by the Executive Order (Missouri, Wyoming, and Iowa) and that such harm related only to those plaintiffs' own contracts with the federal government. The court nonetheless

enjoined the vaccination requirement not only as to all plaintiffs, but also as to all contractors within plaintiffs' borders, including countless contractors who were not parties to this action. At a minimum, then, the district court's injunction should be narrowed to exclude non-parties and those plaintiffs who suffered no irreparable harm as a result of the Executive Order—i.e., narrowed to apply only to the federal contracts of Missouri, Wyoming, and Iowa.

STANDARD OF REVIEW

This Court reviews the district court's grant of a preliminary injunction for abuse of discretion, but questions of law are reviewed de novo. *See Miller v. Honkamp Krueger Fin. Servs., Inc.*, 9 F.4th 1011, 1013-1014 (8th Cir. 2021).

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. Indeed, it is impossible even to enter into a contract without agreement on its terms. *See* 1 Williston on Contracts § 3.2 (4th ed. 2021) (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 concerns 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 regularly 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 continued to exercise 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, 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 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, 169-170 (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.* at 366 (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 73 Fed. Reg. at 33,285). And courts have upheld anti-discrimination orders, observing that they are not "so unrelated to the establishment of 'an economical and

efficient system for … the procurement and supply' of property and services that [they] should be treated as issued without statutory authority." *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (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 ("[T]his 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, "Congress is presumed to be aware of [a] … judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Morriss v. BNSF Ry. Co.*, 817 F.3d 1104, 1111 (8th Cir. 2016) (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 "narrower 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 concerns from Congress—to authorize a variety of orders improving the economy and efficiency of contractors' operations.[3]

B. The Executive Order Reflects The Required Nexus To Economy And Efficiency In Federal Procurement

1. 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 departments and agencies to include in

[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.

certain contracts and solicitations a clause requiring federal contractors to follow certain COVID-19 safety protocols. Those safety protocols, 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. Those efforts, in turn, help to avoid schedule delays and reduced performance quality in critical federal contracts. The safety protocols 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 for," 40 U.S.C. § 101, "[p]rocuring … property and nonpersonal services" and "performing related functions including contracting," *id.* § 101(1).

As the Acting OMB Director noted, the extent to which the contract requirements will further those statutory goals is confirmed by measures taken by private employers in the interests of their own economy and efficiency. 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. Thus, contracting the virus results not only in lost work hours of that employee, but may also result in 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—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.

It is immaterial 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 Procurement 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." Exec. Order No. 14,042, § 2(a), 86 Fed. Reg. at 50,985.

The nexus to an "economical and efficient system" for 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 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)).

2. The district court did not explain why measures that reduce schedule delays and improve productivity in the performance of federal contracts do not enhance the "economy" and "efficiency" of the federal contracting system. Instead, the court stated that if the Executive Order "establishes a sufficient nexus, then the

President would be able to mandate virtually any public health measure that would result in a healthier contractor workforce." App.837; R. Doc. 36, at 8. That reasoning suffers from two fundamental flaws.

First, by suggesting that the Executive Order is impermissible—and distinguishable from prior orders issued under the Procurement Act—because it affects "the realm of public health," App.838; R. Doc. 36, at 9, the district court misperceived the nature of the President's authority under the Procurement Act.

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 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 Ass'n*. 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. 18-20. 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.

Second, the district court was mistaken when it predicted that sustaining the Executive Order will permit the President to enact "virtually any … measure that would result in a healthier contractor workforce." App.837; R. Doc. 36, at 8. Any executive order issued under the Procurement Act must still be reasonably related to the statutory goals of establishing "an economical and efficient system for" federal procurement and contracting, 40 U.S.C. § 101. That the requirements at issue here achieve those goals is underscored, as the Acting OMB Director explained, by private employers' voluntary application of similar requirements to their employees. Whatever the outer limits of the President's Procurement Act authority may be, workplace requirements that have also been imposed by entities of all types in analogous situations fall comfortably within the President's power to manage federal contracting. *Cf. Missouri*, 142 S. Ct. at 653 (emphasizing that "[v]accination requirements are a common feature of the provision of healthcare in America" in upholding a healthcare vaccination requirement).

A requirement tailored to the unique, and very real, threats of the pandemic to government operations also cannot be likened to hypothetical requirements designed to improve the general health of the federal contractor workforce. "In the unlikely event that any of th[ose hypothetical] executive actions did take place, Congress could quickly step in" or those "improbable abuses could … be challenged in federal court." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 614 (2007).

C. 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. "Economical" and "efficient" 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 grounds that the vaccination requirement implicates a question of "economic and

political significance," App.100, R. Doc. 9, at 31 (citation omitted), and that it "disrupt[s] the traditional federal state-balance," App.98, R. Doc. 9, at 29. Neither theory supports such a conclusion.

1. a. 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 Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *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 Indep. Bus.*, 142 S. Ct. at 662 (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, as the district court recognized, is an exercise of Congress's powers under distinct constitutional provisions, including the Spending Clause, *see* App.839, R. Doc. 36, at 10, 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.

b. 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)); *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 "economical" and "efficient" 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 the health and safety" (citation omitted)).

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 Indep. 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). 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]

2. The Executive Order also does not intrude on an area that is traditionally reserved to the States. It is settled law that the government does not "invade[]" areas of state sovereignty "simply because it exercises its authority … in a

[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, 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.").

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, as the district court acknowledged, 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); *see* App.839, R. Doc. 36, at 10 ("Because the Court has concluded that the mandate likely does not violate the Spending Clause, one of Congress's enumerated powers, … plaintiffs are not likely to succeed on their claim of Tenth Amendment violation."). And when it comes specifically to the federal government's power to manage 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 threaten state sovereignty simply because "in addition to promoting economy and efficiency," it also protects the health and safety of some of their citizens. *Carmen*, 669 F.2d at 821. As discussed, *supra* pp. 18-20, 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").

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 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

"The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The asserted injury must be "certain and great and of such

imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996). The district court concluded that the Executive Order would irreparably harm plaintiffs by imposing nonrecoverable compliance costs and by causing disruptions to their workforce from employees who refused to be vaccinated. App.841, R. Doc. 36, at 12. Neither of those injuries is sufficiently certain and imminent to warrant injunctive relief.

Plaintiffs claim that they will incur "nonrecoverable compliance and monitoring costs" as a result of the Executive Order. App.841, R. Doc. 36, at 12. But "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 22, from the exception to the rule. Plaintiffs, moreover, have failed to identify the specific steps they have taken to comply with the vaccination requirement, or the costs associated with those measures, rendering their claimed compliance harms "merely speculative," *Iowa Utils. Bd.*, 109 F.3d at 425.

Nor have plaintiffs introduced evidence to substantiate their claim that the vaccination requirement will cause mass disruptions to their labor forces. Plaintiffs offered a handful of declarations stating that "it can reasonably be anticipated that COVID-19 vaccination requirements … would lead a significant number of

employees to resign or be terminated," App.207, R. Doc. 9-6, at 4, and that certain state institutions "anticipate[] … los[ing] employees as a result of instituting a vaccine mandate," App.302, R. Doc. 9-10, at 3. Such conclusory declarations fail to establish that plaintiffs face injuries that are "certain and great," as opposed to "merely speculative," *Iowa Utils. Bd.*, 109 F.3d at 425; *Florida v. HHS*, 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"). The district court also noted a recent study in which 72 percent of unvaccinated workers stated that they would leave their job rather than be vaccinated, App.840, R. Doc. 36, at 11, but in that same study only "1% of all adults" reported that they actually "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. In fact, the experience of private companies confirms the effectiveness of immunization requirements: Tyson Foods reported, for instance, that nearly 60,000 of its employees were vaccinated after it announced a vaccination requirement, resulting in 96 percent of its workforce being vaccinated. *See Feds for Med. Freedom v. Biden*, 25 F.4th 354, 359 (5th Cir. 2022) (Higginson, J., dissenting); *see also* Mathews, *supra*. Thus, as the Acting OMB Director found, 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.

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. App.841-842, R. Doc. 36, at 12-13. 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; *Observations on Contractor Paid Leave Reimbursement Guidance and Use*, *supra*. These productivity losses will jeopardize the economy and efficiency of billions of dollars in federal contracts performed within plaintiffs' borders. *See* App.832, R. Doc. 36, at 3.

The district court, believing it was maintaining what it deemed to be the "status quo," App.842, R. Doc. 36, at 13, gave insufficient 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. 6. 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 issuing an injunction that extends beyond the handful of plaintiffs who established that their own contracts with the federal government would be impacted by the Executive Order. Even assuming that the injunction could otherwise be sustained, it should be narrowed to cover only those plaintiffs' own contracts.

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)). 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"). 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.

The district court contravened those limitations in issuing its injunction. It determined that only a fraction of plaintiffs established standing, and only then on limited grounds. The court correctly concluded that plaintiffs lacked standing to assert their quasi-sovereign interests against the federal government as *parens patriae*, App.833, R. Doc. 36, at 4, given the well-established rule that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government," *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). And although the court determined that a few plaintiffs had alleged injuries to their sovereign interests sufficient to support standing, App.834, R. Doc. 36, at 5, the court (again) correctly determined that the Executive Order did not harm those plaintiffs' sovereign interests, App.839, R. Doc. 36, at 10; *see Hodel*, 452 U.S. at 291. Thus, the only injuries identified to the court that purportedly warranted injunctive relief concerned three plaintiffs' own contracts with the federal government—that is, the federal contracts of Wyoming, Iowa, and Missouri. App.835, R. Doc. 36, at 6.

The district court, however, did not limit its injunction to those plaintiffs' contracts. Instead, the court enjoined enforcement of the Executive Order "in all covered contracts in Missouri, Nebraska, Alaska, Arkansas, Iowa, Montana, New Hampshire, North Dakota, South Dakota, and Wyoming," App.842, R. Doc. 36, at 13, meaning the injunction extends not only to all plaintiffs, but also to all contractors

within plaintiffs' borders, including countless contractors who were not parties to this action. Granting relief to the many plaintiffs who, on the district court's own account, established no injury subverts the rule that relief should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Califano*, 442 U.S. at 702. Non-party contractors, moreover, 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. At a minimum, then, the district court's injunction should be narrowed to cover only qualifying contracts between the federal government and plaintiffs Wyoming, Iowa, and Missouri.

CONCLUSION

The preliminary injunction should be vacated in full or, at a minimum, to the extent it extends beyond the federal contracts of plaintiffs Wyoming, Iowa, and Missouri.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,373 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.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

s/ David L. Peters
David L. Peters

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ David L. Peters
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