No. 22-1104

United States Court of Appeals
For the Eighth Circuit

STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF IOWA; STATE OF MONTANA; STATE OF NEW HAMPSHIRE; STATE OF NORTH DAKOTA; STATE OF SOUTH DAKOTA; STATE OF WYOMING,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as the President of the United States; et al.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Missouri, The Honorable David D. Noce

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BRIEF OF APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The question here is whether a law whose purpose is to provide for an "economical and efficient" system for federal contracting, and which allows the President to issue "policies and directives" advancing that purpose, can authorize a vaccine mandate reaching one-fifth of the nation's labor force merely because they work for a federal contractor. The answer is no. The Contractor Mandate reaches a contractor's employees whose only connection to a federal contract is a collegial "hello" to a coworker who works on that contract or who supports someone who works on that contract. That plainly goes too far. When Congress centralized oversight over federal contracting in the President, it did not implicitly give him authority to dictate how contractors must run their workplaces, let alone allow him to dictate the private medical choices of their employees.

The district court's decision to provide preliminary relief is clearly correct, and the States do not believe oral argument is necessary. If the Court grants the Government's request for oral argument, the States request equal time.

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STATEMENT OF THE ISSUES

I. Whether the Contractor Mandate is a lawful exercise of the President's authority under the Procurement Act.

Most apposite authorities:

- *National Federation of Independent Business v. Department of Labor (OSHA Mandate)*, 142 S. Ct. 661 (2022) (per curiam)
- *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022)
- *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)
- *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc)
- 40 U.S.C. § 101
- 40 U.S.C. § 121

II. Whether the States established the equitable requirements for preliminary injunctive relief.

Most apposite authorities:

- *National Federation of Independent Business v. Department of Labor (OSHA Mandate)*, 142 S. Ct. 661 (2022) (per curiam)
- *Sleep Number Corp. v. Young*, 33 F.4th 1012 (8th Cir. 2022)
- *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022)

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- *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021)

III. Whether the scope of the injunction is overbroad.

Most apposite authorities:

- *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022)
- *Texas v. Biden*, 20 F.4th 928 (5th Cir. 2021)
- *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019)

INTRODUCTION

In 1949, Congress passed a law to centralize and modernize management of federal procurement (*i.e.*, the "Procurement Act"). *See* Federal Property and Administrative Services Act of 1949, 63 Stat. 377. The law's stated purpose is to "provide … an economical and efficient system for" procurement, and it accomplishes that purpose, in part, by allowing the President to "prescribe such policies and directives, not inconsistent with the" act. *See* §§ 2, 205, 63 Stat. at 378, 389.

In 2021, President Biden and the Government declared that those provisions allow the government to mandate COVID-19 vaccinations for a contractor's employees whose only connection to a federal contract is that they *may* interact with a colleague who works on, or who supports someone who works on, a federal contract. That is the Contractor Mandate, and its breathtaking scope establishes that it is not a dictate of federal procurement, but a public-health measure.

The question here is whether Congress, when it passed the Procurement Act in 1949, believed it was authorizing the President to mandate that contractors require employees who say "hello" to coworkers staffed on a federal contract get a vaccine. Until 2021, the consensus

view was “no”—for no procurement regulation had ever mandated vaccination of any kind. After 2021, the answer is still “no.” The Procurement Act’s text and context, canons of construction, constitutional principles, and common sense all show that a law about federal procurement does not allow the President to impose *de facto* public-health measures.

STATEMENT OF THE CASE

I. COVID-19, vaccines, and the effect of Omicron.

Since early 2020, the country has dealt with the COVID-19 pandemic. Part of the country’s—and the world’s—attempt to address the virus has been the development of COVID vaccines. In December 2020, the Pfizer and Moderna vaccines became publicly available, and in February 2021, the Johnson & Johnson vaccine became publicly available. App. 659; R. Doc. 27, at 2.

Key here is what the vaccines do not do: prevent COVID-19 infection. At the time of the Contractor Mandate, as the parties stipulated, “While the vaccines have proven effective at reducing severe, negative health outcomes, *they* ‘*are not 100% effective at preventing infection*.’” App. 660; R. Doc. 27, at 3 (emphasis added) (quoting CDC,

Possibility of COVID-19 Illness After Vaccination (updated Nov. 9, 2021), https://bit.ly/3HWm7Bw) (citing R. Doc. 9-5, at 3). Rather, "'the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the *effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known*.'" *Id.* (emphasis added) (quoting Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61,555, 61,615 (Nov. 5, 2021)). Instead, as the States' expert said—and as was incorporated by reference into the stipulation, *see* App. 660; R. Doc. 27, at 3 (citing R. Doc. 9-5 ¶ 7)—the COVID vaccines "provide only short-lasting and limited protection versus infection and disease transmission." App. 157; R. Doc. 9-5, at 3.

That was before the Omicron variant became dominant. As the Government admits, the Omicron variant "evade[s] immunity conferred by past ... vaccination." Br. Appellants 6 (quotations omitted); *see also id.* at 39 (calling Omicron "more transmissible and immune-evasive"). Omicron's "evasion" of vaccine-induced immunity is truly extensive;

numerous studies and observations show that vaccines are largely ineffective at preventing infection and transmission of the variant.[1]

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[1] *See*, *e.g.*, N. Andrews et al., *COVID-19 Vaccine Effectiveness Against the Omicron (B.1.1.529) Variant*, 386 New Eng. J. Med. 1533, 1544 (2022) ("Our findings indicate that two doses of vaccination with [Pfizer] ... [is] insufficient to give adequate levels of protection against infection with the omicron variant and mild disease."); Ria Lassaunière et al., *Neutralizing Antibodies Against the SARS-CoV-2 Omicron Variant (BA.1) 1 to 18 Weeks After the Second and Third Doses of the BNT162b2 mRNA Vaccine*, Research Letter, JAMA Network Open, May 13, 2022, at 3 ("[V]accine-induced protective antibody responses following a second and third dose of [the Pfizer vaccine] are transient . . . ."); Jinyan Liu et al., *Vaccines Elicit Highly Conserved Cellular Immunity to SARS-CoV-2 Omicron*, 603 Nature 493, 495 (2022) (noting that while vaccines protect against severe disease from Omicron, there are "substantially reduced neutralizing antibody responses"); Matthew E. Modes et al., *Clinical Characteristics and Outcomes Among Adults Hospitalized with Laboratory-Confirmed SARS-CoV-2 Infection During Periods of B.1.617.2 (Delta) and B.1.1.529 (Omicron) Variant Predominance—One Hospital, California, July 15-September 23, 2021, and December 21, 2021-January 27, 2022*, 71 Morbidity & Mortality Weekly Rpt. 217, 220 (2022) ("Increases in infections among vaccinated persons during the period of Omicron predominance were likely driven both by waning vaccine-derived immunity over time and by relative resistance to vaccine neutralization in the Omicron variant compared with the Delta variant."); UK Health Security Agency, *COVID-19 Vaccine Surveillance Report: Week 16*, at 4 (Apr. 21, 2022) ("With 2 doses of Pfizer or Moderna effectiveness [against symptomatic disease] dropped from around 65 to 70% down to around 15% by 25 weeks after the second dose."); *id.* at 11 tbl.3 (providing estimates of vaccine effectiveness against infection).

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II. The Contractor Mandate.

At roughly the same time vaccines became publicly available—on January 20, 2021—President Biden created the Safer Federal Workforce Task Force (the "Task Force") "to provide 'ongoing guidance to heads of agencies of the Federal Government . . . during the COVID-19 pandemic.'" App. 660; R. Doc. 27, at 3 (quoting Exec. Order No. 13,991, 86 Fed. Reg. 7,045, 7,046 (Jan. 25, 2021)). The Task Force did not, however, mandate COVID-19 vaccinations for federal contractors. *See* App. 662, 663; R. Doc. 27, at 5, 6 (noting that prior to September 24, 2021, there was no COVID-19 vaccination requirement for federal contractors). That occurred nine months later, in September.

A. President Biden's speech

On September 9, 2021, President Biden delivered a speech about fighting the COVID-19 pandemic. *See* App. 660–61; R. Doc. 27, at 3–4. The speech laid the blame for the continuing pandemic on the unvaccinated: "This is a pandemic of the unvaccinated," President Biden declared. App. 682; R. Doc. 27-1, at 11. The unvaccinated, per the President, "supported by a distinct minority of elected officials—are

keeping us from turning the corner" on the pandemic. App. 683; R. Doc. 27-1, at 12.

Because, according to President Biden, "[w]e cannot allow these actions to stand in the way of protecting the large majority of Americans who have done their part and want to get back to life as normal," he announced "a new plan to *require* more Americans to be vaccinated, to combat those blocking public health." *Id.* (emphasis added). "This," he said, "is not about freedom or personal choice." App. 684; R. Doc. 27-1, at 13.

Consistent with that view, the President set forth his plan to "increase vaccinations among the unvaccinated with new vaccination requirements." *Id.* Those requirements included the OSHA vaccine mandate for employers with 100 or more employees, the CMS vaccine mandate for health care workers participating in Medicare and Medicaid, App. 684–85; R. Doc. 27-1, at 13–14, and the Contractor Mandate. Per the President: "If you want to work with the federal government and do business with us, get vaccinated. If you want to do business with the federal government, vaccinate your workforce." App. 685; R. Doc. 27-1, at 14.

To achieve that goal, President Biden signed Executive Order 14,042 ("EO 14,042") that day. *See* 86 Fed. Reg. 50,985, 50,985–988 (Sept. 14, 2021).[2] EO 14,042 says that the Procurement Act,[3] 40 U.S.C. § 101, authorizes it. *See* 86 Fed. Reg. at 50,985. According to the EO,

> This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which 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. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.

Id.

Section 2(a) of the EO directs agencies to ensure their contracts include a "clause [that] shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance [the "Guidance"] for contractor or subcontractor workplace locations published by the [Task Force] provided that the Director of the Office of

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[2] The full text of EO 14,042 was provided to the district court. *See* App. 694–97; R. Doc. 27-1, at 23–26.

[3] Or, the "Federal Property and Administrative Services Act" or "FPASA."

Management and Budget (Director) approves the Task Force Guidance and determines that the Guidance . . . will promote economy and efficiency in Federal contracting." *Id.* The OMB Director's approval would be "an exercise of the delegation of my authority under the Federal Property and Administrative Services Act [to] determine whether such Guidance will promote economy and efficiency in Federal contracting . . . ." *Id.* at 50,985–86 (citation omitted).

The Federal Acquisition Regulatory Council (the "FAR Council") was to create the clause to which § 2(a) refers. *See id.* at 50,986. The EO also directed the FAR Council to create a deviation clause agencies could use pending a final regulation. *See id.* Finally, EO 14,042 said the clause containing the Contractor Mandate would apply to new contracts, including the extension or renewal of an existing contract, but not grants, contracts with Indian tribes, contracts below the simplified acquisition threshold of $250,000, *see* 48 C.F.R. § 2.101, or contracts performed outside the U.S. or its outlying areas. *Id.* at 50,986–87.

B. The Task Force's creation of the Contractor Mandate.

As directed, the Task Force published its Guidance on September 24, 2021. *See* App. 661; R. Doc. 27, at 4. The Task Force released updated

Guidance on November 10, 2021, which is the operative Guidance. This Guidance—other than extending the compliance date and providing a URL link to the Task Force's FAQs regarding the vaccine mandate instead of providing them, *see* App. 664; R. Doc. 27, at 7—is the same as the Guidance the Task Force published on September 24, 2021. *See* App. 627–37; R. Doc. 23-2, at 2–12 (comparing the two). The Guidance, which contains the terms of the Contractor Mandate, purports to preempt any contrary State or local laws. *See* App. 750; R. Doc. 27-1, at 79.

The Guidance and the included FAQs show how broad the Contractor Mandate is. It mandates "COVID-19 vaccination of covered contractor employees." App. 723; R. Doc. 27-1, at 52. "Covered contractor employees" encompasses two categories of employees: "any full-time or part-time employee of a covered contractor [1] working on or in connection with a covered contract or [2] working at a covered contractor workplace." App. 725; R. Doc. 27-1, at 54. The first category covers more than just employees working directly on a federal contract. Employees work "in connection with" a covered contract—a contract that requires compliance with the Contractor Mandate, *see id.*—when they "perform duties necessary to the performance of the covered contract, but … are

not directly engaged in performing the specific work called for by the covered contract, such as human resources, billing, and legal review." App. 746; R. Doc. 27-1, at 75.

The second category covers "employees of covered contractors who are not themselves working on or in connection with a covered contract." App. 725; R. Doc. 27-1, at 54. The Guidance does that by defining "covered contractor workplace" to mean "a location controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract," other than an employee's home. App. 726; R. Doc. 27-1, at 55. There is no exception for employees who work outdoors or who have natural immunity from prior infection. *See* App. 739, 741; R. Doc. 27-1, at 68, 70.

The Guidance therefore mandates vaccination for employees whose only connection to a federal contract is that they work in the same general location as an employee who is working "on or in connection with" a federal contract. The Task Force is upfront about that. Per the FAQs, an employee who works in the same building, or even in different buildings on the same campus or site, as a covered contractor employee

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must be vaccinated "unless a covered contractor can affirmatively determine that none of its employees ... will come into contact with the covered contractor employee during the period of performance of a covered contract." App. 741–42; R. Doc. 1, at 70–71 (discussing buildings and campuses). "Contact" includes "interactions through use of common areas such as lobbies, security clearance areas, elevators, stairwells, meeting rooms, kitchens, dining areas, and parking garages." *Id.* So if an employee says "hello" to a coworker working on or in connection with a federal contract in a parking garage or lobby, his collegiality requires him to be vaccinated.

In short, the Guidance covers basically *all* contractor and subcontractor employees—unless the employee works exclusively from home. *See* App. 726; R. Doc. 27-1, at 55 (excluding employees' homes from the definition of "covered contractor workplace"). Even then, an employee is exempt only if he does not work on a federal contract; employees who do work on such a contract from home must be vaccinated. *See* App. 725, 742; R. Doc. 27-1, at 54, 71. Finally, the Contractor Mandate applies to all sub-contractors. *See* App. 744; R. Doc. 27-1, at 73.

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The broad scope of the Contractor Mandate means that it applies to basically every employee of a federal contractor—at least a fifth of the entire U.S. labor force. *See* App. 13; R. Doc. 1, at 13 (quoting Dep't of Labor, *History of Executive Order 11246* (last visited June 10, 2022), https://bit.ly/3mtGufO).

After the Task Force issued the original Guidance in September, the FAR Council—pursuant to EO 14,042—"issued a memorandum to agencies that award contracts under the Federal Acquisition Regulation (FAR) with initial direction for the incorporation of a clause into their solicitations and contracts to implement the Guidance." App. 663; R. Doc. 27, at 6 (quotations omitted). In the memorandum, the FAR Council "encourages agencies to apply the requirements of its guidance broadly" "[t]o maximize the goal of getting more people vaccinated . . . ." App. 719; R. Doc. 27-1, at 48.

Federal agencies have issued "agency-specific class deviations directing procurement officers to include" the Guidance into contracts pursuant to the FAR Council's memorandum. App. 664–65; R. Doc. 27, at 7–8.

C. OMB's approval of the Contractor Mandate

As required under EO 14,042 for the Guidance to have binding effect, the OMB Director concluded that the Guidance would promote economy and efficiency in federal contracting. The determination for the September version of the Guidance was a single sentence in the Federal Register parroting the same conclusory statements EO 14,042 made:

> The Director of the Office of Management and Budget determines that compliance by Federal contractors and subcontractors with the COVID-19-workplace safety protocols detailed in the Safer Federal Workforce Task Force guidance issued on September 24, 2021 will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract.

86 Fed. Reg. 53,691, 53,691 (Sept. 28, 2021); *see also* App. 714; R. Doc. 27-1, at 43.

The OMB Director attempted to remedy the lack of analysis in her approval of the Task Force's November update to the Guidance—which is substantively the same as the September guidance, *see supra* Statement of the Case § II.B. In the November OMB Determination, the director reiterated—citing President Biden's September 9, 2021, speech—that "[o]ne of the main goals of [the Contractor Mandate] is to

get more people vaccinated." 86 Fed. Reg. 63,418, 63,418 (Nov. 16, 2021).[4]

After providing the Guidance, the OMB Director outlined an "economy-and-efficiency analysis." *Id.* at 63,421–23. The crux of the analysis was that COVID causes worker absenteeism; vaccines prevent infection; and thus, a vaccine mandate will increase economy and efficiency by ensuring "that COVID-19 does not easily spread within the workplace." *Id.* at 63,421–23. The OMB Director asserted that private employers that had required employees to be vaccinated, and had achieved high vaccination rates among their workforces, provided evidence the mandate would not lead to widespread resignations. *See id.* at 63,422.

* * *

With the OMB determination published, the Contractor Mandate came into being. For the first time in history, the President had used the Procurement Act to mandate vaccinations for federal contractors. *See* App. 662; R. Doc. 27, at 5.

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[4] The full determination is at App. 759–66; R. Doc. 27-1, at 88–95.

III. District court proceedings.

The States have a significant interest in federal contracting. For one, federal contracts are important to their economies: "Plaintiff-States maintain significant contracts with the federal government. According to the System for Award Management, in calendar 2020, federal contracts performed in plaintiff-States were worth billions of dollars, ranging from $386 million in Wyoming to $16 billion in Missouri." App. 830–31; R. Doc. 36, at 2–3; *see also* App. 665; R. Doc. 27, at 8. For another, State agencies routinely serve as federal contractors themselves.[5] The States also have an interest in controlling health policy within their borders—a police power left to them by the Constitution.

To vindicate those interests, the States brought a twelve-count complaint challenging the Contractor Mandate as outside the scope of the Procurement Act (Count One), in violation of the Procurement Policy Act (41 U.S.C. § 1707) (Count Two), unconstitutional (Counts Three through

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[5] *See* App. 205–06; R. Doc. 9-6, at 2–3; App. 210–11; R. Doc. 9-7, at 2–3; App. 213–14; R. Doc. 9-8, at 2–3; App. 301–04; App. 255–57; R. Doc. 9-9, at 2–5; R. Doc. 9-10, at 2–5; App. 307–09; R. Doc. 9-11, at 3–5; App. 313–17; R. Doc. 9-12, at 2–6; App. 334–35; R. Doc. 9-13, at 2–3; App. 341–42; R. Doc. 9-14, at 2–3; App. 649–50; R. Doc. 23-4, at 1–2; App. 654; R. Doc. 23-5, at 2. The parties Joint Statement of Material Fact incorporates those declarations and attached exhibits. App. 665; R. Doc. 27, at 8.

Four and Ten through Twelve), and implemented by OMB and the FAR Council in violation of the APA's procedural and substantive requirements (Counts Five through Nine). App. 1–44; R. Doc. 1, at 1–44. The States then moved for a preliminary injunction. *See* App. 64–65; R. Doc. 8, at 1–2.

To facilitate resolution of the States' preliminary injunction motion, the district court ordered "the parties [to] file a non-argumentative Joint Statement of Material Facts … regarding plaintiffs' claims other than those founded on the federal Administrative Procedure Act." Suppl. App.[6] 15; R. Doc. 26, at 1. On December 6, 2021, the parties did. The district court then granted the States relief, *see* App. 830–43; R. Doc. 26, at 1–14; 2021 WL 5998204, confining its order to the States' claims that the Contractor Mandate violates the Procurement Act and is unconstitutional. *See* App. 843; R. Doc. 36, at 14 (appendix to the district court's ruling).

As to standing, the district court rejected the States' standing to bring *parens patriae* claims, but concluded that "Missouri, Alaska,

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[6] "Suppl. App." refers to the Joint Supplemental Appendix filed with this brief. All parties consent to its filing.

Arkansas, and Montana have alleged sufficient injuries to establish standing for their sovereign interest claims [since e]ach state alleges that the contractor mandate ostensibly preempts state statutes regarding vaccine mandates." App. 833–34; R. Doc. 36, at 4–5. The district court also said Wyoming, Iowa, and Missouri "have standing as federal contractors to challenge the mandate." App. 834–35; R. Doc. 36, at 5–6. The other States "fail[ed] to identify contracts with sufficient specificity to establish they are subject" to the Contractor Mandate because they did not "provide the total number and/or value of [their] federal contracts . . . ." App. 834; R. Doc. 36, at 5. Thus, per the court, "Wyoming, Iowa, and Missouri, have standing as federal contractors to challenge the mandate. Because Missouri has standing with regard to both sovereign interests and federal contractor status, its standing is sufficient to permit review." App. 835; R. Doc. 36, at 6.

As to the merits, the district court concluded that the States "are likely to succeed" in showing that the Contractor Mandate "exceeds the President's statutory authority under" the Procurement Act. App. 837; R. Doc. 36, at 8. The district court noted that the government's justification for the Contractor Mandate would allow "the President . . . to

mandate virtually any public health measure that would result in a healthier contractor workforce." *Id.*

In so ruling, the district court rejected the Government's argument that past presidential actions under the Procurement Act justify the mandate. *See* App. 838; R. Doc. 36, at 9. The Contractor Mandate, the district court said, "diverges, both in scope and in kind from the past practice which [the government] argue[s] Congress implicitly endorsed." *Id.* It "reach[es] beyond the workplace and into the realm of public health." *Id.* As support, the court pointed to the mandate's broad coverage and the fact "the FPASA has never been used to require contractors to ensure that their employees were vaccinated against any disease." *Id.*

Next, the district court concluded that the Contractor Mandate, while an invalid exercise of the President's Procurement Act authority, was within Congress's Spending Clause power and did not violate the Tenth Amendment. App. 838–39; R. Doc. 36, at 9–10.

Finally, the district court concluded that the equities justified injunctive relief. Because it found there was no constitutional violation, the district court rejected the States' argument that the Contractor

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Mandate irreparably harmed their sovereign interests. App. 840; R. Doc. 36, at 11. But the court held that the States would suffer harm "to proprietary interests" from mandate-caused disruptions and from unrecoverable "compliance and monitoring costs." App. 840–41; R. Doc. 36, at 11–12. The district court also said that the balance of harms and the public interest militated in favor of relief because the mandate is unlawful. *See* App. 841–42; R. Doc. 36, at 12–13. Finally, the district court limited relief to the States, since only their injuries "are properly before the Court." App. 842; R. Doc. 36, at 13.

The government appealed. App. 844; R. Doc. 43, at 1.

SUMMARY OF THE ARGUMENT

1. Whether the Procurement Act authorizes the Contractor Mandate is fully answered by the mandate's scope. The mandate reaches employees whose only connection to a colleague working on a federal contract is that they greet each other in a hallway. The practical effect is that the mandate will require *all* employees of a federal contractor or subcontractor to be vaccinated, regardless of whether they work on a federal contract. The Procurement Act, whose purpose is to centralize

federal contracting by giving the president supervisory authority over federal contracting entities, cannot be the source of such a power.

The Act's plain terms do not authorize what are, in effect, public-health rules. Rather, they give the President a more modest power—the ability to issue "policies and directives" to supervise how the federal government contracts. Thus, while the President may direct federal contracting to ensure the *government* contracts economically and efficiently, he cannot use his authority to dictate how a contractor runs his business, or to enact a public-health measure. To put it another way, the Procurement Act does not authorize a President to tell a contractor to run his business a certain way because the President believes doing so is economical and efficient. It only authorizes—to borrow language from caselaw—orders with a close nexus to federal procurement.

Until now, that has been the consensus position. As the parties stipulated in district court, the Procurement Act has never been used to impose a vaccine mandate on federal contractors.

The lack of precedent is understandable. Congress must speak clearly before the Executive can interfere in areas involving important political, economic, and social issues; shift the traditional federal-state

balance; or push (and, in this case, exceed) constitutional limits. The Contractor Mandate does all three, but the Procurement Act concededly lacks the necessary clear statement. So it makes sense that no one has considered it authority for any vaccine mandate—let alone one with the vast scope of the Contractor Mandate. Indeed, Congress has expressly spoken on the issue of vaccines, and shown its preference for encouraging vaccinations over mandating them. That cuts against finding an implicit grant of authority to mandate vaccination in a law dealing with federal procurement; so, too, does the fact that the Contractor Mandate violates the Procurement Policy Act and Competition in Contracting Act (CICA).

2. The district court did not err in evaluating the other preliminary injunction factors. As the district court said—in line with precedent from this Court and courts around the country evaluating federal COVID decrees—nonrecoverable compliance costs constitute irreparable harm.

Nor did the district court err in evaluating the evidence and concluding that the Contractor Mandate would cause irreparable disruptions to the States' work as contractors. The evidence the States provided—declarations and a survey showing that some employees will quit if their employers require them to be vaccinated against COVID-

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19—is exactly the type of evidence that is appropriate in a challenge to a broad policy like the Contractor Mandate. That evidence confirms what common sense shows—that an intrusive vaccine mandate will have negative effects on workplaces.

Lastly, the district court did not err in weighing the equities. The Government suffers no cognizable harm from being unable to enforce an unlawful mandate; to the contrary, such an injunction is in the public interest. In any event, the Government's own delays in implementing the Contractor Mandate undermine any claim of harm from the district court's order.

3. The district court did not abuse its discretion in providing relief to all the States. The scope of relief turns on the scope of injury, and the Contractor Mandate imposes harm across all the States; indeed, across the entire nation. The district court's decision to provide relief addressing that injury is not error.

STANDARD OF REVIEW

The Court reviews "a district court's grant of a preliminary injunction … for abuse of discretion, with factual findings examined for clear error and legal conclusions considered *de novo*." *Sleep No. Corp. v.*

Young, 33 F.4th 1012, 1016 (8th Cir. 2022) (quotations omitted). "Because the district court has considerable discretion in determining whether or not a preliminary injunction should issue, the scope of this court's review is very limited." *Id.* (quotations omitted). Affirmance is proper if the injunction is "within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." *Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC*, 953 F.3d 1041, 1044 (8th Cir. 2020) (quotations omitted). Moreover, "[t]his court can affirm on any basis supported in the record." *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670–71 (8th Cir. 2013).

ARGUMENT

Four factors are relevant in determining whether to issue a preliminary injunction: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest." *Sleep No. Corp.*, 33 F.4th at 1016 (alteration in original) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 100, 113 (8th Cir.

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1981) (en banc)). Because the federal government is the defendant in this case, the second and fourth factor merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). While no factor is dispositive, "the third factor—the probability of success—is the most significant." *Sleep No. Corp.*, 33 F.4th at 1016.

I. The Procurement Act does not authorize the Contractor Mandate.

A. The Contractor Mandate is too far afield from procurement to be a valid exercise of the President's Procurement Act authority.

The Contractor Mandate—which arises from a presidential dictate, EO 14,042—is an exercise of presidential power. "The President's power, if any, to issue [an executive] order must stem either from an act of Congress or the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Here, the Government contends that the Procurement Act authorizes the Contractor Mandate. *See* 86 Fed. Reg. at 63,422.

The Procurement Act does no such thing. As the district court held, the Contractor Mandate "is not consistent with the structure and purposes of" the Act. App. 837; R. Doc. 36, at 8. Instead, as the Sixth Circuit held—and as is consistent with the conclusion from four district

courts that the Procurement Act does not authorize the Contractor Mandate[7]—"the relevant text . . . unambiguously *precludes* the government's theory, and, even if there was some ambiguity, the relevant canons of interpretation would foreclose construing the ambiguity in the government's favor." *Kentucky v. Biden*, 23 F.4th 585, 603 (6th Cir. 2022) (denying a stay pending appeal); *see also Brnovich v. Biden*, 562 F. Supp. 3d 123, 152–57 (D. Ariz. 2022); *Georgia v. Biden*, 2021 WL 5779939, at *8–*10 (S.D. Ga. Dec. 7, 2021), *appeal docketed*; *Kentucky v. Biden*, 2021 WL 5587446, at *5–*10 (E.D. Ky. Nov. 30, 2021), *appeal docketed*[8]; *cf. State v. Nelson*, 2021 WL 6108948, at *11–*14 (M.D. Fla. Dec. 22, 2021), *appeal docketed* (analyzing the nexus between the mandate and economical, efficient government procurement).

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[7] The States are aware of only two district courts that have concluded that the Contractor Mandate is consistent with the Procurement Act. *See Donovan v. Vance*, 2021 WL 5979250, at *6 (E.D. Wash. Dec. 17, 2021); *Louisiana v. Biden*, 2021 WL 5986815, at *7–*8 (W.D. La. Dec. 16, 2021). Neither engaged in the same close analysis of the Procurement Act and the scope of the Contractor Mandate as the district court did here. Furthermore, the *Louisiana* court enjoined the Contractor Mandate as unconstitutional. *See Louisiana*, 2021 WL 5986815, at *8.

[8] The Sixth Circuit's opinion in *Kentucky* denied a stay pending appeal in this case.

The Contractor Mandate's breathtaking scope makes this result very clear. The question is whether the Procurement Act authorizes the President to mandate that a contractor ensure that an employee or subcontractor who says "hello" to a person working on a federal contract in a building lobby or parking garage is vaccinated for COVID.

That is no mere contract term. *Contra* Br. Appellants 16. "It is instead a significant encroachment into the lives—and health—of a vast number of employees." *Nat'l Fed. of Indep. Business v. Dep't of Labor (OSHA Mandate)*, 142 S. Ct. 661, 665 (2022). As the District Court for the Middle District of Florida noted, "[u]nder the definitions in the task force's guidance, the [Contractor Mandate] would require the vaccination of, for example: a janitor who cleans the offices of a contractor's legal department, an accountant who works exclusively from home, a student who works part-time in a contracting university's library, and a lumberjack working on a federal logging contract." *Nelson*, 2021 WL 6108948, at *12; *see also* Br. Appellant 24 (acknowledging the mandate "extends to employees … who are not themselves working on a federal contract but who physically interact with colleagues who are"). Thus, "absent hermetic isolation, the likelihood that an employee of an entity

that happens to contract (or subcontract) with the federal government can remain unvaccinated appears trivial at most." *Nelson*, 2021 WL 6108948, at *12. As the district court here correctly summarized, "[t]he vaccine mandate … reach[es] beyond the workplace and into the realm of public health." App. 838; R. Doc. 36, at 9.

The Procurement Act cannot reach that far. A law meant to fix "the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner," *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996), cannot be "a latent well of authority to order the medical enhancement of contractor employees," *Kentucky*, 23 F.4th at 605. Analysis of the text and context of the Procurement Act establishes that. *See*, *e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *United States v. Smith*, 756 F.3d 1070, 1073 (8th Cir. 2014).

The analysis can start and stop with the fact that the putative authority for the Contractor Mandate is located in the Procurement Act's purpose section—that is, § 101(1). That section says the Act's purpose "is to provide the Federal Government with an economical and efficient system for … [p]rocuring and supplying … nonpersonal services, and

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performing related functions including contracting." The problem is that statements of purpose, like § 101, while "useful in construing enumerated powers later found in a statute's operating provisions[,] …are not *themselves* operative provisions, [and] so cannot confer freestanding powers upon the President unbacked by operative language elsewhere in the statute." *Kentucky*, 23 F.4th at 604 (citing *Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019), and *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality opinion)).

Regardless, even if one were to treat § 101 as a grant of power, that would not help the Government. Section 101 refers to "an economical and efficient *system* for … *procuring* … services, and performing related functions including contracting … ." "'System,' in context, refers to '[a] formal scheme or method of governing organization, arrangement,' … [a]nd 'procure' means '[t]o bring into possession; to acquire; gain; get; to obtain by any means, as by purchase or loan.'" *Kentucky*, 23 F.4th at 604 (quoting Webster's New Int'l Dictionary 1974, 2562 (2d ed. 1959)). Thus, § 101 extends only to a "method of contracting—a 'system,' in other words—to obtain" services from contractors. *Id.* It does not extend to orders dictating how contractors

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run their workplace—*i.e.*, orders that seek to make *contractors* "more 'economical and efficient.'" *Id.*

The "performing related functions including contracting" language in § 101(1) confirms this conclusion. By its plain terms, that clause involves only the *federal government's* entry into a contract, not the *contractor's* performance. *See id.* at 604–05 (analyzing the language). "Section 101 thus authorizes the President to implement systems making *the government's* entry into contracts less duplicative and inefficient, but it does not authorize him to impose a medical mandate directly upon contractor employees themselves because he thinks it would enhance *their* personal productivity." *Id.* at 605. Put another way, the Procurement Act "was not intended to achieve a wide variety of economic and social goals, but simply to accomplish an efficient allocation of" federal resources. *Comm. for Auto Responsibility (C.A.R.) v. Solomon*, 603 F.2d 992, 999 n.23 (D.C. Cir. 1979) (per curiam).[9] "Health … concerns … are not among those that Congress arguably sought to accommodate by" the Act. *Id.* at 999.

[9] *C.A.R.* involved the Public Buildings Amendments to the Procurement Act, and basically the same statutory language found in § 101. *See* 603 F.2d at 996 n.3, 999 & n.23.

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Without § 101, the Government cannot rely on § 121(a) to justify the Contractor Mandate. "The President cannot 'carry out this subtitle,' *see* § 121(a), by exerting a power the subtitle never actually confers." *Kentucky*, 23 F.4th at 606. In any event, § 121(a) confirms the States' view. Section 121(a) says "[t]he President may prescribe *policies and directives* that [he] considers necessary to carry out this subtitle"; it does not say he may prescribe *regulations*—*i.e.*, rules that "address employer conduct unrelated to the employer's performance of contractual obligations to the Government," *Building & Construction Trades Department v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002) (alterations omitted) (quoting *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 228–29 (1993)).

"Policies and directives" and "regulations" are distinct, as the statutory context shows. Section 121(c) authorizes the GSA Administrator to "prescribe *regulations* to carry out this subtitle." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *United States v. Daifullah*, 11 F.4th

888, 894 (8th Cir. 2021) (quotations and alterations omitted). Furthermore, other provisions in Title 40 (§ 603) and the U.S. Code (18 U.S.C. § 3496 and 32 U.S.C. § 110) expressly give the President the power to issue regulations. Congress's decision not to do so in § 121(a) affirms that "policies and directives" are distinct from "regulations." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). And, thus, by extension that the President lacks regulatory authority under § 121.

That tracks with the purposes of the Procurement Act—and thus ties back into § 101. The Procurement Act "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc). Congress created § 121 to allow the President to "play a direct and active part in supervising the Government's management functions." *Id.* That plainly supervisory authority provides the President only with "authority to direct" agencies in performing their "functions under FPASA provisions." *AFL-CIO v. Carmen*, 669 F.2d 815, 822 (D.C. Cir. 1981); *see also Chamber of Commerce*, 74 F.3d at 1333. It does not provide him with the authority to dictate that contractors

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require basically all of their employees and subcontractors to be vaccinated against COVID-19.

Confirming that reading of §§ 101 and 121 is the fact that Congress has spoken on the issue of federal vaccine policy. The National Vaccine Program requires the Department of Health and Human Services (HHS) to create a plan to provide "*assistance* to States, localities, and health practitioners in the distribution and use of vaccines, including efforts to *encourage* public acceptance of immunizations . . . ." 42 U.S.C. § 300aa-2(a)(6) (emphases added); *see also* 42 U.S.C. §§ 247d(b)(2)(A), 247d-1(a)–(b) (involving vaccines and public health generally). Similarly, Congress made COVID-19 vaccines part of the States' benchmark Medicaid coverage. 42 U.S.C. § 1396u-7(b)(8). Finally, the Senate disapproved of the OSHA vaccine mandate. *See OSHA Mandate*, 142 S. Ct. at 666.

The existence of specific statutes dealing with vaccines militates against finding hidden authority to impose a vaccine mandate in the Procurement Act's statement of purposes and general grant of authority to the President. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) ("Congress' tobacco-specific statutes preclude the FDA from regulating tobacco products" under the FDCA.). Moreover,

those statutes, plus Congress's rejection of the OSHA mandate, evidence a legislative preference for suasion over compulsion. Given those facts, it is anomalous to conclude that Congress also gave the President an implied power to mandate a vaccine through the Procurement Act. *See*, *e.g.*, *Wetherill v. Geren*, 616 F.3d 789, 796–97 (8th Cir. 2010) ("Congress 'does not, one might say, hide elephants in mouseholes.'") (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

Past practice—or, more precisely, the lack of similar past practice—also cuts against the mandate. The Government, to be sure, points to past presidential practice and court decisions involving orders issued under the Procurement Act prohibiting contractors from discriminating, mandating contractors' compliance with wage and price controls, requiring contractors to post labor notices, requiring contractors to confirm an employees' immigration statutes, and requiring contractors to provide paid sick leave. Br. Appellants 17–21. Those orders, the Government says, affirm the President's power "to authorize a variety of orders improving the economy and efficiency of contractors' operations." *See id.* at 22.

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Of course, a handful of disparate examples does not constitute "longstanding practice." Br. Appellants 22 (quoting *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam)). The Government's conclusion is also question begging, for none of the examples it cites provides evidence that the Contractor Mandate is one of those "variety" of orders. Nor do such examples exist. "As the parties stipulated in their joint statement of material facts, the FPASA has never been used to require contractors to ensure that their employees were vaccinated against any disease. The uses of presidential power under the FPASA [the Government cites] relate to the interactions between contractors and their employees in the workplace, *e.g.*, notification of employee rights, wage controls, and nondiscrimination." App. 838; R. Doc. 36, at 9 (citing App. 662; R. Doc. 27, at 5). "Each of [the Government's examples] has a 'close nexus' to the ordinary hiring, firing, and management of labor. But none of those comes even *close* to the deployment of the Property Act to mandate a medical procedure for one-fifth (or more) of our workforce." *Kentucky*, 23 F.4th at 607–08 (quoting *Kahn*, 618 F.2d at 792). The cases involving antidiscrimination orders—which represent the broadest use of the Procurement Act courts have sanctioned—took pains to emphasize the

narrowness of their decisions. *See id.* at 608 (noting that the *Kahn* court "repeatedly stresses the narrowness of its decision"); *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir. 1971) (noting the evidence showing "that the Presidents were not attempting by the Executive Order program merely to impose their notions of desirable social legislation on the states wholesale [but were acting] in the one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests"); *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 171 (4th Cir. 1981) ("[A]ny increase in the cost of federal contracts that could be attributed to discrimination by these insurers is simply too attenuated to allow a reviewing court to find the requisite connection between procurement costs and social objectives.").

Thus, framed at the proper level, the answer to whether there has been a "longstanding practice" of using the Procurement Act to mandate mass vaccination, *see Missouri*, 142 S. Ct. at 652, is no. That cuts squarely against the Government's position. "The dearth of analogous historical examples is strong evidence that § 101 contains no such power." *Kentucky*, 23 F.4th at 608; *see also OSHA Mandate*, 142 S. Ct. at

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666 (noting that the same fact indicated that the OSHA vaccine mandate is not lawful); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (noting the unprecedented nature of the government's claim of authority).

In short, the Procurement Act does not permit Presidents "to impose their notions of desirable social legislation on the states wholesale." *Contractors Ass'n*, 442 F.2d at 171 (3d Cir. 1971). Only those "policies and directives bearing an actual and logical relationship to" procurement are lawful. *Kahn*, 618 F.2d at 800 (MacKinnon, J., dissenting). In other words, there must be a "sufficiently close nexus between" federal procurement and a purported Procurement Act policy. *Id.* at 792; *see also id.* at 797 (Bazelon, J., concurring); *id.* (Tamm, J., concurring).

The Government tries to meet that requirement by pointing to the risk of asymptomatic transmission of COVID and by claiming that COVID "spreads quickly … and any unvaccinated employee can easily transmit the virus to federal contract employees in a shared workspace." *See* Br. Appellants 24, 25. But assuming asymptomatic transmission

happens,[10] it cannot justify a mandate that applies to such fleeting interactions as the mandate covers.

In any event, the real foundation of the Government's argument is its claim that vaccines prevent transmission of COVID, which reduces costs and so promotes economy and efficiency. *See*, *e.g.*, Br. Appellants 24–25; 86 Fed. Reg. at 63,422. The first problem with the claim is the lack of record support for the proposition. The closest is the OMB director's statement, in her economy-and-efficiency analysis, that vaccination "provide[s] strong and persistent protection against infection." 86 Fed. Reg. at 63,422. But the study she provides to support that proposition analyzed only the effect of vaccination on *hospitalization*, not infection and transmission; it "did not include persons with asymptomatic SARS-CoV-2 infection or COVID-19 who did not require hospitalization." Mark W. Tenforde et al., *Sustained Effectiveness of Pfizer-BioNTech and Moderna Vaccines Against COVID-19 Associated Hospitalizations Among Adults—United States, March-*

[10] *But see* Zachary J. Madewell et al., *Household Transmission of SARS-CoV-2: A Systematic Review and Meta-Analysis*, JAMA Network Open, Dec. 2020, at 1 (finding that people with asymptomatic infections almost never infect others).

July 2021, 34 Morbidity & Mortality Weekly Rep. 1156, 1161 (2021). Thus, it says nothing about whether vaccination prevents infection or transmission. And while the Tenforde study cites two papers arguing that the COVID vaccines may prevent infection, both acknowledge the need for further research and provide little evidence that the COVID vaccines do, in fact, prevent infection. *See* Deborah Cromer et al., *Prospects for Durable Immune Control of SARS-CoV-2 and Prevention of Reinfection*, 21 Nature Rev. 395, 395 (2021); Jackson S. Turner et al., *SARS-CoV-2 mRNA Vaccine Induce Persistent Human Germinal Centre Response*, 596 Nature 109, 111–12 (2021).

That lack of evidence is likely why the Government *stipulated* that the vaccines' ability to prevent infection and transmission is imperfect, and, at the time of the Contractor Mandate, "not currently known." App. 660; R. Doc. 27, at 3. Indeed, the Government stipulated by reference, *see* App. 660; R. Doc. 27, at 3, to the States' expert's conclusion that the COVID vaccines "provide only short-lasting and limited protection versus infection and disease transmission." App. 157; R. Doc. 9-5, at 3. The Government cannot take back those stipulations now. Moreover, as pointed out above, *see supra* Statement of the Case § I, everyone—

including the Government—agrees that Omicron effectively evades the vaccines' protection against infection and transmission. Thus, the evidence clearly shows that vaccines do *not* prevent infection and transmission, and so the Government's claim lacks factual foundation.

There is a more fundamental problem with the Government's argument. Given its breadth, the Contractor Mandate's "manifest purpose and inevitable effect" is the regulation of *health and safety*, and thus it is not "a legitimate response to [federal] procurement constraints or to ... economic need." *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 291 (1986). That is, the mandate is not an exercise of the President's supervisory authority; it is public-health legislation.

As such, the only way to justify it is to do what the Government does here—argue that the Procurement Act permits the President to require contractor to do anything that he concludes would make their business more efficient and economical. *See* Br. Appellant 19 (arguing that the President's power under the Procurement Act includes mandating acts that will increase "the efficiency and productivity of federal contractor operations"). As the district court said, that logic

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means the President can "mandate virtually any public health measure that would result in a healthier contractor workforce." App. 837; R. Doc. 36, at 8; *see also*, *e.g.*, *Kentucky*, 23 F.4th at 608. It goes even further; it would essentially let the President run a contractor's business, setting salaries, hiring and firing workers, mandating certain accounting procedures, and so on. That the Government justifies the Contractor Mandate by pointing to some private employers who have required their employees to be vaccinated, *see* Br. Appellants 24—as opposed to private parties who have required counterparties to a contract to vaccinate their employees—underscores that the mandate is not about procurement but about micromanagement and imposing a social policy.

No court has sanctioned that reading of the Procurement Act. However broad the powers the Act gives the president, *see UAW-Labor Employment and Training Corp. v. Chao*, 325 F.3d 360, 367 (D.C. Cir. 2003) (calling the standard "lenient"), it is "*not* intended to operate as a 'blank check for the President to fill in at his will,'" *Georgia*, 2021 WL 5779939, at *10 (quoting *Kahn*, 618 F.2d at 793); *see also* App. 836–37; R. Doc. 36, at 7–8 (noting that fact). The Contractor Mandate must be "'*reasonably* related' to the purposes of the Procurement Act," *Georgia*,

2021 WL 5779939, at *10 (quoting *Liberty Mut. Ins. Co.*, 639 F.2d at 170), which is *procurement*, not business management or health policy.

The mandate's incredible reach means that employees with little to no connection to federal contracts must get vaccinated. It is hard to see how that has anything to do with ensuring an "economical and efficiency system for ... procurement and supply." § 101(1). Adding the fact that the premise of the efficiency—that vaccination stops infection—is at best mere guesswork and, more likely, wrong, and the risk that at least some employees will quit over the mandate, *see* App. 840–41; R. Doc. 36, at 11–12 (referencing that possibility in discussing irreparable harm), means that there is no "close nexus" between economy and efficiency in procurement and the Contractor Mandate. *Kahn*, 618 F.2d at 792.

B. Clear statement rules confirm that the Procurement Act does not authorize the Contractor Mandate.

The district court thus correctly concluded that the Contractor Mandate sweeps far too broadly to be an exercise of the President's authority under the Procurement Act. *See* App. 837; R. Doct. 36, at 8. But even if the Procurement Act did not clearly deny the President the authority to impose the Contractor Mandate, "related canons of

interpretation still . . . foreclose construing such ambiguity in the government's favor." *Kentucky*, 23 F.4th at 606.

First, "the sheer scope of the . . . claimed authority . . . counsels against the Government's interpretation." *Ala Ass'n of Realtors*, 141 S. Ct. at 2489. "[T]he contractor mandate sweeps in *at least* one-fifth of the American workforce. The true proportion may be even larger, given that the contractor mandate defines so capaciously who qualifies as a covered contractor." *Kentucky*, 23 F.4th at 606–07. As the district court found as a matter of fact, "federal contractors subject to the mandate will face significant disruptions due to resignations." App. 841; R. Doc. 36, at 12. Given the "vast economic and political significance" of the Contractor Mandate, "we would need a clear statement from Congress delegating such authority to the executive branch." *Kentucky*, 23 F.4th at 607 (quoting *Util. Air. Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)); *see also*, *e.g.*, *OSHA Mandate*, 142 S. Ct. at 665; *King v. Burwell*, 576 U.S. 473, 486 (2015). The Procurement Act lacks a clear statement that it permits the executive to issue the Contractor Mandate.

The Government does not contest that fact. *See* Br. Appellants 30–34. It instead argues that the Contractor Mandate "is an exercise of the

federal government's proprietary authority," and thus the clear-statement requirement does not apply. *Id.* at 29.[11] The premise is wrong. The mandate's scope—reaching basically every employee of all federal contractors and subcontractors—establishes that it is a regulation. *See, e.g.*, *Chamber of Commerce*, 74 F.3d at 1338 (finding an order with similar effects regulatory). The Government's claim that the mandate is an exercise of its proprietary power is "simply a pretext to increase vaccination." *Kentucky*, 23 F.4th at 609 n.15; *see also BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 612 (5th Cir. 2021) (calling the OSHA vaccine mandate, which President Biden announced with the Contractor Mandate, a "work-around" an absence of authority to mandate vaccines) (quoting a retweet by President Biden's chief of staff).

Second, the Contractor Mandate disrupts the traditional federal state-balance without a clear statement that Congress intended to do so. "Among the background principles of construction . . . are those grounded

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[11] The Government also argues that the major-questions doctrine does not apply to delegations of authority to the President. *See* Br. Appellant 33–34. It provides no authority for that proposition and, given that the President can delegate his authority to federal officers, *see* 3 U.S.C. § 301, as EO 14,042 does, *see* 86 Fed. Reg. at 50,985–86, the justifications the Government provides fall away.

in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857–58 (2014). To protect that relationship, "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting another source)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Vaccine mandates are such an area. The States "did not surrender [their police powers] when becoming a member[s] of the Union under the Constitution." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). "[T]he police power of a state must be held to embrace . . . such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.*; *see also Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006). Thus, "it is settled that it is within the police power of a state to provide for compulsory vaccination." *Zucht v. King*,

260 U.S. 174, 176 (1922); *see also*, *e.g.*, *Jacobson*, 197 U.S. at 12, 14, 37–38; *Kentucky*, 23 F.4th at 609. "[T]he contractor mandate seeks to … transfer[s] this traditional prerogative from the states to the federal government under the guise of a measure to make federal contracting more 'economical and efficient.'" *Kentucky*, 23 F.4th at 609.

Again, the Government does not claim there is a clear statement in the Procurement Act justifying that transfer. Instead, the Government says that the clear-statement rule doesn't apply because the Contractor Mandate is an exercise of its power to enter into contracts, which is "not an area traditionally reserved to the States." *See* Br. Appellants 34–36. That is reductive and question-begging, and "frames the issue at the wrong level of generality." *Kentucky*, 23 F.4th at 610. It is reductive and question-begging because "the federal government [is using] contracting as naked pretext to invade traditional state prerogatives." *Id.* at 609. And it is too general a framing because the issue is not the States' interest in federal contracting; it is their "traditional interest in regulating public health and, specifically, in determining whether to impose compulsory vaccination on the public at large." *Id.* at 610.

C. Limiting the scope of the Procurement Act avoids an unconstitutional reading of the law.

Two related rules of construction support the district court's injunction. The first is "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The second is "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the Supreme Court "expect[s] a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). *See also Nelson*, 2021 WL 6108948, at *13–*14 (looking to those principles in concluding the Contractor Mandate was an unjustified and improper exercise of the President's procurement power). Those rules apply here because the Contractor Mandate raises grave constitutional concerns—indeed, it is outright unconstitutional on multiple grounds, which also provide an alternative basis for affirmance here.

First, as noted above, *see supra* Argument § I.A, the Government's reading of the Procurement Act has no limit, and so allows the President to regulate almost any decision touching on the business operations of federal contractors. If "the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more 'economical and efficient'—then that *certainly* would present non-delegation concerns." *Kentucky*, 23 F.4th at 607 n.14; *see also OSHA Mandate*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (noting the same issue with the OSHA mandate). It would be inconsistent with the non-delegation doctrine—indeed, with basic constitutional principles—to conclude that the Procurement Act "authorize[s] a workplace safety administration … [that can] make sweeping pronouncements on matters of public health affecting every member of society in the profoundest of ways." *BST Holdings*, 17 F.4th at 611.

Moreover, and related to the federalism concerns flagged above, if the Contractor Mandate were a valid exercise of the President's Procurement Act authority, the statute would violate the Tenth

Amendment and exceed the federal government's power under the Spending Clause.[12]

First, "[u]nder the Spending Clause . . . , 'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'" *Osseo Area Sch., Indep. Sch. Dist. No. 279 v. M.N.B. ex rel. J.B.*, 970 F.3d 917, 922 (8th Cir. 2020) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S.1, 17 (1981)).

The Contractor Mandate, however, can change at a moment's notice. The updated Guidance requires compliance with FAQs the Task Force can update at will. *See* 86 Fed. Reg. at 63,421 (providing the link in a copy of the Guidance). And EO 14,042 authorizes OMB, the Task Force, and FAR to make binding alterations to the Guidance at any time. The ability to alter contract terms mid-performance, with no guidance as to what those alterations may be, is not the kind of unambiguous contract condition that passes constitutional muster. *See Van Wyhe v. Reisch*, 581

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[12] The district court only addressed the States' argument that the Contractor Mandate imposes an unconstitutionally ambiguous condition. *See* App. 839; R. Doc. 36, at 10. Since it did not address the States' other constitutional arguments, *see* App. 110–14; R. Doc. 9, at 41–45; App. 793–95; R. Doc. 28, at 16–18, this court has plenary authority to address them. *See Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020) (per curiam). These arguments provide an alternative ground for affirmance.

F.3d 639, 650 (8th Cir. 2009); *see also Ohio v. Yellen*, 547 F. Supp. 3d 713, 731 (S.D. Ohio 2021) ("[N]ot only does the Constitution require Congress to tell States that there *are* conditions, but Congress must also tell States *what* those conditions are.").

The district court rejected that argument on the basis that "when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe," App. 839; R. Doc. 36, at 10, quoting *National Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). *Finley* is not a Spending Clause case, and the quoted portion of *Finley* involves whether a grant condition is unconstitutionally vague "[u]nder the First and Fifth Amendments." 524 U.S. at 588–90. It thus does not stand for the proposition that there exists an artificial distinction between government contracts and other programs that also derive from the Spending Clause.

Such a conclusion is also inconsistent with the basic Spending Clause principle that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1568 (2022) (alterations omitted)

(quoting *Pennhurst*, 451 U.S. at 17). There is no warrant to exclude actual contracts from that principle.

Second, under the Spending Clause, conditions on federal spending must "relate[] to the federal interest in particular national projects or programs." *Van Wyhe*, 581 F.3d at 650 (quotations omitted); *see also South Dakota v. Dole*, 791 F.2d 628, 631 (8th Cir. 1986). Conditions do not "relate to the federal interest" when they regulate "conduct outside the scope of the" federal contract. *Rust v. Sullivan*, 500 U.S. 173, 197 (2000) (discussing grants); *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218–19 (2013) ("[R]equiring recipients to profess a specific belief ... goes beyond defining the limits of the federally funded program to defining the recipient.").

The Contractor Mandate goes far beyond imposing conditions that relate to the relevant federal interest. There is little connection between, for example, a federal contract and a member of a contractor's legal staff who works from home and sometimes reviews items connected with the contract's performance. And the employee who says "hello" to a coworker working on a federal contract is even farther removed from the contract. Yet the Contractor Mandate applies to both. *See* App. 741–42; R. Doc.

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27-1, at 70–71. As such, the Contractor Mandate bears no relationship to the purposes of the contract, and is not a constitutional exercise of the spending power.

Third, the federal government cannot use the spending power to "commandeer[] a State's . . . administrative apparatus for federal purposes," *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 577 (2012) (Roberts, C.J.), or to "conscript state [agencies] into the national bureaucratic army," *id.* at 585. The Contractor Mandate does just that. The mandate applies to contracts between the federal government and state agencies, *see* App. 834–35; R. Doc. 36, at 5–6 (so noting), and the mandate compels those agencies to require employees whose connection to federal contracting is incredibly tenuous to receive a COVID-19 vaccine, *see* App. 729–30; R. Doc. 27-1, at 58–59. There is little the States can do to avoid that, as the loss of federal contracts would mean the loss of significant revenue. *See* App. 835; R. Doc. 36, at 6 (noting Missouri's "reliance on [federal] contracts to pay [some] employees' salaries"); *see also Brnovich*, 562 F. Supp. 3d at 165 (noting that fact); *Louisiana*, 2021 WL 5986815, at *6 (same). Since the States have little choice but to continue as federal contractors, they must

implement the Contractor Mandate. That is unconstitutional commandeering. *See Printz v. United States*, 521 U.S. 898, 914 (1997).

D. The Procurement Policy Act and Competition in Contracting Act (CICA) bar the Contractor Mandate.

A final, alternative basis to uphold the injunction is the fact that the Contractor Mandate and EO 14,042 conflict with two other laws. *See Chamber of Commerce*, 74 F.3d at 1332.

The first is the Procurement Policy Act. *See* Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 4, 102 Stat. 4055, *later codified at* 41 U.S.C. § 1302(a). The law charges the FAR Council with "issu[ing] and maintain[ing]" a "single, [g]overnment-wide procurement regulation" known as the Federal Acquisition Regulation ("FAR"). 41 U.S.C. § 1303(a)(1). The power to issue contracting regulations is exclusive to the FAR Council. No other agency may issue government-wide procurement regulations. *See* § 1303(a)(2) ("Other regulations relating to procurement issued by an executive agency shall be *limited* to . . . regulations essential to *implement* Government-wide policies and procedures within the agency[] and additional policies and procedures required to satisfy the *specific and unique needs of the agency*." (emphases added)).

In violation of the Procurement Policy Act, EO 14,042 delegates to OMB and the Task Force the power to make a government-wide procurement regulation, when that power belongs to the FAR Council alone. *See* 86 Fed. Reg. at 50,985 (delegating to OMB and the Task Force the role of developing and approving the vaccine mandate for use in federal contracts). And it permits the FAR Council to circumvent traditional procedural requirements for issuing procurement regulations, *see* 41 U.S.C. § 1707, in favor of issuing rules through "guidance," *see* 86 Fed. Reg. at 50,958–86. Because the delegation is unlawful, the Contractor Mandate—which depends on that delegation—is void.

The second law is the Competition in Contracting Act (CICA). The CICA requires "full and open competition" in procuring services. 31 U.S.C. § 3301(a)(1). Agencies cannot preclude "full and open competition by effectively excluding an offeror from winning an award," particularly offerors that "represent[] the best value to the government." *Nat'l Gov't Servs, Inc. v. United States*, 923 F.3d 977, 990 (Fed. Cir. 2019). But the contractor mandate does exactly that—"contractors who 'represent[] the best value to the government' but choose not to follow the vaccine mandate would be precluded from effectively competing for government

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contracts." *Kentucky*, 2021 WL 5587446, at *8 (quoting *Nat'l Gov't Servs*, 923 F.3d at 990). Thus, the Contractor Mandate must give way to the CICA.

II. The district court correctly held that the other equitable factors justified injunctive relief.

A. The States established they would be irreparably harmed absent relief.

A "district court's conclusion that there is a threat of irreparable harm that justifies a preliminary injunction" is reviewed for clear error. *Sleep No. Corp.*, 33 F.4th at 1018. The States are "not required to prove with certainty the threat of irreparable harm, but [they] must prove that irreparable injury is likely in the absence of an injunction." *Id.* (quotations omitted). Harm is irreparable if the "party has no adequate remedy at law." *Id.* (quotations omitted). The Government does not show that the district court erred—much less clearly erred—in finding that the States showed an injunction was necessary to prevent irreparable harm.

First, the Government says that "ordinary compliance costs are typically insufficient to constitute irreparable harm." Br. Appellants 37 (quotations omitted). That's irrelevant. The district court concluded that costs the States would incur to comply with the vaccine mandate are

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"nonrecoverable." App. 841; R. Doc. 36, at 12. That is irreparable harm; "[t]he threat of unrecoverable loss … does qualify as irreparable harm." *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996). The district court's conclusion on this front is consistent with the conclusion of numerous other courts enjoining the Government's COVID orders. *See, e.g.*, *BST Holdings*, 17 F.4th at 618; *Brnovich*, 562 F. Supp. 3d at 165; *Nelson*, 2021 WL 6108948, at *15; *Louisiana*, 2021 WL 5986815, at *10; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (finding irreparable harm where there was "no guarantee of eventual recovery" of lost rent).

Next, the Government attacks the district court's evaluation of the evidence that the States "will face significant disruptions [in their workforce] due to resignations." App. 840–41; R. Doc. 36, at 11–12. The Contractor Mandate is "the sort of large-scale policy that's amenable to challenge using large-scale statistics and figures, rather than highly specific individualized documents." *Texas v. Biden*, 20 F.4th 928, 971 (5th Cir. 2021). So it was more than enough that the States provided declarations discussing the anticipated effects of the mandate on their workforces, *see, e.g.*, App. 302; R. Doc. 9-10, at 3 (North Dakota); App. 310; R. Doc. 9-11, at 6 (Wyoming); App. 343; R. Doc. 9-14, at 4 (Missouri);

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App. 348; R. Doc. 9-15, at 4 (Missouri), and a survey showing that some employees will quit instead of submit to a COVID vaccine mandate, *see* App. 666; R. Doc. 27, at 9–10. That evidence—essentially a statistical sampling from the States plus the survey—ta"robustly support[s]" the district court's holding. *Texas*, 20 F.4th at 971.

The district court's conclusion also conforms with common sense. In response to an employer requiring them to take a vaccine they do not want, employees "will likely react in predictable ways," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019)—and one of those ways is to quit or force the employer to fire them. Again, the evidence the States provided confirms that logical conclusion, and so the district court did not err.

Lastly, as noted above, the district court erred in concluding that the Contractor Mandate is constitutional. *See supra* Argument § I.C. As a result, its conclusion that the States would not suffer irreparable harm to their sovereign interests is incorrect. *See* App. 840; R. Doc. 36, at 11. The Contractor Mandate affirmatively harms the States' sovereign interests, which is also an irreparable harm. *See*, *e.g.*, *BST Holdings*, 17 F.4th at 618 ("The States . . . have an interest in seeing their

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constitutionally reserved police power over public health policy defended from federal overreach.”). And that provides an alternative basis for affirming the district court’s finding of irreparable injury.

B. The district court properly balanced the harms.

The Government’s argument that the district court improperly balanced the harms ignores the crux of the district court’s analysis: That the Contractor Mandate is unlawful and so “there is no public interest in the enforcement of an unlawful action.” App. 841–42; R. Doc. 36, at 13–13. That is enough to meet this factor, as the Supreme Court has held twice in the context of federal COVID orders. *See OSHA Mandate*, 142 S. Ct. at 666; *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490. “[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490.

In any event, the Government’s claims of harm from the injunction are overstated. That is clear from the fact that the Government instituted the vaccine mandate nine months after vaccines became publicly available, *see* App. 659; R. Doc. 27, at 2, and delayed the effective date of the Contractor Mandate during this litigation, *see* App. 664; R. Doc. 27, at 7. Lastly, that there is in place a nationwide injunction

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renders the Government's argument—at least at this time—"somewhat academic." *Kentucky*, 23 F.4th at 611.

III. The injunction's scope is proper.

Finally, the Government argues that the injunction should extend only to "qualifying contracts between the federal government and plaintiffs Wyoming, Iowa, and Missouri." Br. Appellants 41–42. Its argument is that "the only injuries identified to the [district court] that purportedly warranted injunctive relief concerned [those] three [States'] own contracts with the federal government." *Id.* at 41.

The Government cites *Califano v. Yamasaki*, 442 U.S. 682 (1979), in support. *See* Br. Appellants 40. But "the Supreme Court … wrote in *Califano* that one of the 'principles of equity jurisprudence' is that 'the scope of injunctive relief is dictated by the extent of the violation established. *Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (quoting *Califano*, 442 U.S. at 682). *Rodgers* thus upheld a statewide injunction "because the violation established—the plain unconstitutionality of Arkansas's anti-loitering law—impacts the entire state of Arkansas." *Id.*; *see also Lewis v. Casey*, 518 U.S. 343, 360 (1996) (denying relief beyond certain plaintiffs where "[t]he constitution

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violation has not been shown to be systemwide"). Here, the violation—the unlawfulness of the Contractor Mandate—extends to all the States, indeed, it extends nationwide.[13] It was thus appropriate for the district court to have issued relief protecting all the States.

In any event, the Government misunderstands the district court's analysis. The Government seems to think that the district court "determined that only a fraction of plaintiffs established standing." Br. Appellants 41. Not so. The district court's standing analysis was limited to ensuring that at least one State had standing "sufficient to permit review;" the court never excluded any State for want of standing. *See* App. 835; R. Doc. 36, at 6. The district court was thus free to consider the evidence the States put forth describing "the extent of their federal contracts and the likely effect the mandate will have on their operations," such as declarations and the survey, to assess the States' harms and the scope of the injunction. App. 840–41; R. Doc. 36, at 11–12. That evidence is the type of "big-picture" "statistics and figures" that can be used to establish both injury and the need for an injunction in all the States. *See*

[13] Whether that justifies nationwide relief is a different question involving different concerns. *See Rodgers*, 942 F.3d at 458 n.4.

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Texas, 20 F.4th at 971. That is, it shows that enough States contract with the federal government—and that the Contractor Mandate is likely to be disruptive to those contracts—to justify concluding that all the Plaintiff States would suffer harm from the mandate, and so injunctive relief covering all the States is appropriate.

Alternatively, and contra the district court, *see* App. 833–34; R. Doc. 36, at 4–5, the injunction's scope is proper because the States have standing to bring their claims in their *parens patriae* capacity. That is so because the States' claims do not turn on "the operation of the" Contractor Mandate, App. 834; R. Doc. 36, at 5, they turn on the fact that the Contractor Mandate "invades the [States'] prerogative to superintend the public health." *Kentucky*, 23 F.4th at 597. The States thus have "an interest independent of and behind the title of [their] citizens to safeguard [their] domain, … and thus … [their] suit may proceed" on a *parens patriae* theory. *Id.* (quotations omitted) (gathering examples from the Supreme Court). That is, the States may sue the federal government to vindicate a quasi-sovereign interest, *see Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007), and the "health and well-being—both physical and economic of" the States' residents is such an interest, *Alfred L.*

Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982). This makes sense because the Constitution leaves the power to regulate health and welfare to the States, *see*, *e.g.*, *Jacobson*, 197 U.S. at 25.

That, then, is sufficient to support the injunction here. The Contractor Mandate, because it intrudes on the States' quasi-sovereign and *parens patriae* interest in the health and physical and economic well-being of their citizens, which is encapsulated in the States' constitutionally protected power to make health and welfare regulations, harms all the States. Only relief of commensurate scope can remedy it. *See*, *e.g., Rodgers*, 942 F.3d at 458.

CONCLUSION

For those reasons, the States respectfully request the Court to affirm the district court's preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the typeface and formatting requirements of Fed. R. App. P. 27 and 32, that it is written in Century Schoolbook 14-point font, and that it contains 12,686 words as determined by the word-count feature of Microsoft Word. Both the brief and addendum have been scanned for viruses and are virus-free.

/s/ D. John Sauer

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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/s/ D. John Sauer