No. 21-6147

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMONWEALTH OF KENTUCKY, et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, et al.,

Defendants-Appellants.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Executive Branch Materials:

Other Authorities:

INTRODUCTION

The critical question in this case is whether the President—pursuant to his authority under the Procurement Act to "prescribe policies and directives" that he "considers necessary" to "provide the Federal Government with an economical and efficient system for" contracting and procurement—may direct federal agencies to contract only with employers that have a vaccinated federal contractor workforce. As the government has explained (Opening Br. 17-27), the answer to that question is yes. The Procurement Act authorizes the President to pursue policies that in his judgment will improve the economy and efficiency of the overall federal procurement system by enhancing the economy and efficiency of federal contractors' operations. The challenged Executive Order is well within that tradition. As the President determined, requiring vaccination of covered contractor employees decreases absences and reduces transmission of a virulent disease among the federal contractor workforce. And no other considerations required Congress to more clearly authorize the President to issue the Executive Order. The government is therefore likely to succeed on the merits of plaintiffs' challenge, and both the district court and stay panel erred in concluding otherwise.

Plaintiffs have also failed to establish the remaining requirements for preliminary relief. Plaintiffs have not shown that they will suffer immediate and irreparable harm as a result of the Executive Order. The district court's injunction, by contrast, precludes the implementation of measures designed to protect the

performance of federal contracts from extended absences resulting from COVID-19 and its variants. Plaintiffs' insistence that the injunction maintains the "status quo" ignores these harms and the dynamic challenges the pandemic continues to pose to federal contracting.

Finally, at a minimum, the district court's patently overbroad injunction should be limited to plaintiffs' own contracts with the federal government.

ARGUMENT

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS

A. The Procurement Act Authorizes Presidents To Set Policies That Improve The Economy And Efficiency Of Federal Contractor Operations

1. Plaintiffs acknowledge that § 121 of the Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the statute. 40 U.S.C. § 121(a). Section 101, in turn, informs which policies "carry out" the statute, explaining that the Procurement Act's "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. That statement of purpose is not an affirmative grant of authority, *see* Response Br. 11 n.2, but it "is an appropriate guide to the meaning of the statute's operative provisions," including § 121, *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (cleaned up). Together then, these provisions make clear that the Procurement Act 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.[1]

The Executive Order falls well within that express grant of statutory authority. The Executive Order directs agencies to include a clause in certain federal contracts that requires the contractors who elect to do business with the federal government to ensure that their employees abide by COVID-19 safety protocols.[2] Requiring contractors' employees to abide by those safety protocols, including becoming vaccinated against COVID-19, advances the economy and efficiency of contractor operations by decreasing the likelihood that those employees will miss work or transmit the virus to their coworkers. And ensuring that federal contractor performance is more efficient enhances the economy and efficiency of the federal procurement system by enabling the government to avoid entering into costly extensions or paying millions of dollars in unanticipated leave expenses.

2. Plaintiffs urge this Court to depart from the decades-old understanding

[1] Granting the President authority to establish policies that enhance the economy and efficiency of the overall federal procurement system does not render superfluous separate grants of concurrent authority to the Administrator of General Services to promote economy and efficiency in other contexts. *Contra* States Amicus Br. 7.

[2] Amici States are thus mistaken when they argue (at 9-11) that the Executive Order does not "*direct*[] the actions of inferior officials."

of the Procurement Act and limit its reach to policies that "organize the federal government's internal operations," Response Br. 12, and affect "the government's *initial entry* into a contractual agreement," Response Br. 15 (quoting *Kentucky v. Biden*, 23 F.4th 585, 605 (6th Cir. 2022)). They insist that the statute does not permit the President to set standards governing contractors' performance of those contractual agreements. Like the stay panel, plaintiffs derive this limitation from the statute's reference to the "system" for procurement and argue that policies affecting "contractors' internal operations" have nothing to do with enhancing the efficiency of that overall procurement system. Response Br. 12.

The government has already explained why nothing in the Procurement Act's text supports that restrictive reading, even under plaintiffs' definition of its terms. *See* Opening Br. 24-26. Plaintiffs adopt the stay panel's definition of "system" as "[a] formal scheme or method of governing organization, arrangement." Response Br. 12 (alteration in original) (quoting *Kentucky*, 23 F.4th at 604). That definition, however, offers plaintiffs no support. As the government explained, providing the federal government with a "formal scheme or method" 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. *See* Opening Br. 24-25. A procurement "scheme or method" operates efficiently only if it purchases goods and services that are delivered on time and without additional costs.

Even taking plaintiffs' analogy on its own terms (at 12-13), a company can hardly establish an efficient system for obtaining widgets without considering factors affecting the performance of its widget-procurement contracts, including the availability and productivity of the widget makers. The purchaser's "system" for widget procurement would necessarily build in appropriate measures to minimize the risks that performance of the contract would be delayed or unforeseen costs incurred. That does not mean, as plaintiffs suggest, that the government is "impos[ing] requirements directly on the employees of third-party widget makers," Response Br. 13; rather, the government is simply including in its contracts a term that it has determined will ensure those contracts are performed economically and efficiently.

Plaintiffs mistakenly contend that the government's reading rests on a flawed interpretation of § 101's reference to "contracting," Response Br. 14-15. The government, however, has never suggested that the President's authority to issue the Executive Order depends entirely on the word "contracting." The Procurement Act broadly authorizes the President to establish policies aimed at creating an "economical and efficient system for … [p]rocuring … nonpersonal services and performing related functions." 40 U.S.C. § 101. That the statute lists "contracting" as one of those "related functions" only underscores that the President's authority to establish the policies he considers necessary to promote the efficiency of the federal government's system for procuring services necessarily encompasses the authority to establish the terms on which those services are to be acquired. *See* Opening Br. 24-25.

That reading does not render superfluous the other listed functions in § 101. *Contra* Response Br. 15. Those functions exemplify the diverse types of tasks that the federal government may perform as part of the overall process of "procuring and supplying property and nonpersonal services." 40 U.S.C. § 101. Some of those tasks might be related to the federal government's contracts with an outside vendor, but others—like, for example, the federal government's "storage" of the property it procures or supplies—might be entirely unrelated to any contract. The Procurement Act authorizes the President to set the standards he considers necessary for the federal government to perform all of those tasks efficiently, and the challenged Executive Order—which directs federal agencies not to enter into certain contracts with entities that do not follow certain workplace safety protocols—is a straightforward exercise of that authority.

Plaintiffs cannot derive support for their reading from the historical problems that purportedly motivated the Procurement Act's passage. Response Br. 13-14. According to plaintiffs, Congress enacted the Procurement Act to address the fact that during World War II, "many agencies entered duplicative contracts supplying the same items and creating a massive post-war surplus." Response Br. 14 (quoting *Kentucky*, 23 F.4th at 606). But even if duplicative contracts were "'the principal evil' legislators may have intended or expected to address" in their legislative commands, "'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'" *Bostock v. Clayton*

County, 140 S. Ct. 1731, 1749 (2020) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). And here, the legislative commands in the Procurement Act unquestionably afford the President broad authority to issues the "policies and directives" that he "considers 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; *see AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc) (noting that "[e]conom[ical]" and "efficien[t]" are terms of great breadth).

3. The longstanding practice of all three branches of government reflects the terms of the statute.

a. Plaintiffs do not dispute that executive orders issued under the Procurement Act have consistently been directed at improving the performance of federal contracts. *See* Opening Br. 18-19 (collecting examples of Executive Orders justified on the grounds that they will create "more efficient and dependable procurement sources" or "improve the health and performance of employees of Federal contractors" (citation omitted)). Nor do they contest that the "longstanding practice of [an agency] in implementing the relevant statutory authorities" is a basis for rejecting a "narrower view" of "seemingly broad language." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam). Thus, the longstanding executive practice of using the Procurement Act to issue orders that improve the efficiency of contractor

performance counsels against adopting plaintiffs' narrow view of the statute as authorizing only orders that improve the efficiency of internal government operations.

Plaintiffs' only response is to point out that none of those previous executive orders involved a vaccination requirement. Response Br. 23-24. But, as the Supreme Court has explained, it does not matter that the vaccination requirement "goes further than what the [President] has done in the past to implement" his statutory authority. *Missouri*, 142 S. Ct. at 653. The President "has never had to address an infection problem of this scale and scope before." *Id.* "[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the [President] has long been recognized to have." *Id.* at 654.

b. Plaintiffs' interpretation of the Procurement Act is also inconsistent with decades of judicial decisions upholding orders on the ground that improving the economy and efficiency of contractors' operations would improve the economy and efficiency of the federal government's system for procurement. In *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, the court noted that anti-discrimination orders had been upheld because they would reduce "costs and delay[s]" in federal government programs, 442 F.2d 159, 170 (3d Cir. 1971); in *UAW-Labor Employment & Training Corp. v. Chao*, the court upheld an order requiring contractors to post employee notices because it would enhance the "productivity" of contractor employees, "facilitat[ing] the efficient and economical completion of … procurement contracts," 325 F.3d 360, 366 (D.C. Cir. 2003) (citation omitted); and in *Chamber of*

Commerce v. Napolitano, the court upheld an order requiring contractors to ensure that their employees are lawfully present in the United States based on the President's judgment that such assurances would create "more efficient and dependable procurement sources," 648 F. Supp. 2d 726, 738 (D. Md. 2009) (citation omitted). As the D.C. Circuit concluded in *AFL-CIO v. Kahn*, the President's authority to achieve an economical and efficient system for federal procurement extends to policies that address "those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." 618 F.2d at 789; *see* Opening Br. 19-21, 26.[3]

Plaintiffs attempt to distinguish those cases as involving "modest work-anchored" orders, with a "close nexus to the ordinary hiring, firing, and management of labor." Response Br. 16, 31 (cleaned up). Even if that characterization were accurate, it reflects an acknowledgment that the courts sustained executive orders directed to the performance of contracts, not just to the process of locating and entering into those contracts. Plaintiffs thus do not credibly dispute that their theory of the Procurement Act conflicts with decades of judicial decisions.

[3] These cases likewise demonstrate why amici States are incorrect that the President's authority is limited to "required" or "indispensable" orders, States Amicus Br. 7-8 (citation omitted). The statute empowers the President to enact policies that he "*considers* necessary" to carry out the statute's goals. 40 U.S.C. § 121(a) (emphasis added).

In any event, the Executive Order at issue is explicitly work-anchored: It applies only to contractor employees performing work on federal contracts or sharing workplaces where work on federal contracts is taking place. *See* 86 Fed. Reg. 63,418, 63,419 (Nov. 16, 2021). And, as private sector practice illustrates, vaccination requirements are as much a part of management of labor and "traditional … business-related decision-making," Response Br. 31, as other orders issued over the decades. *See* 86 Fed. Reg. at 63,422; *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).

c. That Congress, in the wake of this consensus, has reenacted the Procurement Act without restricting the President's power is further evidence of the breadth of the statute's grant of authority. *See* Opening Br. 21-22.

Plaintiffs protest that "silence from Congress cannot defeat the better reading of the statute." Response Br. 16. This case, however, involves not just congressional silence, but congressional recodification of the relevant provisions without substantive change. It thus differs meaningfully from the cases plaintiffs rely on where the litigants argued that Congress intended to apply the judicial interpretation of an existing provision to entirely new statutory language. *See BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1541-1542 (2021) (rejecting argument that "Congress implicitly ratified and endorsed" application of judicial interpretation of existing provision to newly added statutory language); *Jama v. Immigration & Customs*

Enf't, 543 U.S. 335, 350-351 (2005) (rejecting Congressional acquiescence argument where new statutory procedure was "forged … out of two provisions, only one of which had been construed as petitioner wishes"). When, as here, there has been a complete reenactment of a statutory provision without change, "Congress is presumed to be aware of an administrative or judicial interpretation of [the] statute and to adopt that interpretation." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1280 (11th Cir. 2021) (citation omitted); *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633-634 (2019) ("[W]e presume that when Congress reenacted the same language" in a later version of the statute, "it adopted the earlier judicial construction of that phrase."). That presumption applies even where the "uniform interpretation" arises from "inferior courts," and not the Supreme Court. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) (citation omitted). And although only a handful of appellate courts have had occasion to evaluate Procurement Act orders, *see* States Amicus Br. 13-14, they have uniformly (until now) applied the nexus test and accepted that the Act authorizes the President to issue orders that improve the efficiency of contractor operations.

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

The Executive Order manifestly reflects the required nexus to the Procurement Act's goals of economy and efficiency in federal procurement. *Contra* Response Br.

31-33. Directing the inclusion of a COVID-19 safety clause reduces the likelihood that contractor employees will contract a severe and highly transmissible illness and thus enables the government to avoid entering into costly extensions or paying hundreds of millions of dollars in unanticipated leave expenses. *See* Opening Br. 27-32.

Plaintiffs are wrong to suggest that this logic lacks any limiting principle such that sustaining the Executive Order would permit the President to use the Procurement Act to "impose any requirement on contractors and their employees—health-related or not—in the name of economy and efficiency." Response Br. 32. The government has always acknowledged that presidential authority under the Procurement Act is constrained by the statute's text, which requires that any executive order bear a close nexus to the statutory goals of establishing "an economical and efficient system" for federal procurement and contracting, 40 U.S.C. § 101. *See* Opening Br. 19-22. The President's status as "the most singularly accountable elected official in the country," *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 357 (5th Cir. 2022) (Higginson, J., dissenting), also serves as a check on extreme actions that would offend the popular will. And, like any market participant, the President, as CEO of the Executive Branch, has a strong interest in doing business with qualified contractors. The President thus has additional incentives not to impose conditions that do not promote efficiency and that contractors—who are free to seek other contracts—might view as unacceptable. The conditions here, however, parallel

conditions that many employers have voluntarily imposed on their own workforces after concluding that vaccination requirements advance their economic and other interests.[4]

History confirms that these limits have effectively constrained the President's power. Since the Procurement's Act enactment, courts have construed the statute to authorize Presidents to enact policies that in the President's judgment will improve the economy and efficiency of federal contractors' operations. *See* Opening Brief 19-22, 26. And yet, the President has never issued the far-fetched orders that plaintiffs and the district court posit. *See, e.g.*, Opinion & Order, RE 50, PageID #884 (theorizing order that would prevent the government from contracting with contractors "who employ individuals over a certain BMI"); Response Br. 23 (theorizing order requiring contractor employees to "wear masks in perpetuity" at "family gatherings, concerts, [and] sporting events" (quoting *Kentucky*, 23 F.4th at 608)). The effectiveness of those limits is not diminished because the President has chosen now—in the midst of a pandemic of a "scale and scope" never before seen, *Missouri*, 142 S. Ct. at 653—to require contractors to adhere to workplace requirements

[4] Plaintiffs point out (at 32 n.5) that some of those employers rescinded their requirements after the Executive Order was enjoined. But OMB cited examples of numerous employers who applied vaccination requirements even before the Executive Order was issued in September 2021. 86 Fed. Reg. at 63,422 & n.13 (citing Jessica Mathews, *The Major Companies Requiring Workers to Get COVID Vaccines*, Fortune, Aug. 23, 2021, https://perma.cc/2WQZ-SUCA).

that address the unique, and very real, threats that pandemic poses to government operations.

Amici States criticize OMB for not citing enough evidence of procurement delays or increased costs resulting from COVID-19 and for failing to account for the "mass terminations and resignations" that they say will follow from these requirements. *See* States Amicus Br. 15-16, 23-25. The district court correctly recognized, however, that the Acting OMB Director conducted a "thorough and robust economy-and-efficiency analysis" that fully "addressed potential effects on the labor force and costs of the vaccine mandate." Opinion & Order, RE 50, PageID #896. The Acting OMB Director considered available data from "experiences shared by private companies" before reaching her conclusion that "few employees" would "quit because of the vaccine mandate." 86 Fed. Reg. at 63,422. And she determined that the requirements would result in savings to the government after analyzing the "substantial costs" associated with lost federal contractor work hours and predicting that those costs would "be passed on to the Federal Government, either in direct cost or lower quality, including delays." *Id.* Amici might disagree with those conclusions, but "[w]hen, as here, an agency is making predictive judgments about the likely economic effects of a rule," courts "are particularly loath to second-guess its analysis."

Opinion & Order, RE 50, PageID #896 (alteration in original) (quoting *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013)).[5]

Finally, that the Executive Order also protects the health and safety of citizens does not make its economy-and-efficiency rationale "naked pretext," Response Br. 33 (quoting *Kentucky*, 23 F.4th at 609). Exercises of Procurement Act authority often further goals in addition to economy and efficiency. *See* Opening Br. 37-38. The President's determination of how best to achieve economy and efficiency in federal operations does not "become[] illegitimate," simply because, "in addition to" advancing those goals, it "serves other, not impermissible, ends as well." *American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815, 821 (D.C. Cir. 1981). Plaintiffs offer no response to this authority.

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[5] Amici States are also mistaken when they argue that the OMB Determination was procedurally defective and an impermissible delegation of authority. *See* States Amicus Br. 11-13, 20-23. The district court correctly rejected plaintiffs' argument that the OMB Determination was procedurally flawed because it did not undergo the notice-and-comment procedures described in 41 U.S.C. § 1707, and plaintiffs do not press that argument on appeal. *See* Opinion & Order, RE 50, PageID #891-895; *Brnovich v. Biden*, __ F. Supp. 3d __, 2022 WL 252396, at *14, *22-23 (D. Ariz. Jan. 27, 2022); *cf.* U.S. Gov't Accountability Office, B-333725, *Safer Federal Workforce Task Force—Applicability of the Congressional Review Act to COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors* 6-7 (Mar. 17, 2022), https://go.usa.gov/xztsH (concluding that OMB was not acting as an "agency" within the meaning of the Congressional Review Act when it issued OMB Determination). Further, the President delegated to the OMB Director the authority to make an economy-and-efficiency determination, Exec. Order No. 14,042, 86 Fed. Reg. 50,985, 50,985-986 (Sept. 14, 2021), not to issue "government-wide procurement regulations," *contra* States Amicus Br. 12 (cleaned up). That delegation was consistent with 3 U.S.C. § 301 and 41 U.S.C. § 1303.

C. No Other Considerations Cast Doubt On The Validity Of The Executive Order

Plaintiffs maintain that three additional considerations counsel against the government's position: the "major-questions doctrine," "the federalism canon," and the Competition in Contracting Act. Response Br. 17-31. None of those considerations supports invalidating the Executive Order.

1. Plaintiffs are mistaken when they argue that Congress was required to speak more clearly if it intended to authorize the Executive Order because it implicates issues of "vast economic and political significance." Response Br. 19 (citation omitted). The economic and political significance of an issue is relevant only when an agency action would "bring about an enormous and transformative expansion in … regulatory authority." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see* Opening Br. 38-40. No such expansion occurred here because the President—"the most singularly accountable elected official in the country," *Feds for Med. Freedom*, 25 F.4th at 357 (Higginson, J., dissenting)—exercised his proprietary authority, as purchaser of services, to impose conditions on the performance of federal contracts.

There is ample reason for applying these principles only in cases involving exercises of regulatory—as opposed to proprietary—authority. Both of the cases on which plaintiffs rely (at 21-24) involved exercises of regulatory authority unrelated to the federal government's purchasing power. *Alabama Ass'n of Realtors v. Department of*

Health & Human Services, for example, involved an eviction moratorium that the Centers for Disease Control and Prevention (CDC) imposed on "all residential properties nationwide," 141 S. Ct. 2485, 2486 (2021) (per curiam), pursuant to its authority "to make and enforce such regulations as in [the CDC's] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," *id.* at 2487 (quoting 42 U.S.C. § 264(a)). And *National Federation of Independent Business v. Occupational Safety & Health Administration (NFIB)* involved a standard that applied to "all who work for employers with 100 or more employees." 142 S. Ct. 661, 663 (2022) (per curiam); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (considering whether Congress delegated to FDA the authority to regulate cigarettes and smokeless tobacco). In contrast, where the government exercised its spending power to impose a vaccination requirement on recipients of Medicare and Medicaid, the Supreme Court declined to require an authorization more specific than definitional provisions which authorized the Secretary to impose conditions he "finds necessary in the interest of … health and safety." *Missouri*, 142 S. Ct. at 652 (quoting 42 U.S.C. § 1395x(e)(9)).

Drawing this distinction between regulatory and proprietary authority reflects the concerns that animate the cases on which plaintiffs seek to rely. As plaintiffs acknowledge, one reason courts have considered the economic and political significance of an agency action is to "fortif[y] the structure of the Constitution giving the *legislative* power to Congress." Response Br. 25 (emphasis added); *see also NFIB*,

142 S. Ct. at 669 (Gorsuch, J., concurring) (these principles "guard[] against unintentional, oblique, or otherwise unlikely delegations of the legislative power"); *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (these principles are grounded in "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch"). A President exercising only proprietary authority as the CEO of the Executive Branch is not exercising what is traditionally considered legislative power. Instead, powers granted to manage government funds and enter into contracts relate to the President's inherent authority to manage the Executive Branch, and thus 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); *cf. Jessup v. United States*, 106 U.S. 147, 152 (1882) (collecting cases establishing that "the United States can, without the authority of any statute, make a valid contract"). That is why the delegations of authority in Congress's "general appropriations of large amounts, to be allotted and expended as directed by designated government agencies … ha[ve] never been seriously questioned." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937).[6]

[6] The same principles underscore why the Procurement Act does not, as plaintiffs suggest (at 28), violate nondelegation principles. Congress regularly uses general delegations when authorizing the Executive to expend public funds, and the

Plaintiffs miss the point when they assert that the government has not identified "authority for the proposition that the President has inherent authority to implement a vaccine mandate covering roughly one-fifth of the American workforce," Response Br. 27. That is not the question. The question is whether the President needed a clearer delegation of authority to issue the Executive Order, and the President's inherent authority to manage administration of the Executive Branch bears directly on the answer to that question. When, as here, the President is acting in an area "where he enjoys his own inherent Article II powers," Congress can "assign the President broad authority" without raising constitutional concerns. *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting); *id.* at 2140 (noting that under "traditional teachings" more broadly worded delegations are permissible where they "at least arguably, implicated the president's inherent Article II authority").

Plaintiffs are also wrong to suggest that the Executive Order "is regulatory," Response Br. 26. Plaintiffs cite two D.C. Circuit cases for that proposition, but those cases underscore plaintiffs' misunderstanding of the authority the President exercised here. *Chamber of Commerce v. Reich* and *UAW-Labor Employment & Training Corp. v. Chao* considered whether orders precluding the use of replacement workers for striking employees and requiring employers to post notices of employee rights violated

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Act's economy-and-efficiency standard supplies an intelligible principle that can be applied "to determine whether [the President's] actions are within the legislative delegation." *Kahn*, 618 F.2d at 793 n.51.

principles of preemption under the National Labor Relations Act (NLRA). To the extent those courts discussed the distinction between regulatory and proprietary orders, they did so only in the context of "labor relations policy"—a context that "is different because of the NLRA and its broad field of pre-emption." *Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996). Even in that context, moreover, the D.C. Circuit has rejected the theory that the government exercises regulatory authority whenever it "acts through blanket, across-the-board rules." *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002) (citation omitted). What matters instead is whether the government disqualifies contractors "on the basis of conduct unrelated to any work they were doing for the Government." *Id.* That is not the case here, where the requirements apply only to workers and workplaces associated with the performance of federal contracts.

2. The Executive Order also does not "significantly alter the balance between federal and state power," Response Br. 30 (quoting *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489). Plaintiffs do not dispute that the President can exercise his authority in a manner that displaces the states' police powers. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981). Nor do they dispute that the federal government—and not the states—has the power to set conditions on federal contracts and to police the behavior of federal contractors. *See United States v. Virginia*, 139 F.3d 984, 987 (4th Cir. 1998). That ends the matter: Because the Executive Order is an exercise of the President's authority to manage the terms on

which services are procured for the federal government, it does not alter the federal-state balance.

Plaintiffs incorrectly assert that this analysis "frames the issue at the wrong level of generality," Response Br. 30 (quoting *Kentucky*, 24 F.4th at 610). But framing the issue at plaintiffs' preferred level of generality would mean that each of the prior executive orders establishing anti-discrimination, wage, and leave requirements for federal contractors required equally clear authorization from Congress. *See* Opening Br. 18-19. In any event, the government has explained (Opening Br. 37) how even the cases plaintiffs cite evaluate the nature of a regulated relationship in assessing whether federal law impermissibly intrudes on state powers. *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (concluding that CDC eviction moratorium "intrude[d] into an area that is the particular domain of state law" because it affected "the landlord-tenant relationship"). And it is undisputed that the relationship at issue here—between the federal government and its contractors—is "inherently federal in character." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). Plaintiffs have no response to this authority.

3. Finally, the Executive Order is consistent with the Competition in Contracting Act, which requires the government to use competitive procedures in procurement. *Contra* Response Br. 17-18. The government already explained why plaintiffs' reliance on *National Government Services, Inc. v. United States*, 923 F.3d 977 (Fed. Cir. 2019), is misplaced. *See* Opening Br. 33-34. Plaintiffs respond that the

Executive Order "effectively exclud[es] an offeror from winning an award, even if that offeror represents the best value to the government." Response Br. 18 (quoting *National Gov't Servs., Inc.*, 923 F.3d at 990). But the President here has determined that the contractors that represent "the best value to the government" are those that agree to incorporate the COVID-19 safety clause. The President is authorized to make that determination, as the cases upholding executive orders under the Procurement Act in a variety of contexts make clear. *See supra* pp. 8-10.

II. PLAINTIFFS FAILED TO ESTABLISH THE REMAINING PRELIMINARY INJUNCTION FACTORS

Plaintiffs have not shown that the Executive Order will cause them irreparable harm, "an indispensable requirement for a preliminary injunction," *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) (citation omitted). Plaintiffs mistakenly assert that the Executive Order "intrud[es] on [plaintiff States'] sovereign authority to regulate public health within their borders." Response Br. 33. The States suffered no harm to their sovereign interests (irreparable or otherwise) because, as discussed, the President can exercise his authority to displace states' police powers and has lawfully done so here, *see supra* pp. 20-21.[7] And the selective quotation of the

[7] In any event, neither Ohio nor Kentucky has "statutes enacted by representatives of [their] people," Response Br. 34 (citation omitted), barring vaccination requirements, *see* Nat'l Academy for State Health Policy, *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, https://perma.cc/48QA-H5T3 (last updated April 4, 2022), and Tennessee enacted its current prohibition only after bringing suit and filing for preliminary relief, Tenn. Code Ann. § 14-2-101 (enacted Nov. 12, 2021).

President's public statements (Response Br. 33) does nothing to bolster plaintiff States' claimed harm, as courts are properly "reluctant to consider the President's motivation in issuing [an] Executive Order," *Reich*, 74 F.3d at 1335, because "what matters is the lawful scope of a president's authority, not the statements they make," *Kentucky*, 23 F.4th at 615 (Cole, J., concurring in part and dissenting in part) (citing *Trump v. Hawaii*, 138 S. Ct. 2392 (2018)).

Plaintiffs also reassert their erroneous claim that the Executive Order will cause labor shortages for them and other contractors within plaintiff States' borders, emphasizing the stay panel's conclusion that they "plausibly allege[d]" such harm, Response Br. 37 (alteration in original) (quoting *Kentucky*, 23 F.4th at 601). It is black letter law that plaintiffs must "substantiate[] their allegation[s] of irreparable … harm with [actual] evidence" in the record, *Manakee Prof'l Med. Transfer Serv., Inc. v. Shalala*, 71 F.3d 574, 581 (6th Cir. 1995), but they failed to do so. Plaintiffs offered a handful of declarations stating that some unspecified number of their employees would quit rather than be vaccinated, *see* Response Br. 36, but they introduced no evidence of how many employees would seek accommodations under the Executive Order, how many accommodations would be granted, and, in the event an accommodation was denied, how many employees would actually leave their roles rather than be vaccinated, *see* Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE (reporting a discrepancy between the number of employees who say they would leave a job rather than be vaccinated and the

number who actually do so). Evidence establishing "nothing more than that 'some employees' may resign rather than be vaccinated" is "entirely speculative" and does not "show[] an irreparable injury is likely." *Florida v. Department of Health & Human Servs.*, 19 F.4th 1271, 1292 (11th Cir. 2021). Plaintiffs also offer no rebuttal to the Acting OMB Director's conclusion that the benefits achieved in reducing extended contractor employee absences would outweigh any "cost associated with replacing" unvaccinated covered contractor employees. 86 Fed. Reg. at 63,422.

Plaintiffs' remaining irreparable harm claims are equally unavailing. Plaintiffs stress (at 35-36) the compliance costs they will purportedly incur as a result of the Executive Order, but they offer no response to the authority establishing that "ordinary compliance costs are typically insufficient to constitute irreparable harm," *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). Plaintiffs fret (at 35) that failure to comply with the Executive Order may jeopardize future contracting opportunities, but any claim of irreparable harm premised on some future solicitation for which plaintiffs may (or may not) be eligible because they may (or may not) meet all bid requirements is too "speculative [and] theoretical" to warrant preliminary relief, *Hargett*, 978 F.3d at 391 (citation omitted). And plaintiffs cannot establish irreparable harm merely by repeating the district court's entirely unsupported assertion that "contractors who do not comply [with the contractor mandate] will likely be blacklisted from future contracting opportunities." Response Br. 35 (alteration in original) (quoting Opinion & Order, RE 50, PageID #879).

In contrast to plaintiffs' speculative claims of irreparable injury, the government daily suffers concrete harm from the court's overbroad injunction. Plaintiffs do not dispute that the injunction affects hundreds of billions of dollars in federal contracts performed within plaintiff States' borders.[8] Nor do plaintiffs dispute that the productivity losses the pandemic causes those contracts—in the form of schedule delays as well as leave and health care costs—are passed on to the government and, ultimately, to the American taxpayers.

Plaintiffs nevertheless insist that the injunction is necessary to maintain the "status quo." Response Br. 38. As the emergence of new variants starkly illustrates, there is no static status quo in this pandemic; indeed, since the commencement of this appeal, roughly 30 million more COVID-19 cases have been reported in the United States. CDC, *COVID Data Tracker*, https://go.usa.gov/xzzGJ (last visited April 13, 2022). How to address the evolving challenges the virus poses to the delivery of essential services to the American people is a question best left to the President, as the politically accountable head of the Executive Branch, not to unelected courts.

[8] Plaintiffs mistakenly contend that the government's opening brief in this appeal did not rely on the Field Declaration because the "declaration is deeply flawed," Response Br. 39. The Field Declaration, which accompanied the stay motions submitted to the district court and stay panel, definitively establishes that the preliminary injunction imposes immense harm on the federal government. *See* Field Decl., RE 53-1, PageID #919-924. The government has refrained from relying on the declaration in this appeal because it was not before the district court when it ruled on the preliminary injunction motion.

III. THE PRELIMINARY INJUNCTION IS OVERBROAD

Plaintiffs' attempts to defend the district court's patently overbroad injunction—which extends to countless contractors who were not parties to this suit—are unavailing.

The claimed harms to plaintiff States' quasi-sovereign and sovereign interests cannot support the district court's injunction, much less its extension to non-parties. As the government has explained (Opening Br. 48-50), plaintiff States may not maintain a suit against the federal government to assert quasi-sovereign interests on behalf of their citizens, and the stay panel misapplied Supreme Court precedent in concluding otherwise. Plaintiffs do not even attempt to defend the stay panel's reasoning on this point. Response Br. 40-41. In addition, for the reasons explained above, the Executive Order inflicts no harm to plaintiff States' sovereign interests that warrants injunctive relief. *Supra* pp. 22-23.

Plaintiffs are also mistaken in asserting that the injunction's scope is necessary to protect their pursuit of "future contracting opportunities with the federal government," Response Br. 42. Plaintiffs fail to explain how extending the injunction to all federal contractors within plaintiff States' borders—the vast majority of whom presumably do not carry out the same functions as the States and their subdivisions, and thus do not compete with plaintiffs for federal contracts—is "no more burdensome … than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Moreover, any claim of irreparable harm based

on the potential loss of unspecified future contracting opportunities is too speculative to justify injunctive relief, *supra* p. 24.

CONCLUSION

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

Respectfully submitted,

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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 6,478 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.

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CERTIFICATE OF SERVICE

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

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