No. 22-30019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

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CERTIFICATE OF INTERESTED PERSONS

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

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

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Indiana, State of
Mississippi, State of

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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. The answer to that question is yes. *See* Opening Br. 17-26. For decades, all three branches of government have agreed that 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 cast doubt on the validity of the Executive Order. The government is therefore likely to succeed on the merits of plaintiffs' challenge, and the district court 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 to address the dynamic challenges the pandemic continues to pose to federal contracting.

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. 22-23, 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 of the Procurement Act and limit its reach to policies that "mak[e] *the government's* entry into contracts less duplicative and inefficient," Response Br. 27 (quoting

[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. *See American Fed'n of Gov't Emps. v. Carmen*, 669 F.2d 815, 821-23 (D.C. Cir. 1981); *contra* Response Br. 32-33; States Amicus Br. 7.

[2] Amici States are thus mistaken when they argue that the Executive Order does not "*direct*[] the actions of inferior officials," States Amicus Br. 10-11.

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. Plaintiffs derive this limitation from the statute's reference to the "system" for procurement and argue that policies that direct agencies to contract with contractors who will perform economically and efficiently have nothing to do with enhancing the efficiency of that overall procurement system. Response Br. 26.

Nothing in the Procurement Act's text supports that restrictive reading. Plaintiffs appear to define "system" for procurement as a "method of contracting" or "obtain[ing] nonpersonal services." Response Br. 26 (quoting *Kentucky*, 23 F.4th at 604). But providing the federal government with a "method" of contracting or obtaining services necessarily includes setting the terms on which those services are to be acquired and contracts are to be performed.[3] *See* Opening Br. 18. After all, the government—or, for that matter, any contracting entity—could hardly establish an efficient "system or method" for "contracting" for services without considering factors affecting the performance of its services contracts, including the availability and productivity of its service providers. A system for services procurement must necessarily build in appropriate measures to minimize the risks that performance of

[3] Plaintiffs' reliance on § 101's reference to "contracting" confirms their misunderstanding of the statute. Even if that phrase refers only to the "government's initial entry into a contract[]," Response Br. 26 (citation omitted), the government could not enter a contract without setting the terms on which that contract is to be performed. *See* Opening Br. 18.

contracts would be delayed or unforeseen costs incurred. That does not mean that the government is "impos[ing] [requirements] directly upon contractor employees," Response Br. 27 (quoting *Kentucky*, 23 F.4th at 605); rather, the government is including in its contracts a term that it has determined will ensure those contracts are performed economically and efficiently.

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 ensuring the government enters into contracts that will be performed efficiently. *See* Opening Br. 19-20 (collecting examples). 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 ensure 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 respond that none of those previous executive orders offered reducing absenteeism as a rationale or required vaccination. Response Br. 20. But President Barack Obama issued an executive order with the express goal of "improv[ing] the health and performance of employees of Federal contractors."

Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 10, 2015). That the President has never adopted this precise means of achieving that goal is irrelevant, *contra* Response Br. 17-19, as the Supreme Court's decision in *Biden v. Missouri* makes clear. There, the Court upheld a Centers for Medicare & Medicaid Services (CMS) vaccination requirement even though CMS had never previously issued such a requirement. As in *Missouri*, the President "has never had to address an infection problem of this scale and scope before." 142 S. Ct. at 653. "[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); *see Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967); 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 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 784, 789 (D.C. Cir. 1979); *see* Opening Br. 20-22, 35-36.[4]

Plaintiffs attempt to distinguish those court of appeals decisions as involving "modest, work-anchored" orders, Response Br. 19 (quoting *Kentucky*, 23 F.4th at 608), with a "close nexus to ordinary procurement activities such as hiring, firing, and management of labor," *id.* (citation omitted). Even if that characterization were accurate, it reflects an acknowledgment that courts have sustained executive orders directed to the performance of contracts, not just to the process of entering into those contracts. Plaintiffs thus do not credibly dispute that their theory of the Procurement Act conflicts with decades of judicial decisions.

[4] These cases likewise demonstrate why amici States are incorrect that the President's authority is limited to "required" or "indispensable" orders, States Amicus Br. 8-9 (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 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 as other orders issued over the decades. *See id.* at 63,422.

To the extent plaintiffs suggest that the Supreme Court abrogated this uniform interpretation in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), they are mistaken. The *Chrysler* Court did not "reject[] the Executive's reliance on the Procurement Act to require disclosure of woman- and minority-employment statistics" or hold that the Procurement Act must "specific[ally] reference" the precise method for achieving economy and efficiency, Response Br. 24 (emphasis omitted) (quoting *Chrysler*, 441 U.S. at 304 n.34). To the contrary, the Court expressly refused "to decide whether" the Executive Order at issue "[wa]s authorized by" the Procurement Act, *Chrysler*, 441 U.S. at 304, and emphasized that a "grant of legislative authority" does not necessarily need to be "specific before [policies] promulgated pursuant to it can be binding," *id.* at 308.

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. 22-23.

Plaintiffs offer no response to this argument. Instead, they point to other procurement-related statutes and argue that those statutes explicitly authorize the President to "set social policy," while the Procurement Act does not. Response Br. 25. But those other statutes—which deal with disparate circumstances not remotely implicated here—have no bearing on the President's authority to establish policies that enhance the economy and efficiency of the overall federal procurement system. *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (observing that statutes that "do not declare the meaning of," "seek to clarify," or "reflect any direct focus by Congress upon the meaning of" a different statute offer no "mandate, guidance, or direct suggestion about how courts should interpret" that statute). The best indication of the Procurement Act's reach comes instead from "the words on the page … adopted by Congress and approved by the President," *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), which afford the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies, *Chao*, 325 F.3d at 366 (quoting *Kahn*, 618 F.2d at 789).

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

The Executive Order reflects the required nexus to the Procurement Act's goals of economy and efficiency in federal procurement. 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. 24-26.

Plaintiffs are wrong to suggest that this logic lacks any limiting principle, Response Br. 21. 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. 17-18. 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.

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 efficiency of contractors' operations. *See* Opening Brief 18-20, 26-27. And yet,

the President has never issued the far-fetched orders that plaintiffs posit. *See, e.g.*, Response Br. 21 (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—during a pandemic of a "scale and scope" never before seen, *Missouri*, 142 S. Ct. at 653—to require contractors to adhere to workplace requirements that address the unique, and very real, threats that pandemic poses to government operations.

Plaintiffs contend that the Office of Management and Budget (OMB) Determination lacks the requisite nexus—and is arbitrary and capricious—because the Acting Director did not provide enough evidence or reasoning in support of her economy-and-efficiency determination and failed to account for aspects of the problem, like the "costs to the States" and "effect[s] of large-scale resignations." *See* Response Br. 24-25, 48-50. The Acting OMB Director, however, conducted a "thorough and robust economy-and-efficiency analysis" that fully "addressed potential effects on the labor force and costs of the vaccine mandate." *Kentucky v. Biden*, __ F. Supp. 3d __, 2021 WL 5587446, at *12 (E.D. Ky. Nov. 30, 2021). She 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, and quantifying, 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.* The Acting OMB Director also evaluated potential limitations on the vaccination requirement, *see id.* at 63,420, explicitly adopting the "religious exemption" that plaintiffs contend she ignored, Response Br. 50. And while the OMB Determination may not specifically address reliance interests, there was no need to do so here: OMB was not changing a longstanding position. *Cf. Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-23 (2016).

This case thus stands in stark contrast to *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981). The court there concluded that an anti-discrimination order lacked the requisite nexus as applied to subcontractors who sold workers compensation insurance to contractor employees because those subcontractors were not performing federal contracts, and there was no evidence suggesting that discrimination in their operations affected the cost of federal contracts. *See id.* at 171. The Executive Order at issue here, in contrast, requires vaccination only for contractor and subcontractor employees who work on federal contracts or who interact with colleagues who do. And the OMB Determination cited ample evidence to support its conclusion that transmission of COVID-19 increases the costs of federal contracts. Plaintiffs 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." *Kentucky*, 2021 WL

5587446, at *12 (alteration in original) (quoting *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013)).

Finally, that the Executive Order also protects the health and safety of citizens does not make its economy-and-efficiency rationale pretextual, Response Br. 49-50. Exercises of Procurement Act authority often further goals in addition to economy and efficiency. *See* Opening Br. 35-36. 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." *Carmen*, 669 F.2d at 821. Plaintiffs offer no response to this authority.

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

None of the other considerations plaintiffs put forward 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. 17-18, 21-22 (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. 29-31. No such expansion occurred

here because the President exercised his proprietary authority, as purchaser of services, to impose conditions on the performance of federal contracts.

The cases plaintiffs cite reflect this distinction. In each of those cases, an agency exercised regulatory authority unrelated to the federal government's purchasing power. *See National Fed'n of Ind. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 663 (2022) (per curiam) (evaluating standard applied to "all who work for employers with 100 or more employees"); *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2486 (2021) (per curiam) (evaluating eviction moratorium imposed on "all residential properties nationwide"); *King v. Burwell*, 576 U.S. 473 (2015) (evaluating rule related to availability of tax credits); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (evaluating whether agency had 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)).

Plaintiffs' only response is to assert that the Executive Order is regulatory because it has real-world public health effects. Response Br. 18. But the practical effects of an order do not transform the nature of the authority being exercised. Prior executive orders establishing anti-discrimination and noninflationary wage and price

requirements for federal contractors also had significant "real-world" effects. And yet, courts uniformly upheld those orders without demanding that the Procurement Act explicitly reference either inflation or discrimination. *See* Opening Br. 19-22.

In any event, the government has also explained why the cases cited by plaintiffs reflect concerns about diminished accountability and thus suggest a need for special clarity only when there is some doubt as to whether Congress "assign[ed]" a significant decision "to an agency." *Utility Air*, 573 U.S. at 324; *see* Opening Br. 29-33. Those considerations are inapplicable here. The Procurement Act clearly assigns the President the authority to determine what policies are necessary to carry out the statute's economy and efficiency goals. And there is no risk of diminished accountability, as the President has inherent power to direct operations of the Executive Branch, *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), and is "the most singularly accountable elected official in the country," *Feds for Med. Freedom*, 25 F.4th at 357 (Higginson, J., dissenting).

2. Similar principles underscore why the Procurement Act does not violate the nondelegation doctrine. *Contra* Response Br. 30. The nondelegation doctrine recognizes that Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy*, 139 S. Ct. at 2123 (plurality op.) (citation omitted). Proprietary powers granted to manage government funds and enter into contracts, however, 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, 1266-67 (1985) (citation omitted); *cf. Jessup v. United States*, 106 U.S. 147, 151-52 (1882) (collecting cases establishing that "the United States can, without the authority of any statute, make a valid contract"). That is likely why the broad delegations of authority in Congress's "general appropriations" statutes "ha[ve] never been seriously questioned." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937). It is likely also why every court of appeals to consider the question has held that the Procurement 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.

3. The Executive Order also does not "significantly change[] the federal-state balance" or contravene the Tenth Amendment, Response Br. 28-29, 35-40 (citation omitted). Plaintiffs do not 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: The Executive Order does not displace state powers or violate the Tenth Amendment because it is an exercise of the President's authority to manage the terms on which services are procured for the federal government.

Plaintiffs assert that this focus on the federal contracting context is "pretextual" and "frames the issue at the wrong level of generality." Response Br. 38, 39 (citation omitted). But adopting plaintiffs' preferred level of generality would mean that

Presidents exceeded their authority under the Procurement Act and violated the Tenth Amendment when they established anti-discrimination, wage, and leave requirements for federal contractors. *See* Opening Br. 19-20. In any event, even the cases plaintiffs cite evaluate the nature of a regulated relationship in assessing whether federal law intrudes on state powers. *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (concluding that 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' reliance (at 36-37) on *BST Holdings, LLC v. Occupational Safety & Health Administration*, 17 F.4th 604 (5th Cir. 2021), illustrates their misunderstanding of these principles. The Occupational Safety and Health Administration's vaccination-or-testing standard regulated employers that had no connection to federal contracting. And it was promulgated pursuant to authority granted by Congress under the Commerce Clause. *See id.* at 617-18. In contrast, the Procurement Act is an exercise of authority under distinct constitutional provisions, including the Spending Clause,

and the Executive Order invokes only the President's power to impose contract conditions that govern workplaces involved in federal contracting.[5]

Plaintiffs' argument that the Executive Order violates the Tenth Amendment by impermissibly "commandeer[ing]" the states, Response Br. 39, fails for similar reasons. The federal government may not compel states to enact or administer a federal program. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 935 (1997). But there is no similar constitutional concern when a state voluntarily undertakes an obligation pursuant to a valid contract with the federal government. *See id.* at 936 (O'Connor, J., concurring) ("Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs."); *see id.* at 916 (majority op.) (noting historical practice of contracting with state officials). To hold otherwise would cast doubt on the constitutionality of every contract between the federal and state governments.

4. The Executive Order does not conflict with the other procurement statutes plaintiffs identify. *Contra* Response Br. 31-35. The Procurement Policy Act authorizes the Federal Acquisition Regulatory Council (FAR Council) to promulgate the Federal Acquisition Regulation (FAR), a "single, [g]overnment-wide procurement

[5] Plaintiffs assert that the Executive Order "push[es] the limit" of Congress's Spending Clause authority, but they offer no explanation why that is so. Response Br. 29 (citation omitted). Any such assertion is baseless, in any event. *See Kentucky*, 2021 WL 5587446, at *7 n.9; *Missouri v. Biden*, __ F. Supp. 3d __, 2021 WL 5998204, at *6 (E.D. Mo. Dec. 20, 2021).

regulation" containing standard government contract clauses. 41 U.S.C. § 1303(a)(1); *see also* 48 C.F.R. pts. 1-53. The Executive Order does not purport to exercise that authority or assign it elsewhere. *Contra* Response Br. 31-32. Rather, the Executive Order directs the Task Force to develop COVID-19 safety protocols and delegates to OMB the authority to determine whether those protocols promote economy and efficiency in federal procurement. *See* Exec. Order No. 14,042, § 2, 86 Fed. Reg. 50,985, 50,985-86 (Sept. 14, 2021). If the protocols are determined to advance economy and efficiency, the Executive Order asks the FAR Council to incorporate the protocols into the FAR in the long run and to help agencies, consistent with their authority under the Procurement Policy Act, to incorporate those protocols into agency-specific regulations in the short run. *See id.* § 3(a), 86 Fed. Reg. at 50,986; *see also* 41 U.S.C. § 1303(a)(2)(A) (allowing agencies to prescribe "regulations essential to implement Government-wide policies and procedures within the agency"). In short, the Executive Order directs the actions of agencies, not private parties, *contra* Response Br. 32, and does so in a manner consistent with the Procurement Policy Act and the Procurement Act.

The Executive Order is also consistent with the Competition in Contracting Act, which requires the government to use competitive procedures in procurement. A contracting requirement does not violate that statute "simply because that requirement has the effect of excluding certain offerors who cannot satisfy that requirement." *National Gov't Servs., Inc. v. United States*, 923 F.3d 977, 985 (Fed. Cir.

2019). A policy violates the statute only if it "effectively make[s] it impossible for certain offerors to win an award" *regardless* of whether they are willing and able to comply with all contracting conditions. *Id.* at 983. Plaintiffs assert that the Executive Order "effectively exclud[es]" offerors who otherwise would "represent[] the best value to the government." Response Br. 55 (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 different contexts make clear. *See supra* pp. 5-8.

D. The FAR Memo, The OMB Determination, And The Task Force Guidance Do Not Suffer From Procedural Infirmities

Plaintiffs are also mistaken when they argue that the FAR Memo, the OMB Determination, and the Task Force Guidance are procedurally defective because they did not follow the notice-and-comment procedures described in 41 U.S.C. § 1707. Response Br. 40.[6]

[6] Plaintiffs assert that these actions are subject to the Administrative Procedure Act (APA)'s notice-and-comment requirements to the extent they "do not involve procurement and contracting." Response Br. 43. But there is no question that this implementing guidance, like the Executive Order, involves "matter[s] relating to … contracts" and thus is exempt from APA procedural requirements. 5 U.S.C. § 553(a)(2).

1. The government explained that plaintiffs lack a cause of action to challenge the purported procedural deficiencies in the FAR Memo because the FAR Memo is not "final agency action" reviewable under the APA. *See* Opening Br. 37-39. The FAR Memo provides agencies only with "*initial* direction" for the incorporation of a sample clause, and it spawns no legal consequences because it does not bind any agency or contractor. *Brnovich v. Biden*, 562 F. Supp. 3d 123, 160 (D. Ariz. 2022) (emphasis added); *Kentucky*, 2021 WL 5587446, at *11.

Plaintiffs protest that the FAR Memo is the "final word on what should be in federal contracts *right now*." Response Br. 45. But the question for purposes of finality is whether the FAR Memo "anticipates the necessity of further agency action before [its requirements] can be implemented." *Louisiana State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 582 (5th Cir. 2016). And the FAR Memo plainly anticipates such action—either by individual agencies using their independent authority to temporarily deviate from the FAR and incorporate the Memo's sample clause or by the FAR Council promulgating a formal FAR amendment.

That some agencies started asking contractors to modify their contracts before the injunction was issued does not transform the FAR Memo into final agency action. *Contra* Response Br. 45-46. For an agency action to be final, that particular action must have spawned legal—not exclusively practical—consequences. *Louisiana State*, 834 F.3d at 582. Any legal consequences here, however, will arise only if the

contractors agree to the modification requests and even then, such consequences will result from the contract modification, not the FAR Memo.

2. Plaintiffs' procedural challenge to the OMB Determination fails because the OMB Determination is not subject to § 1707's procedural requirements. *See* Opening Br. 42-45. Those requirements apply only to "executive agenc[ies]," *see* 41 U.S.C. § 1707(c)(1), and the Acting OMB Director was standing in the shoes of the President—not acting as an "executive agency"—when she issued the OMB Determination. *See* Opening Br. 42-43. The case plaintiffs cite, *Meyer v. Bush*, 981 F.2d 1288 (D.C. Cir. 1993), did not concern the Procurement Policy Act or consider whether OMB acts as an agency when it exercises authority delegated by the President under 3 U.S.C. § 301 and so has no bearing on this question.

Even if § 1707 does apply, the Acting OMB Director voluntarily complied with its requirements when she explained that "urgent and compelling circumstances"—the need to align deadlines across vaccination requirements, promote regulatory certainty, and stop the spread of the pandemic—justified waiving notice. *See* Opening Br. 43 (quoting 41 U.S.C. § 1707(d)). Plaintiffs respond that the § 1707 exception was "designed for emergencies, not achieving regulatory uniformity." Response Br. 43 n.2. But the authority they cite does not address § 1707, let alone state that its application is limited to imminent threats to life or property. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014).

In any event, the Acting OMB Director also explained why the vaccination requirement would help save American lives. That a vaccine was first authorized for use in December 2020 does not undermine that justification. *Contra* Response Br. 41-43. The President issued the Executive Order in September 2021, shortly after vaccines became both widely available among adults and particularly necessary given the emergence of the Delta variant and the return to work of many federal contractor employees. *See* 86 Fed. Reg. at 63,423. OMB made an initial economy-and-efficiency determination later that same month as soon as the Task Force issued initial guidance. *See* 86 Fed. Reg. 53,692 (Sept. 28, 2021). When the Task Force updated its guidance a few weeks later, OMB issued a revised determination that comprehensively examined the emerging data on the effectiveness of vaccines, assessed the experience of private employers in imposing vaccination requirements, and concluded that a vaccination requirement would promote economy-and-efficiency in federal contracting.

3. The district court did not address plaintiffs' procedural challenge to the Task Force Guidance (and so this court need not, *see Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017)), but similar logic precludes that challenge. Plaintiffs lack a cause of action to challenge the Guidance because it was issued by the Safer Federal Workforce Task Force, which is an entity within the Executive Office of the President that exists solely to advise the President and thus lacks the "substantial independent authority" required of an "agency" under the APA, *Meyer*, 981 F.2d at 1292-98 (concluding that President's Task Force on Regulatory Relief was not "agency" under

Freedom of Information Act because it lacked "substantial independent authority"); *Soucie v. David*, 448 F.2d 1067, 1073-75 (D.C. Cir. 1971) (applying same test to APA). The Task Force Guidance, like the FAR Memo, also has no standalone legal force; it becomes binding only following the OMB Director's economy-and-efficiency determination. *See Brnovich*, 562 F. Supp. 3d at 160. Plaintiffs do not rebut these arguments.

II. PLAINTIFFS FAILED TO ESTABLISH THE REMAINING PRELIMINARY INJUNCTION FACTORS

Plaintiffs have not shown that the Executive Order will cause them irreparable harm, "an essential prerequisite to preliminary injunctive relief," *White v. Carlucci*, 862 F.2d 1209, 1212 (5th Cir. 1989) (citation omitted). Plaintiffs reassert their erroneous claim that the Executive Order intrudes on "their constitutionally reserved authority over public health policy," Response Br. 51 (quoting ROA.650). Plaintiffs 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. 16-18. Plaintiffs' conclusory assertion that "they were denied the ability to defend [their sovereign] interest by submitting comments," Response Br. 53, fails for the same reason. In any event, "a bare procedural violation" cannot "satisfy the injury-in-fact requirement of Article III," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), much less the irreparable-harm requirement for injunctive relief.

Plaintiffs' claim that the Executive Order will "lead to increased unemployment" fares no better. Response Br. 53. It is well established that "the irreparable harm element must be satisfied by independent proof," *White*, 862 F.2d at 1211, but plaintiffs in no way satisfied their evidentiary burden here. Plaintiffs offered a handful of declarations stating that some unspecified number of employees may quit rather than be vaccinated, 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 similarly lack sufficient evidentiary support to warrant injunctive relief. Plaintiffs stress (at 53-54) the compliance and

monitoring costs they will purportedly incur as a result of the Executive Order, but they introduced no evidence of the specific steps they have taken to comply with the Executive Order, or the costs associated with those measures, *cf. Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (detailing the compliance measures required by new regulations and the "$2 billion in costs" that they would impose). Plaintiffs fret (at 53) that failure to comply with the Executive Order may jeopardize their future contracting opportunities, but concern about future solicitations for which plaintiffs may (or may not) be eligible because they may (or may not) meet all bid requirements is precisely the type of "speculative injury [that] is not sufficient" to support injunctive relief. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (alteration and citation omitted). And plaintiffs cannot establish irreparable harm by making inflammatory and entirely unsubstantiated claims that the Executive Order's implementation will somehow "lead to an increase in sex crimes against children in" Louisiana and Mississippi, Response Br. 54. "[T]here must be more than [such] an unfounded fear"—and unfounded fearmongering—"on the part of the applicant." *Daniels Health Scis.*, 710 F.3d at 585 (citation omitted).

In contrast to plaintiffs' speculative claims of irreparable injury, the government daily suffers concrete harm from the court's injunction. Plaintiffs do not dispute that the injunction affects millions of dollars in federal contracts. 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. Instead, plaintiffs merely reiterate their merits argument, asserting the equities favor an injunction because the Executive Order is unlawful. Response Br. 55. That "cursory" treatment of the equities factors ignores that plaintiffs must independently show that the balance of harms and public interest warrant the "extraordinary remedy" of a preliminary injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24, 26 (2008). It also ignores that in issuing the Executive Order, the President validly exercised his Procurement Act authority to address the evolving challenges the virus poses to the delivery of essential services to the American people. *See supra* pp. 2-3.

CONCLUSION

The preliminary injunction should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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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 6,492 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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