No. 22-1104

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MISSOURI, et al.,

Plaintiffs-Appellees,

v.

JOSEPH BIDEN, Jr., et al.,

Defendants-Appellants.

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

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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. As the government has explained (Opening Br. 15-28), the answer to that question is yes. 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.

Plaintiffs do not seriously dispute that limiting transmission of a highly infectious virus improves contractor efficiency and thus all but concede that the Executive Order is consistent with how the Procurement Act has long been understood. Plaintiffs instead focus principally on the Executive Order's scope, emphasizing that it extends to employees that exchange casual "hello[s]" with coworkers who work on federal contracts. Response Br. 3, 13, 28, 52. But determining how to craft a requirement that appropriately covers the sources of

infection transmission involves complex policy and line-drawing judgments—judgments that Congress expressly authorized the President, not unelected judges or recalcitrant states, to make. Even if plaintiffs' scope arguments were correct, it would mean at most that this Court should hold that the Procurement Act authorized the Executive Order in the main but remand for consideration of a more targeted injunction related to the vaccination requirement's scope.

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. 29, 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

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[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] Plaintiffs are thus mistaken when they argue (at 22, 32-34) that the Executive Order does not "direct federal contracting." *See also* States Amicus Br. 9-11.

of the Procurement Act and limit its reach to policies that concern the mere supervision of federal contracting authorities. Response Br. 22. They insist (at 30-31) that the statute does not permit the President to set standards governing how contractors perform federal contractual agreements. Plaintiffs derive this limitation from the statute's reference to the "system" for procurement, *see* 40 U.S.C. § 121, arguing that policies affecting "how contractors run their workplace[s]" are unrelated to enhancing the efficiency of that overall procurement system, Response Br. 30-31.

Nothing in the Procurement Act's text supports that restrictive reading, even under plaintiffs' definition of its terms. Plaintiffs appear to define "'system'" for procurement as a "'method'" of "'contracting'" or "'obtain[ing]' services from contractors." Response Br. 30 (quoting *Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022)). That definition offers plaintiffs no support. 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.[3] *See* Opening Br. 16-17. After all, the government—or, for that matter, any contracting entity—could hardly establish an efficient "system" for

[3] Plaintiffs' reliance on § 101's reference to "contracting" confirms their misunderstanding of the statute. Even if, as plaintiffs contend, that "clause involves only the federal government's entry into a contract," Response Br. 31 (emphasis omitted), the government could not enter a contract for services without setting the terms on which those services are to be acquired and performed. *See* Opening Br. 16.

"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 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. 31 (quoting *Kentucky*, 23 F.4th at 605); rather, the government is simply including in its contracts a term that it has determined will ensure those contracts are performed economically and efficiently.

Nor can plaintiffs derive support for their reading from the historical problems that purportedly motivated the Procurement Act's passage. Response Br. 29. According to plaintiffs, Congress enacted the Procurement Act "to fix 'the absence of central management that could coordinate the entire government's procurement activities.'" *Id.* (quoting *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996)). That Congress entrusted the President with that supervisory authority only confirms that the President "play[s] a direct and active part" in the procurement process. *AFL-CIO v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979) (en banc). And even if a lack of central oversight was "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)

(citation omitted). Here, the Procurement Act's legislative commands broadly authorize the President to issue 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 Kahn*, 618 F.2d at 789 (noting that "[e]conom[ical]" and "efficien[t]" are terms of great breadth).

3. The longstanding practice of all three branches of government confirms that plaintiffs misread the statute's terms.

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. 17-18 (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 improve the efficiency of contractor performance counsels against adopting plaintiffs' narrow view of the statute as only authorizing orders that improve the efficiency of internal government operations.

Plaintiffs point out that none of those previous executive orders involved a vaccination requirement. Response Br. 36-38. But that argument carries little weight following the Supreme Court's decision in *Biden v. Missouri*, which upheld the Centers

for Medicare & Medicaid Services (CMS) vaccination requirement even though CMS had never previously issued a vaccination requirement. As in *Missouri*, it does not matter that the vaccination requirement here "goes further than what the [President] has done in the past to implement" his statutory authority. 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. 18-20, 26-27.[4]

Plaintiffs attempt to distinguish those cases as involving orders with a "'close nexus' to the ordinary hiring, firing, and management of labor." Response Br. 36 (quoting *Kentucky*, 23 F.4th at 607); *see* App.838; R. Doc. 36, at 9. 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 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.

In any event, the challenged Executive Order is explicitly work-related: It applies only to contractor employees performing work on federal contracts or sharing

[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. 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).

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 the "workplace," App.838; R. Doc. 36, at 9, as other orders issued over the decades. *See* 86 Fed. Reg. at 63,422.

c. Plaintiffs do not dispute that Congress, by reenacting the Procurement Act in the wake of this consensus, presumptively adopted the (until now) uniform interpretation of the Act as authorizing the President to issue orders that improve the efficiency of contractor operations. *See* Opening Br. 20-21. Plaintiffs instead maintain that through other congressional action and inaction "Congress has spoken on the issue of federal vaccine policy." Response Br. 34.

To whatever else plaintiffs' hodgepodge of statutory provisions speak, they "do not declare the meaning of," "seek to clarify," or "reflect any direct focus by Congress upon the meaning of" the *Procurement Act* and thus offer no "mandate, guidance, or direct suggestion about how courts should interpret" that Act. *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). And plaintiffs' "speculation about why" this Congress has "declined to adopt" certain legislation regarding vaccines is "a particularly dangerous basis on which to rest an interpretation of" the Procurement Act, which "a different and earlier Congress did adopt." *Bostock*, 140 S. Ct. at 1747 (citation omitted). 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," *id.* at 1738, 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. *Contra* Response Br. 28-29, 38-40. Directing the inclusion of a COVID-19 safety clause in federal contracts 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. 22-28.

Plaintiffs mistakenly assert that "the premise of the efficiency—that vaccination stops infection—is at best mere guesswork and, more likely, wrong." Response Br. 43. Even courts that have enjoined the Executive Order have made clear that these cases are "not … about whether vaccines are effective. They are." *Kentucky v. Biden*, __ F. Supp. 3d __, 2021 WL 5587446, at *1 (E.D. Ky. Nov. 30, 2021); *Georgia v. Biden*, 2021 WL 5779939, at *1 (S.D. Ga. Dec. 7, 2021) (same). And as the Centers for Disease Control and Prevention (CDC) has recently explained, COVID-19 vaccines "remain the best public health measure to protect people from COVID-19 and reduce the likelihood of new variants emerging." CDC, *Omicron Variant: What You Need to*

Know, https://perma.cc/KY38-SZFK (last updated Mar. 29, 2022); *contra* Response Br. 41.

Plaintiffs, moreover, misapprehend the Office of Management and Budget's (OMB) efficiency determination as resting on an assumption that vaccination *completely* stops transmission. The Acting OMB Director concluded that vaccines would reduce transmissions because they "provide strong and persistent protection against infection, illness, and hospitalization" and because "[r]educing the number of infected people mechanically reduces transmission." 86 Fed. Reg. at 63,422. She also noted that "some preliminary evidence … indicates that vaccines also reduce transmission by people who contract 'breakthrough' infections." *Id.* She further concluded that by protecting against serious infections, vaccines would reduce absences from "workers who catch the virus [and] miss … work" as well as from "exposed workers [who] would likely need to quarantine and would also miss work." *Id.* Fewer absences "would generate meaningful efficiency gains for Federal contractors," as "[w]orkers unable to work generate substantial costs on employers." *Id.*; *see also* Opening Br. 6. The Acting OMB Director thus conducted a "thorough and robust economy-and-efficiency analysis" and "provided ample support for the premise that a vaccine mandate will improve procurement efficiency." *Kentucky*, 2021 WL 5587446, at *12, *13. 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." *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013) (citation omitted).[5]

Equally unavailing is plaintiffs' focus on the Executive Order's scope and their insistence that the Executive Order is overbroad because it applies to contractor employees working from home or outside, as well as to employees who are working where federal contracts are performed. Response Br. 52-53. The determination of how to appropriately tailor a policy to address the unique challenges a pandemic poses to the federal procurement system is a decision that Congress assigned to the President when it authorized him to prescribe the policies that he "*considers necessary* to carry out" the statute, 40 U.S.C. § 121(a) (emphasis added). In crafting the Executive Order, the President carefully considered the vaccination requirement's scope, including whether to limit it to employees working on federal contracts. In the end, the President concluded that the efficiency of federal contractors suffers when their employees become ill and miss work, regardless of whether those employees work in an office, from home, or outside. And he determined that unvaccinated employees who share a workplace with colleagues who are performing federal contracts can

[5] Amici States are similarly mistaken when they assert that OMB failed to cite evidence of increased costs from COVID-19 or to account for resignations. *See* States Amicus Br. 24-25. The Acting OMB Director considered available data from "experiences shared by private companies" and concluded 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. *Id.*

easily transmit the virus to those peers, given the "highly communicable" nature of the disease. 86 Fed. Reg. at 63,421. That plaintiffs now disagree with those determinations does not render the Executive Order an invalid exercise of the President's Procurement Act authority.

Plaintiffs are also wrong to suggest that sustaining the Executive Order would permit the President to use the Procurement Act to "essentially … run a contractor's business." Response Br. 42. 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. 15-17. 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 undermine 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. 23. 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 that address the unique, and very real, threats that pandemic poses to government operations.[6]

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

Plaintiffs maintain that clear statement rules, the constitutional avoidance canon, and other procurement-related statutes counsel against the government's position. Response Br. 43-56. None of those considerations supports invalidating the Executive Order.

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[6] Amici States also argue that the OMB Determination was procedurally defective. *See* States Amicus Br. 21-24. Plaintiffs did not raise that argument on appeal, so this court should decline to address it. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826-27 n.6 (8th Cir. 2009) (declining to consider an argument raised by amici but not by the parties to the case). In any event, the OMB Determination conformed with all applicable procedural requirements. *See Kentucky*, 2021 WL 5587446, at *13; *Brnovich v. Biden*, 562 F. Supp. 3d 123, 158-60 (D. Ariz. 2022).

1. Plaintiffs are mistaken when they argue that Congress was required to speak more clearly if it intended to authorize the Executive Order, either because of the Executive Order's "economic and political significance" or because of its purported effect on federal-state relations. Response Br. 43-47; July 1, 2022 28(j) Letter.

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, not an agency, exercised his proprietary authority, as purchaser of services, to impose conditions on the performance of federal contracts. Where 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).[7]

Plaintiffs do not contest that these principles apply only when agencies exercise regulatory authority. And the Supreme Court's recent decision in *West Virginia v. EPA*, which evaluated EPA's authority to regulate greenhouse gas emissions from power plants, does not suggest otherwise. 2022 WL 2347278, at *13 (U.S. June 30,

[7] Plaintiffs are thus wrong to suggest (at 45 n.11) that there is no basis for applying "major-questions" principles differently in the context of presidential exercises of authority.

2022) (rejecting EPA's claimed authority on the ground that it "represent[ed] a 'transformative expansion in [EPA's] *regulatory* authority'" (emphasis added) (quoting *Utility Air*, 573 U.S. at 324)).

Instead, plaintiffs assert that the Executive Order "is a regulation" because it "reach[es] basically every employee of all federal contractors and subcontractors." Response Br. 45. The Executive Order, however, is limited to employees who perform work on certain federal contracts or who are likely to come into contact with those who do. And if plaintiffs were correct—that the scope of a Procurement Act order transforms it into regulatory action requiring clear authorization—it would mean that the prior executive orders establishing anti-discrimination or anti-inflationary wage requirements for federal contractors required equally clear authorization from Congress. Courts, however, upheld those orders without demanding special clarity. *See* Opening Br. 17-18. *Chamber of Commerce v. Reich* does not change that analysis. *Contra* Response Br. 45. To the extent the court there discussed the distinction between regulatory and proprietary orders, it did so only in the context of "labor relations policy"—a context that "is different because of the [National Labor Relations Act] and its broad field of pre-emption." *Reich*, 74 F.3d at 1337.

The Executive Order also does not "disrupt[] the traditional federal state-balance," such that clearer authorization was required. Response Br. 45; July 1, 2022 28(j) Letter. Plaintiffs do not dispute that the federal government—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); App.839; R. Doc. 36, at 10. That ends the matter: The Executive Order does not alter the federal-state balance 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 analysis "frames the issue at the wrong level of generality." Response Br. 47 (quoting *Kentucky*, 23 F.4th at 610). But in assessing whether federal law impermissibly intrudes on state powers, courts evaluate the nature of a regulated relationship. *See Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (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).

Nor does the fact that the Executive Order protects the health and safety of citizens mean that "the federal government [is using] contracting as naked pretext to invade traditional state prerogatives," Response Br. 47 (alteration in original) (quoting *Kentucky*, 23 F.4th at 609), or that the President has transformed the Procurement Act from a federal contracting to a public health statute, *see* July 1, 2022 28(j) Letter. Exercises of Procurement Act authority often further goals in addition to economy and efficiency. *See* Opening Br. 26-27. Even if, as plaintiffs suggest, the Procurement

Act's primary purpose was not "to achieve a wide variety of economic and social goals," Response Br. 31 (quoting *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 999 (D.C. Cir. 1979) (per curiam)), courts have made clear that 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.

2. Plaintiffs' constitutional arguments fare no better. As every court of appeals to consider the question has held, the Procurement Act does not violate nondelegation principles. *Contra* Response Br. 49. The 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. Plaintiffs offer no basis to distinguish or reject that reasoning. Indeed, plaintiffs' argument again only underscores their misunderstanding of the authority exercised here. The Procurement Act authorizes the President to exercise his proprietary authority, as the CEO of the Executive Branch, to set policies governing how agencies purchase goods and services. Congress regularly uses general delegations when authorizing the Executive to expend public funds in that manner, and those delegations "ha[ve] never been seriously questioned." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937).

Plaintiffs' invocation of Spending Clause principles is similarly misplaced. Plaintiffs point out (at 50-52) that in the context of federal *grants* to states, the Supreme Court has analogized to contract-law principles in holding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1568, 1570 (2022) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). But the Executive Order concerns contracts, not grants. "Plaintiffs cite no authority for the proposition that" the clarity requirement for federal grants "appl[ies] to federal contracts." App.839; R. Doc. 36, at 10. Such an application would make no sense: In the context of contracts, parties know the terms and conditions of their agreements because they are set forth in the contracts themselves. There can be no doubt that parties entering such contracts "exercise [their] choice knowingly, cognizant of the consequences of [their] participation," *Cummings*, 142 S. Ct. at 1570 (quoting *Pennhurst*, 451 U.S. at 17).

That is assuredly true of the contracts at issue here. The Executive Order directs agencies to include in covered contracts a COVID-19 safety clause that requires compliance with protocols established by the Safer Federal Workforce Task Force (Task Force). *See* Exec. Order No. 14,042, § 2, 86 Fed. Reg. 50,985, 50,985-86 (Sept. 14, 2021). Plaintiffs maintain that ambiguity exists because the government may update the Task Force's guidance. Response Br. 50. That contention, however, implicates the enforceability under everyday contract law of (potential) modifications

to individual covered contracts. *See generally* Restatement (Second) of Contracts § 89 (Am. L. Inst. 1981). It has nothing to do with the constitutionality of the Executive Order. In any event, the Federal Acquisition Regulation (FAR) expressly authorizes contracting officers to make unilateral modifications to procurement contracts like those theorized by plaintiffs. *See* 48 C.F.R. § 43.103(b).

The Executive Order also does not impermissibly "commandeer" state officials in violation of the Tenth Amendment, Response Br. 53. 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). There is no similar constitutional concern, however, where the state voluntarily undertakes obligations pursuant to a valid contract with the federal government. *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."); *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 government and the states.

3. Finally, the Executive Order does not conflict with the other statutes plaintiffs identify. *Contra* Response Br. 54-56. The Procurement Policy Act authorizes the Federal Acquisition Regulatory Council (FAR Council) to promulgate the FAR, a "single, [g]overnment-wide procurement 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 assign that authority elsewhere; rather, it

instructs the Task Force to develop workplace safety guidelines and delegates to OMB the authority to determine whether those guidelines promote economy and efficiency in federal procurement. *See* Exec. Order No. 14,042, § 2, 86 Fed. Reg. at 50,985-86. 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 to incorporate those protocols into agency-specific deviations in the short run. *See id.* § 3(a), 86 Fed. Reg. at 50,986. Such deviations do not evade procedural requirements, *contra* Response Br. 55; they are expressly authorized in the FAR, *see* 48 C.F.R. § 1.400, and the Procurement Policy Act, *see* 41 U.S.C. § 1303(a)(2)(A) (allowing agencies to prescribe "regulations essential to implement Government-wide policies and procedures within the agency").

The Executive Order is also consistent with the Competition in Contracting Act, which requires the government to use competitive procedures in procurement. As the case plaintiffs cite underscores, 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 (second alteration in

original) (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. 6-9.

II. PLAINTIFFS FAILED TO ESTABLISH THE REMAINING PRELIMINARY INJUNCTION FACTORS

Plaintiffs have not shown that the Executive Order will cause them irreparable harm, "the absence of [which] is by itself sufficient to defeat a motion for a preliminary injunction." *DISH Network Serv. LLC v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013). Plaintiffs emphasize the district court's finding that they will suffer irreparable harm in the form of nonrecoverable compliance costs. Response Br. 56. The government already explained why ordinary compliance costs generally do not support injunctive relief (Opening Br. 37), but even if they could, the district court clearly erred in concluding that *plaintiffs'* purported "compliance and monitoring costs" justified this injunction, App.841; R. Doc. 36, at 12. It is well established that plaintiffs must make "a sufficient evidentiary showing of irreparable harm" to warrant injunctive relief, *MPAY Inc. v. Erie Custom Comput. Applications, Inc.*, 970 F.3d 1010, 1020 (8th Cir. 2020), but plaintiffs in no way satisfied that evidentiary burden. 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). The "uncorroborated claim that these harms are inevitable does not satisfy [plaintiffs'] burden to show irreparable harm." *MPAY*, 970 F.3d at 1020.

Plaintiffs' claim that they will suffer disruptions to their labor forces similarly lacks sufficient evidentiary support to warrant injunctive relief. Plaintiffs introduced no evidence—either in the form of "large-scale statistics" or "specific individualized documents," *Texas v. Biden*, 20 F.4th 928, 971 (5th Cir. 2021)—showing how many of their 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. Instead, plaintiffs offered conclusory declarations and a single study that, at most, suggest that some unspecified number of employees would quit rather than be vaccinated. 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); *see also Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015).[8] Plaintiffs also offer no rebuttal to the Acting OMB Director's conclusion that the benefits of reducing extended contractor employee absences

[8] Plaintiffs' reliance (at 58) on *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), is misplaced. That case did not concern the standard for establishing irreparable harm, but rather the evidentiary showing necessary to meet the fairly-traceable requirement for Article III standing. *Id.* at 2556.

would outweigh any "cost associated with replacing" unvaccinated covered contractor employees. 86 Fed. Reg. at 63,422.

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 billions of dollars in federal contracts performed within their borders. 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.[9] Instead, plaintiffs merely reiterate their merits argument, asserting the equities favor an injunction because the Executive Order is unlawful. Response Br. 59. 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.

[9] That the Executive Order is currently enjoined nationwide misses the point. Response Br. 59-60. The Government is appealing that overbroad injunction, *see Georgia v. President of the United States*, No. 21-14269 (11th Cir.), and were that injunction vacated or narrowed, the injunction at issue here would jeopardize billions of dollars in federal contracts performed in plaintiffs' borders.

III. THE PRELIMINARY INJUNCTION IS OVERBROAD

At a minimum, the district court's patently overbroad injunction—which extends to all covered contractors within plaintiffs' borders—should be narrowed.

The claimed harms to plaintiffs' quasi-sovereign and sovereign interests cannot support the injunction's scope. As the district court correctly concluded, App.833; R. Doc. 36, at 4, plaintiffs may not maintain a suit against the federal government to assert quasi-sovereign interests on behalf of their citizens, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982). And for the reasons explained above, the Executive Order does not disrupt the federal-state balance and so inflicts no harm to plaintiffs' sovereign interests warranting injunctive relief. *See supra* pp. 16-18.

Plaintiffs erroneously assert that the injunction's scope is proper because the Executive Order "extends to all the States, indeed, it extends nationwide." Response Br. 61. The Supreme Court has made clear, however, that even in challenges to federal policies of nationwide scope, injunctive relief may "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Otherwise, a statewide or even nationwide injunction would be warranted anytime a plaintiff successfully challenged a federal policy, contravening the traditional limits on courts' equity powers. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring).

This Court's decision in *Rodgers v. Bryant*, 942 F.3d 451 (8th Cir. 2019) is not to the contrary. *Contra* Response Br. 60. In that case, the Court found "broad preliminary relief … appropriate" where plaintiffs "established" a meritorious "facial challenge to a [state criminal] statute under the First Amendment." 942 F.3d at 458-59. Here, the district court concluded that no constitutional violation occurred, App.839; R. Doc. 36, at 10, and that the only harm "established" by plaintiffs related to the federal contracts of Wyoming, Iowa, and Missouri, App.835; R. Doc. 36, at 6.[10] The injunction should therefore extend no further than those plaintiffs' own contracts with the federal government because a broader injunction is "[un]necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702.

Alternatively, if the Court concludes that the Executive Order is consistent with the Procurement Act but that it is overbroad in extending to certain employees who are not themselves performing work on federal contracts, *see supra* pp. 12-13, then the Court should remand for the district court to craft a narrower injunction targeted to the scope of the vaccination requirement.

[10] It makes no difference that other plaintiffs introduced some evidence regarding their federal contracts (Response Br. 62), as that evidence neither established cognizable harm warranting injunctive relief nor justifies extending the injunction to non-parties.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,447 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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

/s/ David L. Peters
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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 Eighth Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

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