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

CORRECTED BRIEF FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

The federal government respectfully requests oral argument. The district court preliminarily enjoined the federal government from enforcing in Ohio, Kentucky, and Tennessee an Executive Order providing that certain new federal contracts include vaccination requirements analogous to those adopted by private employers. The government believes that oral argument would facilitate the Court's consideration of the case.

INTRODUCTION

The United States is in the midst of an ongoing pandemic that has caused millions of Americans to become ill and hundreds of thousands to die. The pandemic has also substantially disrupted the American economy. One study estimates that the cost of lost work hours associated with COVID-19 exceeds $100 billion. To reduce further economic loss, many private companies have chosen to require that their employees receive a COVID-19 vaccine. Those vaccines substantially reduce the risk that an employee will become sick, miss work, or pass the illness along to others, including coworkers.

The principal question in this case is whether the President of the United States may require federal agencies to do business only with contractors that impose the same type of vaccination requirement on their employees. The Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. § 101 *et seq.*, authorizes the President to "prescribe policies and directives" to ensure "an economical and efficient system" for federal contracting. *Id.* §§ 101, 121(a). This provision has consistently been understood, by both the Executive Branch and the federal courts, to give the President both "necessary flexibility and broad-ranging authority" in setting procurement policies reasonably related to the statute's aims, *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (citation omitted), including policies that in the President's judgment will improve the economy and efficiency of federal contractors' operations. The President exercised

that authority by issuing an Executive Order directing federal agencies to include in certain contracts a clause requiring covered contractor employees to follow COVID-19 safety protocols, which include vaccination requirements.

That Executive Order falls well within the terms of the Procurement Act. Requiring entities that enter into federal contracts to have a vaccinated workforce enhances the efficiency of federal contractor operations because a workplace free from COVID-19 is more efficient than a workplace in which employees become infected, transmit their infections to others, and miss work. Ensuring that federal contracts are performed in a timely and cost-sensitive manner, in turn, advances the economy and efficiency of the overall federal procurement system by lowering contracting costs and protecting the public fisc.

The district court nevertheless enjoined the policy, and a divided motions panel of this Court declined to stay that ruling pending appeal. The rationale underlying the district court's injunction—that the President exceeded his authority under the Procurement Act because the Executive Order constituted a public health measure not clearly authorized by Congress—is mistaken. The Executive Order is an exercise of the federal government's procurement powers, not a public health regulation, and it falls squarely within the text and tradition of the Procurement Act. The stay panel majority's restrictive reading of the Procurement Act not only is inconsistent with the statute's long-understood meaning, but also is at odds with the Supreme Court's recent decision in *Biden v. Missouri*, 142 S. Ct. 647 (2022), which holds that

longstanding practice like the one here forecloses attempts to narrow the broad language included in a statutory grant of authority.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361 and 5 U.S.C. §§ 702, 703. Complaint, RE 1, PageID #19. The district court entered a preliminary injunction on November 30, 2021. Opinion & Order, RE 50, PageID #872-900. The government timely appealed on December 3, 2021. Notice of Appeal, RE 52, PageID #903-905; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The district court preliminarily enjoined the enforcement of Executive Order 14,042 as to "federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee." Opinion & Order, RE 50, PageID #900. This appeal presents three questions:

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

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

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

STATEMENT OF THE CASE

A. Federal Contracting And The Procurement Act

Congress enacted the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 101 *et seq.*—known as the Procurement Act—with the aim of "provid[ing] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting." *Id.* § 101(1). The Act empowers the President to "prescribe policies and directives that the President considers necessary to carry out" that objective. *Id.* § 121(a). Presidents have long used this power to issue a wide variety of executive orders relating to federal procurement and contracting. *See, e.g.*, Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965) (forbidding civilian contractors from discriminating on the basis of race, creed, color, or national origin); Exec. Order No. 12,800, 57 Fed. Reg. 12,985, 12,985 (Apr. 13, 1992) (requiring contractors to inform their employees that they have a right not to pay union dues).

Congress has also authorized the Office of Federal Procurement Policy, a subcomponent of the Office of Management and Budget (OMB), to "issue policy directives … for the purpose of promoting the development and implementation of the uniform procurement system." Pub. L. No. 96-83, § 4(e), 93 Stat. 648, 650 (1979). And Congress created the Federal Acquisition Regulatory Council (FAR Council), 41 U.S.C. § 1302, which is chaired by the administrator of the Office of Federal

Procurement Policy and provides guidance on how agencies should obtain full and open competition in contracting. The FAR Council promulgates the Federal Acquisition Regulation (FAR), which contains standard clauses that are to be included in certain government contracts. *See* 48 C.F.R. pts. 1-53.

B. COVID-19 Safety Requirements For Federal Contractors

1. The COVID-19 pandemic

Since January 2020, the United States has been in a state of public health emergency because of COVID-19. U.S. Dep't of Health & Hum. Servs., *Determination That a Public Health Emergency Exists* (Jan. 31, 2020), https://perma.cc/VZ5X-CT5R. In the two years since that emergency began, there have been more than 74 million confirmed cases of COVID-19 in America and more than 850,000 Americans have died from the disease. Ctrs. for Disease Control & Prevention (CDC), *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker (last visited Jan. 31, 2022). Beginning in July 2021, cases, deaths, and hospitalizations due to COVID-19 began to rise dramatically due to the emergence of a "more infectious" strain of the virus known as the Delta variant. CDC, *Delta Variant* (Aug. 26, 2021), https://perma.cc/4RW6-7SGB. In December 2021, another strain, the Omicron variant, began to cause "a rapid increase in infections" due to its "increased transmissibility and … ability … to evade immunity conferred by past infection or vaccination." CDC, *Potential Rapid Increase of Omicron Variant Infections in the United States* (Dec. 20, 2021), https://perma.cc/6CWF-QZQW.

COVID-19 has also led to massive economic disruptions in the public and private sectors. The global economy contracted by 3.5 percent in 2020. Eduardo Levy Yeyati & Federico Filippini, *Social and Economic Impact of COVID-19*, at 1 (Brookings Inst., Brookings Global Working Paper #158, June 2021), https://perma.cc/4J2W-N83V. One study estimates that between March 2020 and February 2021 the pandemic cost $138 billion in lost work hours among U.S. full-time private-sector employees. Abay Asfaw, *Cost of Lost Work Hours Associated with the COVID-19 Pandemic—United States, March 2020 Through February 2021*, 65 Am. J. Indus. Med. 20 (2022). In the public sector, the Government Accountability Office (GAO) reports that in the first six months of the pandemic a single federal agency, the Department of Energy, spent more than $550 million reimbursing contractors for COVID-19-related paid leave. GAO, GAO-20-662, *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance and Use* 11 (Sept. 2020), https://perma.cc/TPF7-9VN4.

Once vaccines against COVID-19 became widely available in the United States, many private companies chose to mitigate the costs of the pandemic by imposing vaccination requirements on their workers and, in some cases, on visitors to their premises. 86 Fed. Reg. 63,418, 63,422 & n.13 (Nov. 16, 2021) (citing Jessica Mathews, *The Major Companies Requiring Workers to Get COVID Vaccines*, Fortune, Aug. 23, 2021, https://perma.cc/2WQZ-SUCA). Many companies have reported high rates of compliance with these requirements. For example, by October 2021, 99.7

percent of United Airlines' workforce had complied with its vaccination requirements, and Tyson Foods had reported that more than 96 percent of its workforce was vaccinated. *Id.* at 63,422.

2. The challenged federal actions

On September 9, 2021, President Biden issued Executive Order No. 14,042. 86 Fed. Reg. 50,985 (Sept. 14, 2021). The Executive Order instructs Executive departments and agencies, "to the extent permitted by law," to incorporate a COVID-19 safety clause into certain future contracts and solicitations. *Id.* § 2(a), 86 Fed. Reg. at 50,985. That clause requires that contractors and subcontractors comply with guidance developed by a federal task force, upon the OMB Director's determination that adherence to the guidance "by contractors or subcontractors[] will promote economy and efficiency in Federal contracting." *Id.* The Executive Order further instructs the FAR Council to amend the FAR to include the same COVID-19 safety clause. *Id.* § 3(a), 86 Fed. Reg. at 50,986. It states that "agencies are strongly encouraged, to the extent permitted by law," to seek to modify existing contracts to include the COVID-19 safety clause. *Id.* § 6(c), 86 Fed. Reg. at 50,987. But the Executive Order by its terms does not apply to existing contracts absent the contractor's consent. *See id.* § 2(a), 86 Fed. Reg. at 50,985.[1] Nor does it apply even

[1] Contractors can agree to bilaterally modify existing contracts to include the COVID-19 safety clause. The Executive Order also applies to existing contracts upon extension, renewal, or exercise of an option. Exec. Order No. 14,042, § 5(a), 86 Fed. Reg. at 50,986.

prospectively to contractors' workplaces that are unconnected to work on a federal contract. *See id.* ("This clause shall apply to any workplace locations … in which an individual is working on or in connection with a Federal Government contract or contract-like instrument … .").

On November 10, 2021, the Acting OMB Director determined that the guidance prepared by the designated task force would promote economy and efficiency in federal contracting (OMB determination). 86 Fed. Reg. at 63,418; *see* Exec. Order No. 14,042, § 2(c), 86 Fed. Reg. at 50,985-986.[2] The approved guidance requires covered contractor employees to be fully vaccinated against COVID-19 unless they are legally entitled to an accommodation. 86 Fed. Reg. at 63,420. It also requires, among other things, that in some circumstances covered contractor employees wear masks and physically distance while at workplace locations where work on or in connection with federal contracts is being performed. *Id.* at 63,420-421. The Acting OMB Director explained that, "[j]ust as … private businesses have concluded that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market, … the Guidance will realize economy and efficiency in Federal contracting." *Id.* at 63,421. She further noted that the benefits achieved in reducing extended employee absences would outweigh any "cost associated with replacing" unvaccinated employees, as "the

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

experience of private companies" indicated that the overwhelming majority of employees comply with vaccination requirements. *Id.* at 63,422 & n.13.

On September 30, 2021, the FAR Council issued guidance advising agencies on how to seek to include the COVID-19 safety clause in new contracts and solicitations (FAR Council guidance). Memorandum from FAR Council to Chief Acquisition Officers, et al., re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021), https://perma.cc/9BQ8-XBT6. That guidance contains a sample clause that implements the Executive Order.

C. Prior Proceedings

1. In November 2021, the Commonwealth of Kentucky, the States of Ohio and Tennessee, as well as two local sheriffs' offices within those States, filed this suit challenging the Executive Order, the OMB determination, and the FAR Council guidance. Plaintiffs moved for a preliminary injunction.

On November 30, the district court entered a preliminary injunction that bars the federal government "from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee." Opinion & Order, RE 50, PageID #900. As a threshold matter, the court concluded that plaintiffs had established standing to sue on the theory that plaintiff States could "litigate as *parens patriae*" to protect the interests of entities within their borders that had contracts with the federal government. *Id.*, PageID #877 (citation omitted).

On the merits, the district court acknowledged that OMB reasonably determined that the vaccination requirement was necessary to achieve "an economical and efficient procurement system." Opinion & Order, RE 50, PageID #889-897. The court ruled, however, that the President "exceeded his delegated authority under" the Procurement Act in issuing the challenged Executive Order. *Id.*, PageID #882. The court recognized that the Act "granted to the president a broad delegation of power that presidents have used to promulgate a host of executive orders," *id.*, but the court expressed doubt that the statute could be the basis for what it described as "a public health measure," *id.*, PageID #884. The court also opined that the Executive Order's connection to economy and efficiency was undermined by the fact that the vaccination requirement allegedly applied to workers "who work entirely from home," and workers who primarily work outdoors. *Id.* The court further stated that its interpretation found support in the Competition in Contracting Act and principles of nondelegation and federalism. *Id.*, PageID #885-891.

The court also determined that plaintiffs satisfied the equitable requirements for a preliminary injunction. Opinion & Order, RE 50, PageID #897-898. The court concluded that the Executive Order irreparably harmed plaintiffs by imposing "nonrecoverable compliance" costs, and by intruding on the States' "interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach." *Id.*, PageID #898 (citation omitted). According to the court, those costs outweighed "any abstract harm" to the federal government from enjoining

the Executive Order, such that the balance of harms and public interest weighed in favor of preliminary relief. *Id.* (citation omitted).

Although the district court acknowledged that a remedy should be "limited to the parties before the Court," it enjoined the federal government from enforcing the order for all "federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and Tennessee." Opinion & Order, RE 50, PageID #899-900. The government appealed, Notice of Appeal, RE 52, PageID #903-905, and sought a stay pending appeal.

2. On January 5, 2022, a divided motions panel of this Court denied the government's request for a stay pending appeal. *Kentucky v. Biden*, __ F.4th __, 2022 WL 43178 (6th Cir. Jan. 5, 2022). The stay panel first held that plaintiffs had standing to sue based on the proprietary interests in their own contracts with the federal government. *Id.* at *5-6. The stay panel also determined that plaintiff States had standing to assert their sovereign interests in protecting their vaccination policies from federal interference and their quasi-sovereign interests in protecting the economic well-being of their citizens. *Id.* at *6-9.

The stay panel then concluded that the President lacked statutory authority to direct inclusion of vaccination requirements in federal contracts. The panel emphasized that the statute refers to the procurement "system." *Kentucky*, 2022 WL 43178, at *12. It concluded that the statute therefore contemplated only orders directed to the economy and efficiency of the federal government's method of

procurement rather than to the economy and efficiency of contractors' operations. *Id.* at *12-13. The contract condition here thus falls outside the statute's grant of authority, the panel reasoned, because it does not make the government's method of "enter[ing] into contracts less duplicative and inefficient." *Id.* at *12-13. The stay panel asserted that a contrary reading would raise nondelegation and federalism concerns, *id.* at *14 n.14, *15-16, and it also suggested that Congress would need to speak more clearly if it wished to delegate to the President the authority to issue an order "with such 'vast economic and political significance,'" *id.* at *14 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

Judge Cole would have stayed the injunction pending appeal. In his view, plaintiff States did not have standing to assert the interests of their citizens as *parens patriae*, and they lacked standing to assert their sovereign interests because the Executive Order neither overrode state policies nor intruded into an area traditionally left to the States. *Kentucky*, 2022 WL 43178, at *18-19. Judge Cole also disagreed with the stay panel's interpretation of the Procurement Act, noting that "[c]ourts have recognized that the [Procurement] Act gives the President 'necessary flexibility and broad-ranging authority'" and that "the President and Congress have 'frequently imposed on the procurement process social and economic programs somewhat removed from a strict view of efficiency and economy.'" *Id.* at *19 (first quoting *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003), then quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc)). Judge Cole

concluded that the Executive Order was "consistent with the provisions of the [Procurement] Act" because it "promotes economy and efficiency in federal contracting by ensuring federal contractors implement adequate COVID-19 safeguards to protect their workers and reduce the spread of COVID-19." *Id.* at *20.

SUMMARY OF ARGUMENT

I. The Procurement Act authorizes the President to "prescribe policies and directives" that he considers "necessary" to ensure "an economical and efficient system" for procurement and contracting. For decades, Presidents and courts of appeals have understood, contrary to the stay panel's interpretation, that this broad language gives the President flexibility to impose contracting requirements that have a sufficiently close nexus to those statutory objectives, including policies that improve the economy and efficiency of federal contractors' operations. Although Congress has amended and recodified the statute on several occasions, it has not disturbed either the Executive Branch's consistent view of its Procurement Act authority or the approval of that view by the courts of appeals. As the Supreme Court explained after the stay panel's decision in this case, this "longstanding practice … in implementing the relevant statutory" provisions fatally undermines the stay panel's "narrow[] view" of the Procurement Act's "broad language." *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022).

There is a clear nexus between the Executive Order and the Procurement Act's statutory goals of establishing "an economical and efficient system" for procurement.

As the President explained in issuing the Executive Order, requiring contractors' employees to become vaccinated decreases the likelihood that those employees will miss work or transmit the virus to their coworkers. The requirement therefore advances the economy and efficiency of contractor operations, just as private companies have recognized in imposing vaccination requirements on their own employees. And ensuring that federal contractor performance is more efficient in turn enhances the economy and efficiency of the overall federal procurement system.

The district court did not take issue with the connection between the vaccination requirement and the statutory goal of an "economical and efficient system" for procurement. Instead, the court expressed concern that the Executive Order is a "public health measure" that will open the door for Presidents to enact virtually any procurement policy under "the guise of economy and efficiency." Those concerns lack foundation. That the President has acted well within the scope of his proprietary authority here is underscored by the fact that vaccination requirements have been imposed by private and public entities in a variety of situations, including in their response to the current pandemic. Courts, moreover, have repeatedly upheld exercises of proprietary authority under the Procurement Act, even though they have effects in addition to the promotion of economy and efficiency (e.g., anti-discrimination requirements).

The district court was also incorrect to suggest that the Competition in Contracting Act, as well as nondelegation and federalism principles, counsel against

sustaining the Executive Order. As the Federal Circuit has held, contractual requirements do not contravene the Competition in Contracting Act simply because they have the effect of excluding contractors who cannot satisfy them. And as every appellate court to consider the nondelegation question has concluded, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that guides the President's discretion. The Executive Order, furthermore, raises no federalism concerns, as federal contracting is not a matter reserved to the States.

Similarly, the decisions cited by the stay panel majority concerning issues of "economic and political significance" do not call the Executive Order's validity into question. Those cases involved the exercise of regulatory authority, but the Executive Order is not an exercise of regulatory authority; it is an exercise of the federal government's proprietary powers, as a purchaser of goods and services. Those cases also expressed concern about the risk of diminished accountability associated with the agency actions at issue. No such risk exists here. The Procurement Act vests authority in the President, who has inherent constitutional power to direct operations of the Executive Branch and is directly accountable to the people. There is no risk that the President will not be held accountable for actions that he directs in an Executive Order.

II. Plaintiffs have also failed to establish that they face irreparable injury in the absence of an injunction and that the balance of the equities favors preliminary relief. Plaintiffs assert that they will be irreparably injured by the costs of complying

with the Executive Order, but such compliance costs do not constitute irreparable harm; in any event, plaintiffs introduced no evidence of the compliance steps they have taken or the cost of those measures. Nor do plaintiffs' other asserted harms entitle them to injunctive relief. As noted, the Executive Order is not a public health measure that intrudes on plaintiff States' sovereign interests. It also has no effect on plaintiffs' existing agreements with the federal government. And plaintiffs offer no evidentiary support for their entirely speculative prediction that significant numbers of employees will quit or be terminated rather than be vaccinated.

The pandemic's effects on the economy and efficiency of the contractor workforce, by contrast, are anything but conjectural. Enjoining the Executive Order will cause concrete harm to the federal government and American taxpayers stemming from significant productivity losses in the performance of federal contracts. In accepting plaintiffs' assertions without scrutiny, and in dismissing the impact of an Executive Order designed to minimize disruption of federal contracts, the district court improperly substituted its policy judgment for that of the President.

III. Finally, the district court independently erred by issuing an overbroad injunction. Article III and principles of equity require that an injunction sweep no further than necessary to address the injuries identified to the court. The district court nonetheless enjoined the vaccination requirement as to all contractors in plaintiff States, including countless contractors who were not parties to this action.

At a minimum, then, the district court's injunction should be vacated to the extent it extends beyond plaintiffs' own federal contracts.

STANDARD OF REVIEW

A district court's "decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion." *Online Merchants Guild v. Cameron*, 995 F.3d 540, 546 (6th Cir. 2021) (citation omitted). This Court "review[s] the district court's legal conclusions *de novo* and its factual findings for clear error." *Id.* (citation omitted).

ARGUMENT

I. THE EXECUTIVE ORDER IS LAWFUL

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

1. a. The text of the Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Act, as long as those policies are "consistent" with the remainder of the statute. 40 U.S.C. § 121(a). In determining what policies are consistent with the statute, the Act states that its "purpose … is to provide the Federal Government with an economical and efficient system for," among other things, "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." *Id.* § 101. The link between that statement of purpose and the operative provision, contrary to the stay panel's suggestion, is clear: The statement of purpose in § 101 "is 'an appropriate guide' to the 'meaning of the … operative provision[]'" in § 121(a). *Gundy v. United*

States, 139 S. Ct. 2116, 2127 (2019) (plurality op.) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012)). The Procurement Act thus empowers the President to "prescribe policies and directives that the President considers necessary" to "provide the Federal Government with an economical and efficient system" for "[p]rocuring … property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. §§ 101, 121.

As the courts have long recognized, the Procurement Act's express grant of statutory authority permits the President to issue orders that improve the economy and efficiency of contractors' operations because such orders advance the economy and efficiency of the federal government's overall contracting "system," 40 U.S.C. § 101. In the first decades after the Procurement Act's enactment, for example, "the most prominent use of the President's authority under the [statute]" was "a series of anti-discrimination requirements for Government contractors." *AFL-CIO v. Kahn*, 618 F.2d 784, 790 (D.C. Cir. 1979) (en banc). Presidents Dwight Eisenhower, John F. Kennedy, and Lyndon B. Johnson each issued orders forbidding contractors from discriminating on the basis of race, creed, color, or national origin, *id.* (citing orders)—all in an effort to prevent the federal government's suppliers from "increasing its costs and delaying its programs by excluding from the labor pool available minority workmen," *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 170 (3d Cir. 1971).

More recently, Presidents have continued to exercise their Procurement Act authority to impose contract requirements that they determined enhanced the economy and efficiency of federal contractor operations. President George W. Bush, for example, issued an order requiring federal contractors to use the E-Verify system to verify the lawful immigration status of employees, reasoning that "[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions" and thus are "generally more efficient and dependable procurement sources." Exec. Order No. 13,465, 73 Fed. Reg. 33,285, 33,285 (June 6, 2008). And President Barack Obama issued an order requiring federal contractors to provide their employees with paid sick leave based on his determination that doing so would "improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees." Exec. Order No. 13,706, 80 Fed. Reg. 54,697, 54,697 (Sept. 7, 2015).

b. For decades, the courts of appeals have endorsed this view of the Procurement Act as affording the President both "necessary flexibility and 'broad-ranging authority'" in setting procurement policies. *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *Kahn*, 618 F.2d at 789). Courts have accordingly recognized that an order issued by the President is a proper exercise of his Procurement Act authority if there exists a "sufficiently close nexus"

between the order and the statutory goals of economy and efficiency, *Kahn*, 618 F.2d at 792; *see also Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981) ("[A]ny application of the Order must be reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement … ." (citing *Contractors Ass'n of E. Pa.*, 442 F.2d at 170)), and the order is otherwise consistent with the law, *cf. Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (enjoining Procurement Act order because it conflicted with the National Labor Relations Act).

That standard is a "lenient" one, *Chao*, 325 F.3d at 367, and courts have respected the President's judgment that policies will enhance economy and efficiency in federal procurement, including by increasing the efficiency and productivity of federal contractor operations. In *Chao*, for example, the D.C. Circuit upheld an order requiring government contractors to post notices of certain labor rights based on President Bush's judgment that "'[w]hen workers are better informed of their rights, … their productivity is enhanced,'" and that "'[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.'" *Id.* (quoting Exec. Order No. 13,201, 66 Fed. Reg. 11,221, 11,221 (Feb. 17, 2001)). Similarly, in *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726 (D. Md. 2009), a district court upheld President Bush's order requiring federal contractors to use the E-Verify system based on his judgment that contractors with "rigorous employment eligibility confirmation policies" would be "more efficient and dependable procurement sources." *Id.* at 738

(quoting 73 Fed. Reg. at 33,285). And courts have upheld anti-discrimination orders, observing that they are not "so unrelated to the establishment of 'an economical and efficient system for … the procurement and supply' of property and services that [they] should be treated as issued without statutory authority." *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (quoting 40 U.S.C. § 101); *see Contractors Ass'n*, 442 F.2d at 170-171 (agreeing that antidiscrimination orders were "authorized by the broad grant of procurement authority" because "the *federal government* has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects" (emphasis added)).

c. Congress has repeatedly revised the Procurement Act against the background of this longstanding consensus among the courts of appeals, and it has never modified or restricted the President's power. *See, e.g.*, Pub. L. No. 99-500, 100 Stat. 1783, 1783-345 (1986); Pub. L. No. 99-591, 100 Stat. 3341, 3341-345 (1986); Pub. L. No. 104-208, 110 Stat. 3009, 3009-337 (1996). Indeed, Congress recodified—without substantive change—both the Procurement Act's statement of purpose and the operative provision authorizing the President to set procurement policies to achieve the statute's goals. *See* Pub. L. No. 107-217, 116 Stat. 1062, 1063 (2002) (recodifying statement of purpose at 40 U.S.C. § 101); *id.* at 1068 (recodifying grant of authority at 40 U.S.C. § 121(a)); *id.* at 1303 ("[T]his Act makes no substantive change in existing law … .").

As the en banc D.C. Circuit explained in *Kahn*, in sustaining the order there, when "the President's view of his own authority under a statute … has been acted upon over a substantial period of time without eliciting congressional reversal, it is 'entitled to great respect'" and "'should be followed unless there are compelling indications that it is wrong.'" 618 F.2d at 790 (quoting *Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978), and *Miller v. Youakim*, 440 U.S. 125, 144 n.25 (1979)). And as this Court has emphasized, congressional amendment of a statute without "meaningful[] change [to] the text … permits the inference that Congress did not wish to change what had become a uniform practice" among courts. *Samarripa v. Ormond*, 917 F.3d 515, 518 (6th Cir. 2019); *see also Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536 (2015) ("If a word or phrase has been … given a uniform interpretation by inferior courts … , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." (alterations in original) (quoting Scalia & Garner, *supra*, at 322)).

d. "[T]he government's early, longstanding, and consistent interpretation of a statute"—especially without any resistance from Congress over many decades—is "powerful evidence of its original public meaning." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) (emphasis omitted). And in finding that the government was likely to succeed in defending another vaccination requirement against challenge, the Supreme Court emphasized that, where such a

requirement is consistent with an agency's "longstanding practice," that requirement is likely permissible. *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam). That recent holding (which was issued after the stay panel in this case held that the government had not demonstrated a likelihood of success on the merits) applies equally in this Procurement Act context.

2. The stay panel majority departed from this consistent understanding and adopted a reading with potentially far-ranging implications. *Kentucky v. Biden*, __ F. 4th __, 2022 WL 43178, at *12-14 (6th Cir. Jan. 5, 2022).[3] Implicitly suggesting that every prior court had misunderstood the text of the statute, the panel stressed the statute's reference to a "system" for procurement and stated that the "text does *not*, in fact, authorize the President to take 'necessary measures' to procure 'economical and efficient' 'nonpersonal services.'" *Id.* at *12. Rather, it permits him to employ an "economical and efficient *system*" to "*procur*[*e*]" those nonpersonal services. *Id.* (quoting 40 U.S.C. § 101) (court's emphases). Based on that purported distinction, the stay panel concluded that the statute "authorizes the President to implement systems making *the government's* entry into contracts less duplicative and inefficient," but does not permit him to set standards regarding how the contract will be

[3] The decision of a stay panel is "not strictly binding upon subsequent panels." *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014); *see also R.E. Dailey & Co. v. John Madden Co.*, 1992 WL 405282, at *1 n.1 (6th Cir. Dec. 15, 1992) ("[W]e are not bound to follow the decision of the motions panel …."). In the stay briefing, both plaintiffs and the government addressed the merits as framed by the district court and therefore did not address the interpretation advanced by the stay panel majority.

performed. *Id.* at *13 (court's emphasis); *see id.* (concluding that "'contracting' within § 101 refers to the government's initial entry into a contractual agreement to procure nonpersonal services—not all the subsequent tasks performed in connection with the contract"); *id.* (concluding that "it makes little sense to construe 'contracting' as likewise covering the subsequent performance of the contract").

Nothing in the definition of the word "system"—or any other term in § 101—supports such a restrictive interpretation. The panel itself defined "system" as "[a] formal scheme or method of governing organization, arrangement." *Kentucky*, 2022 WL 43178, at *12 (quoting *System*, Webster's New International Dictionary 2562 (2d ed. 1959)). The panel defined "procure" as "'[t]o bring into possession; to acquire; gain; get; to obtain by any means.'" *Id.* (quoting *Procure*, Webster's New International Dictionary at 1974). And it defined "contracting" as "[e]ntering into a contract or mutual agreement." *Id.* at *13 (quoting *Contracting*, 2 The Oxford English Dictionary 914 (1933)). Section 101, in other words, states that the purpose of the Procurement Act "is to provide the Federal Government with an economical and efficient" scheme or method ("system") for acquiring ("procuring") "nonpersonal services," and performing related functions including entering into contracts ("contracting").

Establishing a formal method for acquiring services or entering into contracts necessarily includes setting the terms on which those services are to be acquired and contracts are to be performed. Setting the terms of performance cannot be excluded

from the method of contracting, as the stay panel suggested, because it is impossible even to enter into a contract without agreement on those terms. *See* 1 Williston on Contracts § 3.2 (4th ed.) (noting that, for a contract to be enforceable, there must be agreement on essential terms); *cf. Bilski v. Kappos*, 561 U.S. 593, 607 (2010) (explaining that term "'method' … include[s] at least some methods of doing business"). The Procurement Act also specifically lists "setting specifications" among the functions for which the President should act to ensure economy and efficiency. 40 U.S.C. § 101(1). That language reinforces the reading that is evident from the statute's more general text: A system of procurement will not be "economical and efficient" *as a system* if it purchases overpriced or lower-quality goods or services—even if it is effective at facilitating the entry into contracts for those goods or services.

The stay panel was wrong to suggest that reading "contracting" to include setting the terms of performance renders superfluous the other functions listed in § 101—all of which "will naturally occur … in connection with a contract's performance." *Kentucky*, 2022 WL 43178, at *13. Those functions do not refer to aspects of a contractor's performance—they refer to tasks that the government performs as part of the procurement process. So, for example, "inspection" and "storage" refer to the government's examination and then retention of the property it acquires. The list of examples simply ensures that the President can establish "economical and efficient" methods for the government's performance of those

"related functions," 40 U.S.C. § 101, just as he can establish economical and efficient methods for entering into contracts and setting the terms of those contracts.

In short, the text leaves no doubt that orders that direct Executive departments and agencies to include in contracts a clause that ensures those contracts will be performed in a more timely and less costly manner necessarily make the procurement "system" more "economical and efficient." Directing the inclusion of a COVID-19 safety clause, in particular, 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, like the Department of Energy, paying hundreds of millions of dollars in unanticipated leave expenses. *See supra* p. 6.

The panel's reasoning also cannot be reconciled with decades of judicial decisions like *Contractors Association*, *Chao*, and *Chamber of Commerce* upholding orders on the ground that improving the economy and efficiency of contractors' operations would improve the economy and efficiency of the federal procurement system. Anti-discrimination orders would reduce "costs and delay[s]" in federal government programs. *Contractors Ass'n*, 442 F.2d at 170. Orders requiring contractors to post employee notices enhance the "productivity" of contractor employees, "facilitat[ing] the efficient and economical completion of … procurement contracts." *Chao*, 325 F.3d at 366. Orders requiring contractors to ensure that their employees are lawfully present in the United States create more "efficient … procurement sources" for the federal government. *Chamber of Commerce*, 648 F. Supp. 2d at 738.

The panel's reasoning is further at odds with the Supreme Court's decision in *Biden v. Missouri*, which held that the Executive Branch may "impose[] conditions of participation" on recipients of Medicare and Medicaid that include a vaccination requirement. 142 S. Ct. at 652. The governing statute there "authorized the Secretary to impose conditions on the receipt of Medicaid and Medicare funds that 'the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.'" *Id.* (quoting 42 U.S.C. § 1395x(e)(9)). The Court rejected a "narrow view" of that "seemingly broad language" that would "authorize[] the Secretary to impose no more than a list of bureaucratic rules regarding the technical administration of Medicare and Medicaid." *Id.* at 652. In doing so, the Court explained that "the longstanding practice of [the agency] in implementing the relevant statutory authorities tells a different story." *Id.* That is equally the case here, where the "longstanding practice" encompasses decades of Executive Branch practice interpreting the statute to authorize a variety of orders improving the economy and efficiency of contractors' operations.

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

1. The Executive Order manifestly reflects the required nexus to the statutory objective of "an economical and efficient system" for procurement, 40 U.S.C. § 101. The Executive Order directs Executive departments and agencies to include in certain contracts and solicitations a clause requiring contractors to provide

COVID-19 safeguards to their workers. Those safeguards, the Executive Order explains, "will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." Exec. Order No. 14,042, § 1, 86 Fed. Reg. at 50,985. Those efforts, in turn, help to avoid schedule delays and reduced performance quality in critical federal contracts. The safeguards also minimize the leave and health care costs that, in some contracts, might be passed along to the federal government. By ensuring that the federal government is entering into contracts that will be performed efficiently, the Executive Order contributes directly to establishing "an economical and efficient system," 40 U.S.C. § 101, for "[p]rocuring … property and nonpersonal services" and "performing related functions including contracting," *id.* § 101(1).

As the Acting OMB Director noted, the extent to which the contract requirements will further those statutory goals is confirmed by measures taken by private employers in the interests of their own economy and efficiency. As noted above, one study estimates that between March 2020 and February 2021, the pandemic cost $138 billion worth of lost work hours among U.S. full-time workers. Asfaw, *supra*. The extent of the impact stems in part from the highly transmissible nature of the virus. Thus, contracting the virus results not only in lost work hours of that employee, but may also result in transmitting the virus to the coworkers, customers, and clients with whom they interact. To address those concerns, large numbers of private employers—including AT&T, Bank of America, Google, Johnson

& Johnson, and Microsoft—have established vaccination requirements for their workforces, recognizing "that vaccination, masking, and physical distancing requirements will make their operations more efficient and competitive in the market." 86 Fed. Reg. at 63,421-422, 63,422 n.13. The Procurement Act empowers the President to use the same means as private enterprises in making a judgment about how best to promote economy and efficiency in the federal government's contracting and procurement.

The risk of transmission is diminished with respect to contractor employees to the extent they work exclusively from home or outdoors. But, as the Acting OMB Director reasonably explained, unvaccinated workers are far more likely than vaccinated workers to contract the virus, suffer severe and debilitating symptoms, and miss work, even if they are working from home. *See* 86 Fed. Reg. at 63,422. For that reason, private and public entities have required proof of vaccination for all employees, regardless of their workplace. Mathews, *supra*.

The nexus to an "economical and efficient system" of procurement is not diminished because Presidents have not previously directed inclusion of a vaccination requirement in federal contracts. *See PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2261 (2021) ("[T]he non-use[] of a power does not disprove its existence." (citation omitted)). As the Supreme Court noted, Presidents have "never had to address an infection problem of this scale and scope before." *Missouri*, 142 S. Ct. at 653. The virus is readily transmitted and is particularly insidious because it can be

communicated by asymptomatic carriers. And while the impact of the virus varies, it is often debilitating for extended periods and has been fatal in more than 850,000 cases to date. "[S]uch unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Id.* at 654; *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[T]he fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command" (cleaned up)).

2. The district court did not explain why measures that reduce schedule delays and improve productivity in the performance of federal contracts do not enhance the "economy" and "efficiency" of the federal contracting "system." Instead, the court stated that "it strains credulity that Congress intended … a procurement statute[] to be the basis for promulgating a public health measure such as mandatory vaccination." Opinion & Order, RE 50, PageID #884.

But exercises of proprietary authority under the Procurement Act and related statutes have often furthered goals in addition to the promotion of economy and efficiency. For example, in *American Federation of Government Employees, AFL-CIO v. Carmen*, 669 F.2d 815 (D.C. Cir. 1981) (R.B. Ginsburg, J.), the D.C. Circuit observed that the Executive Order sustained in *Kahn*—which had the principal purpose of lowering the government's procurement costs by requiring adherence to price and wage guidelines—had the "additional goal of slowing inflation in the economy as a

whole." *Id.* at 821 (citing *Kahn*, 618 F.2d at 792-793). Much the same was true of the antidiscrimination requirements addressed in cases like *Contractors Association*. As the D.C. Circuit noted, these requirements had the "additional goal of promoting enhanced employment opportunities for minorities." *Id.* (citing *Contractors Ass'n*, 442 F.2d at 171). And it was equally true of the order at issue in *Chamber of Commerce*, in which President Bush required federal contractors to use the E-Verify system to verify the lawful immigration status of their employees; that order had significant effects on the implementation of immigration laws in addition to its impact on the economy and efficiency of federal procurement. *See supra* pp. 20-21. The President's determination of how best to achieve economy and efficiency in federal operations does not "become[] illegitimate," the D.C. Circuit explained, simply because, "in addition to" advancing those goals, it "serves other, not impermissible, ends as well." *Carmen*, 669 F.2d at 821.

The district court was also wrong to suggest that sustaining the Executive Order would mean that the Procurement Act "could be used to enact virtually any measure at the president's whim under the guise of economy and efficiency." Opinion & Order, RE 50, PageID #884. The Executive Order and the OMB determination were not enacted on a "whim"; they were, as the district court elsewhere recognized, the result of a "thorough and robust economy-and-efficiency analysis" that "addressed potential effects on the labor force and costs of the vaccine mandate." *Id.*, PageID #896. And, like requirements imposed in the private sector,

the Executive Order is not established "under the guise" of economy and efficiency: It serves those purposes directly by "decreas[ing] worker absence, reduc[ing] labor costs, and improv[ing] the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government." Exec. Order No. 14,042, § 1, 86 Fed. Reg. at 50,985.

For similar reasons, the stay panel was mistaken in concluding that the Executive Order is distinguishable from prior orders because it is not a "work-anchored measure with an inbuilt limiting principle," *Kentucky*, 2022 WL 43178, at *15 (citation omitted). A requirement addressed to the unique, and very real, threats of the pandemic to government operations cannot be likened to hypothetical requirements designed to improve the general health of the federal contractor workforce. That the requirements at issue are actions properly taken in a proprietary capacity is underscored by private employers' application of similar requirements to their employees. Whatever the outer limits of the President's Procurement Act authority may be, workplace requirements that have also been imposed by entities of all types in analogous situations fall comfortably within the President's power to manage federal contracting.

C. The Executive Order Does Not Raise Competition In Contracting Act, Nondelegation, Or State Sovereignty Concerns

The district court sought to bolster its analysis by invoking three concerns that it thought counseled in favor of an injunction: "the Competition in Contracting Act,

the nondelegation doctrine and concerns regarding federalism." Opinion & Order, RE 50, PageID #885. The stay panel majority declined to address whether the Executive Order conflicts with the Competition in Contracting Act, *Kentucky*, 2022 WL 43178, at *16 n.18, but agreed with the district court that the Executive Order raised nondelegation and federalism concerns, *id.* at *14 n.14, *15-16.[4] Those concerns are misplaced.

1. The Competition in Contracting Act requires "full and open competition" and "competitive procedures." 41 U.S.C. § 3301. 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); *see id.* (discussing requirements that contractors be U.S. citizens, have certain relevant experience, and provide certain services). The addition of a COVID-19 safety clause to government contracts is an unremarkable application of that doctrine.

In reaching its contrary conclusion, the district court mistakenly likened the requirement here to a policy that capped the number of contracts a single contractor could receive in *National Government Services, Inc. v. United States*. That limitation applied without regard to a contractor's willingness and ability to meet all contract

[4] Although the stay panel did not hold that the Procurement Act violated nondelegation principles, it stated that "[i]f the government's interpretation" of the statute "were correct … , then that *certainly* would present non-delegation concerns." *Kentucky*, 2022 WL 43178, at *14 n.14.

requirements. 923 F.3d at 980-981. The Federal Circuit held that the limitation violated the Competition in Contracting Act because it "effectively make[s] it impossible for certain offerors to win an award" even if they were willing to comply with all contracting conditions. *Id.* at 983. No similar concerns exist here.

2. 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). But the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." *Yakus v. United States*, 321 U.S. 414, 425 (1944) (citation omitted). On the contrary, "in our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Thus, the Court has only twice held statutes invalid on nondelegation grounds and has concluded that a statutory delegation is constitutional as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *Id.* (second alteration in original) (citation omitted).

That standard is easily met here. The Procurement Act sets forth specific statutory goals—the promotion of "an economical and efficient system" of federal procurement of property and services, 40 U.S.C. § 101—and authorizes the President

to issue orders reasonably related to those statutory goals in the particular context of federal procurement, *see id.* § 121(a). As every court of appeals to consider the question has recognized, the Procurement Act's economy-and-efficiency standard supplies an intelligible principle that "can be applied generally to the President's actions to determine whether those actions are within the legislative delegation." *Kahn*, 618 F.2d at 793 n.51; *see City of Albuquerque v. Department of Interior*, 379 F.3d 901, 914-915 (10th Cir. 2004).

Even if more specific statutory guidance might be required in some circumstances, it is not needed in a statute that addresses government procurement of goods and services and does not grant general regulatory authority. *Cf. Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (nondelegation doctrine requires that "Congress makes the policy decisions when regulating private conduct"). Congress routinely employs general terms when authorizing the Executive to manage and expend public funds. *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies."). And the constitutionality of those laws "has never seriously been questioned." *Clinton v. City of New York*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part). That is likely because powers granted to manage government property and enter into contracts relate to the President's inherent authority to manage the Executive Branch. *Cf. Jessup v. United States*, 106 U.S.

147, 152 (1882) (collecting cases establishing that "the United States can, without the authority of any statute, make a valid contract"). Those powers generally do not involve "an abdication of the 'law-making' function." David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1266-1267 (1985) (citation omitted); *cf. Gundy*, 139 S. Ct at 2144 (Gorsuch, J., dissenting) ("Congress may assign the President broad authority regarding … matters where he enjoys his own inherent Article II powers.").

3. The district court also expressed concerns (shared by the stay panel) that the Executive Order intrudes on an area that is reserved to the States. Opinion & Order, RE 50, PageID #890-891; *see Kentucky*, 2022 WL 43178, at *15-16 (suggesting that the Executive Order would "significantly alter the balance between federal and state power" (quoting *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam)). But it is settled law that the government does not "invade[]" areas of state sovereignty "simply because it exercises its authority … in a manner that displaces the States' exercise of their police powers." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981).

In any event, federal contracts are not an area traditionally reserved to the States. On the contrary, the Constitution expressly provides that "*Congress* has authority under the Spending Clause to appropriate federal moneys to promote the general welfare" and "to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Sabri v. United States*, 541 U.S. 600, 605

(2004) (emphasis added). And when it comes specifically to the federal government's power to manage the performance of federal contracts, the Supreme Court and courts of appeals have repeatedly held that "federal contractors cannot be required to satisfy state 'qualifications in addition to those that the [Federal] Government has pronounced sufficient.'" *United States v. Virginia*, 139 F.3d 984, 990 (4th Cir. 1998) (alteration in original) (quoting *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956)).

This reasoning does not "frame[] the issue at the wrong level of generality," *Kentucky*, 2022 WL 43178, at *16. As illustrated by the principal cases discussed by the stay panel majority, courts routinely consider the nature of the regulated relationship in determining whether federal law invades an area traditionally reserved to the States. *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"); *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 5 F.4th 666, 671 (6th Cir. 2021) (similar). Here, the relationship between federal agencies and their contractors "originates from, is governed by, and terminates according to federal law." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). It is thus "inherently federal in character" and so does not present federalism concerns. *Id.*

Nor is the President's exercise of Procurement Act authority a "pretext to invade traditional state prerogatives," *Kentucky*, 2022 WL 43178, at *16 (footnote omitted), simply because "in addition to promoting economy and efficiency" in

federal contracting, it also protects the health and safety of citizens, *Carmen*, 669 F.2d at 821. As discussed, courts have routinely upheld executive orders that advance non-economic policy interests—preventing workplace discrimination, deterring illegal immigration, and so on—as well as promote economy and efficiency in federal procurement. *See supra* pp. 30-31. And Presidents have previously exercised Procurement Act authority in ways that affect areas traditionally regulated by States, like public health. *See, e.g.*, 80 Fed. Reg. at 54,697 (requiring federal contractors to allow employees to earn up to seven days or more of paid sick leave annually to "improve the health and performance of employees of Federal contractors").

D. Considerations Of The Executive Order's Economic And Political Significance Do Not Cast Doubt On Its Legality

1. The stay panel invoked cases adopting a more circumspect approach to agency claims of authority where agency actions threaten an "enormous and transformative expansion in … regulatory authority." *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *see National Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). Those cases have no application here.

The Executive Order does not exercise "regulatory authority" at all. Instead, it is an exercise of the federal government's proprietary authority, as the purchaser of services from federal contractors and subcontractors—and one that applies only to those workplaces where work on federal contracts is taking place. As the Supreme

Court recognized eighty years ago, "[l]ike private individuals and businesses, the Government enjoys the unrestricted power … to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). The Executive Order thus does not regulate employers generally (or even federal contractors generally, because it does not reach workplaces that are unrelated to federal contracting work); instead, it reflects a management decision to insist on, from companies that elect to do business with the federal government, contract terms that reflect the same type of requirements that private sector employers impose on their employees.

The contract conditions addressed by the Executive Order thus stand on a very different footing from the COVID-19 vaccination-or-testing standard promulgated by the Occupational Safety and Health Administration (OSHA). *See National Fed'n of Ind. Bus.*, 142 S. Ct. at 662 (per curiam). The standard there directly regulated employers, pursuant to authority granted by Congress under the Commerce Clause. *See id.* at 662-663. In contrast, the Procurement Act is an exercise of Congress's powers under distinct constitutional provisions, including the Spending Clause, and the Executive Order challenged here invokes only the President's power to impose conditions in workplaces involved in performing federal contracts. When the government acts "in its capacity as proprietor" and "manager of its internal operation," it "has a much freer hand" than when it "exercise[s] its sovereign power to regulate." *NASA v. Nelson*, 562 U.S. 134, 148 (2011). And, as explained, Congress regularly uses general

terms when authorizing the Executive to manage public funds in that role. *See supra* pp. 35-36. In short, Congress was not required to specify the precise means appropriate for the Executive to improve efficiency of federal contracts in the midst of a global pandemic, even if it would be required to do so in certain contexts involving direct regulation.

2. The cases cited by the stay panel also reflect the proposition that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see National Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (per curiam) (similar). But those considerations cast no doubt on the validity of the Executive Order.

In *Brown & Williamson*, for example, the Supreme Court held that a "cryptic" statutory provision should not be understood as "delegat[ing]" to the FDA the authority to resolve the question whether cigarettes and smokeless tobacco should be banned; that was a question for Congress, not the FDA, the Court concluded. 529 U.S. at 159-160; *see id.* at 141, 156 (explaining that the agency's interpretation would be "incompatible" with other aspects of the statute). Likewise, the Court in *Utility Air* rejected the EPA's interpretation of ambiguous provisions of the Clean Air Act—which would have allowed the agency to set standards for emissions of greenhouse gases from new motor vehicles—on the ground that "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear

congressional authorization." 573 U.S. at 324; *see id.* at 321 (explaining that the agency's position was "inconsistent with—in fact, would overthrow—the Act's structure and design"). In *King v. Burwell*, 576 U.S. 473 (2015), the Supreme Court held that Congress did not clearly delegate to the IRS the determination whether tax subsidies for health insurance plans purchased on an Exchange created by the Affordable Care Act were available for Exchanges run by the federal government; the Court accordingly resolved that statutory question de novo. *Id.* at 485-486. In *Alabama Association of Realtors*, the Supreme Court held that a provision of the Public Health Service Act did not delegate to the CDC the authority to institute a moratorium on evictions. 141 S. Ct. at 2489. And in *National Federation of Independent Business*, the Supreme Court concluded that the Occupational Safety and Health Act authorizes OSHA to regulate only "*occupational* hazards" and that therefore it was not "clear" that Congress had given OSHA the authority "to regulate the hazards of daily life … simply because most Americans have jobs and face those same risks while on the clock." 142 S. Ct. at 665.

The Executive Order—and its cited source of authority, the Procurement Act—differ in crucial respects.

First, the text of the Procurement Act makes plain that Congress assigned the President the authority to determine what "policies and directives" are "necessary to carry out" the Procurement Act's objective of ensuring "an economical and efficient system" for federal contracting and procurement, 40 U.S.C. § 121. That authority is

stated in unquestionably broad terms. *See Kahn*, 618 F.2d at 789 (noting that "economical" and "efficient" are terms of great breadth). If an Executive Order bears a reasonable nexus to that objective, there is no question that Congress authorized its issuance. *Cf. Missouri*, 142 S. Ct. at 652 (concluding that rule fell "within the authority that Congress … conferred" where definitional provisions authorized Secretary to impose conditions he "finds necessary in the interest of health and safety").

Second, the fact that the authority here is delegated to the President himself distinguishes this case from those where courts have questioned whether Congress intended to delegate authority over a "major question" to an administrative agency. Whereas courts have expressed the concern that agencies lack political accountability, *National Fed'n of Ind. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (allowing Congress to "hand off all its legislative powers to unelected agency officials" would replace "government by the people" with "government by bureaucracy"), the President is unquestionably "accountable to the people," *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513 (2010). There is little chance that the President will not be held accountable for actions he directs in an Executive Order.

Third, one of the other concerns animating these cases is the prospect of agencies overreaching their authority. *See National Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (per curiam) (expressing concern that the standard "extend[ed] beyond the agency's legitimate reach"). That concern applies here with diminished force in light of the President's inherent power under Article II to exercise general administrative control

"throughout the Executive Branch of government, of which he is the head," *Building & Construction Trades Dep't v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002), including by managing the performance of employees and contractors alike, *see Nelson*, 562 U.S. at 150 (rejecting argument that, "because they are contract employees and not civil servants, the Government's broad authority in managing its affairs should apply with diminished force"). Congress would have understood that it was legislating in an area in which the President already exercises powers pursuant to his constitutional responsibilities.

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

The preliminary injunction should be vacated for the independent reason that plaintiffs have not made the requisite "clear showing" that the remaining preliminary injunction factors are satisfied. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008). Plaintiffs have not established that they will suffer immediate and irreparable harm absent the injunction. Nor have they demonstrated that the balance of harms and public interest—factors that merge where, as here, the federal government is the opposing party, *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020)—weigh in favor of preliminary relief.

A. Plaintiffs Have Not Established Irreparable Harm

"Irreparable harm is an indispensable requirement for a preliminary injunction." *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir.

2020) (citation omitted). The asserted injury "must be both certain and immediate, not speculative or theoretical." *Id.* (citation omitted). Plaintiffs failed to make that showing.

1. The district court cursorily concluded that the Executive Order irreparably harmed plaintiffs by imposing nonrecoverable compliance costs and by intruding on plaintiff States' sovereign interests, Opinion & Order, RE 50, PageID #898, but neither of those injuries are sufficiently imminent and irreparable to warrant injunctive relief.

The district court first mistakenly concluded that the threat of having to comply with the Executive Order irreparably harmed plaintiffs because "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance." Opinion & Order, RE 50, PageID #898 (quoting *BST Holdings, LLC v. Occupational Safety & Health Admin.*, 17 F.4th 604, 618 (5th Cir. 2021)). But "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *American Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980). A contrary rule would encompass every case in which a litigant complains of a new contract requirement or regulation, thereby transforming the "extraordinary remedy" of equitable relief, *Winter*, 555 U.S. at 22, from the exception to the rule. Plaintiffs, moreover, have failed to identify the specific steps they have taken to comply with the vaccination

requirements, or the costs associated with those measures, rendering their claimed compliance harms entirely "speculative," *Hargett*, 978 F.3d at 391 (citation omitted).

The district court also erred in holding that plaintiff States had "an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach" and that the "loss of [those] constitutional freedoms '… unquestionably constitute[d] irreparable injury.'" Opinion & Order, RE 50, PageID #898 (quoting *BST Holdings*, 17 F.4th at 618). Although this Court has held that when an individual's "constitutional rights are threatened or impaired, irreparable injury is presumed," *Doe v. University of Cincinnati*, 872 F.3d 393, 407 (6th Cir. 2017) (citation omitted), the deprivation of an individual's constitutional rights is categorically different from the structural principles at issue here. In any event, for the reasons explained above (at 36-37), the Executive Order does not unconstitutionally infringe on plaintiff States' police powers, *Hodel*, 452 U.S. at 291, and thus does not inflict irreparable harm.

2. The stay panel, for its part, credited plaintiffs' other asserted injuries, including the threat that employees may quit or be fired rather than be vaccinated, and the potential that plaintiffs may lose existing federal contracts. *Kentucky*, 2022 WL 43178, at *5, *17. These injuries too are insufficiently imminent and irreparable to support injunctive relief.

Plaintiffs introduced no evidence to substantiate their claim that the vaccination requirements will cause mass disruptions to their labor forces or those of

federal contractors within their borders. Instead, they offer a general assertion that "a natural predictable consequence of the mandate is that numerous employees may be fired, retire, or quit their jobs." Amended Complaint, RE 22, PageID #420. Such conclusory allegations fail to establish that plaintiffs face injuries that are "both certain and immediate," as opposed to merely "speculative or theoretical," *Hargett*, 978 F.3d at 391 (citation omitted); *Florida v. HHS*, 19 F.4th 1271, 1292 (11th Cir. 2021) (declarations "say[ing] nothing more than that 'some employees' may resign rather than be vaccinated" are "entirely speculative" and do not "show[] an irreparable injury is likely"). Moreover, there is "no systematic evidence" that "vaccine mandates may lead some workers to quit their jobs rather than comply … or that it would be likely to occur among employees of Federal contractors." 86 Fed. Reg. at 63,422. In fact, "the experience of private companies is to the contrary," *id.*, with one recent study noting that only "1% of all adults … say they left a job because an employer required them to get vaccinated," Kaiser Family Found., *The KFF COVID-19 Vaccine Monitor* (Oct. 28, 2021), https://perma.cc/ENL7-E7HE.

Nor have plaintiffs established that the Executive Order imminently and irreparably imperils their existing federal contracts. *Cf. Kentucky*, 2022 WL 43178, at *5-6. The Executive Order requires that only certain *future* contracts include the vaccination requirements. *See supra* p. 7. Although plaintiffs claim that some agencies have proposed modifying certain of their current contracts to include the vaccination requirements, such modifications, where accepted, have been the product of bilateral

agreement. *See* Carr Decl., RE 27-1, PageID #700; Flowers Decl., RE 22-2, PageID #533. And plaintiffs have introduced no evidence to support the district court's assertion that contractors who decline the modification "will likely be blacklisted from future contracting opportunities." Opinion & Order, RE 50, PageID #879.[5]

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

The district court also abused its discretion in holding that the balance of harms and public interest weighed in favor of an injunction. Opinion & Order, RE 50, PageID #898.

Delaying implementation of the Executive Order will lead to productivity losses in the performance of federal contracts from schedule delays as well as leave and health care costs for workers who are sick, isolating, or quarantined. *See* 86 Fed. Reg. at 63,421-422; *COVID-19 Contracting: Observations on Contractor Paid Leave Reimbursement Guidance and Use*, *supra*. These productivity losses will jeopardize the economy and efficiency of billions of dollars in federal contracts in plaintiff States. *See* Opinion & Order, RE 50, PageID #87.

Having accepted plaintiffs' unsubstantiated allegations of harm, the district court casually dismissed these real and immediate injuries to the federal government

[5] To the extent that a dispute arises over a provision in an existing contract, plaintiffs, like federal contractors generally, may seek monetary redress under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.* The availability of that relief negates plaintiffs' irreparable harm claims related to their existing contracts. *See Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

and American taxpayers as "abstract." Opinion & Order, RE 50, PageID #898 (quoting *BST Holdings*, 17 F.4th at 618). The virus's impact on the delivery of essential services to the American people is anything but "abstract." The pandemic continues to pose complex and dynamic challenges to essential government work, as the emergence of new variants illustrates. *See supra* p. 5.

III. THE SCOPE OF THE PRELIMINARY INJUNCTION IS OVERBROAD

The district court independently erred in issuing an injunction that affords relief to federal contractors within plaintiff States who are not parties to this action. Even assuming that the district court's injunction could otherwise be sustained, it should be narrowed because plaintiff States lack standing to assert claims against the federal government on behalf of non-parties.

A. Plaintiff States Lack Standing To Represent The Interests Of Non-Parties Against The Federal Government

Plaintiff States cannot proceed as *parens patriae* against the federal government to protect the economic well-being of their citizens. *Cf.* Opinion & Order, RE 50, PageID #877; *Kentucky*, 2022 WL 43178, at *6-8. As the Supreme Court explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), States may litigate on behalf of their citizens as *parens patriae* in certain contexts, including to protect "quasi-sovereign interest[s] in the health and well-being—both physical and economic—of [their] residents in general." *Id.* at 607. It is well established, however, that "[a] State does not have standing as *parens patriae* to bring an action against the

Federal Government." *Id.* at 610 n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-486 (1923)). That is because the federal government is "the ultimate *parens patriae* of every American citizen." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). It is thus "no part of [a State's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government" because "[i]n that field it is the United States, and not the state, which represents them as *parens patriae*." *Mellon*, 262 U.S. at 485-486.

Contrary to the district court's suggestion, Opinion & Order, RE 50, PageID #877, the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), in no way disturbed that decades-old rule. Although the Court in *Massachusetts* discussed quasi-sovereign interests in the context of the "special solicitude" owed States in the standing analysis, *id.* at 519-520, the case did not involve *parens patriae* standing because Massachusetts asserted its own "rights under federal law" rather than the rights of its citizens, *id.* at 520 n.17. Indeed, the Supreme Court made clear that "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)." *Id.* (quoting *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945)).

For its part, the stay panel noted that the *Snapp* Court distinguished between two concepts of *parens patriae*—one involving States bringing purely third-party suits on behalf of citizens, and the other involving States suing to protect their own quasi-

sovereign interests in their citizens' economic well-being. *Kentucky*, 2022 WL 43178, at *6-7 (citing 458 U.S. at 601-602). The stay panel then mistakenly concluded that while States were prohibited from bringing the former type of suit against the federal government, the latter was permissible. *Id.* at *7, *9. The Court in *Snapp* drew no such distinction in categorically announcing that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." 458 U.S. at 610 n.16. Indeed, the *Snapp* Court permitted the Commonwealth of Puerto Rico to assert quasi-sovereign interests as *parens patriae*, *id.* at 608, only because "the Commonwealth [was] seeking to secure the federally created interests of its residents against *private defendants*," *id.* at 610 n.16 (emphasis added). None of the cases cited by the stay panel in which States asserted quasi-sovereign interests in the economic well-being of their citizens, *see Kentucky*, 2022 WL 43178, at *8-9 (citing cases), were brought against the federal government because a "state can not have a quasi-sovereign interest" where matters of federal law are at issue, *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 182 (D.C. Cir. 2019) (citation omitted). Thus, "[t]he distinction is not, as [the panel] suggests, between two types of *parens patriae* lawsuits, one permissible and one not," but rather "between a *parens patriae* lawsuit (what *Mellon* prohibits) and a State suing based on 'its rights under federal law.'" *Id.* (quoting *Massachusetts*, 549 U.S. at 520 n.17).

B. Relief Should Extend No Further Than Plaintiffs' Own Contracts

Because plaintiff States may assert only their own "rights under federal law" against the federal government, *Massachusetts*, 549 U.S. at 529 n.17, the district court erred in enjoining the Executive Order's enforcement against all contractors in plaintiff States, Opinion & Order, RE 50, PageID #900.[6]

"Article III of the Constitution limits the exercise of the judicial power to 'Cases' and 'Controversies.'" *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). A federal court may entertain a suit only by a plaintiff who has suffered a concrete "injury in fact," and the court may grant relief only to remedy "the inadequacy that produced [the plaintiff's] injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1929-1930 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). Principles of equity reinforce those limitations. A court's authority to award relief is generally confined to relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999). And it is settled that injunctive relief may "be no more burdensome to the defendant than

[6] The district court did not hold that plaintiff States had standing based on their sovereign (as opposed to quasi-sovereign) interests, and, accordingly, did not premise the scope of its injunction on that ground. Opinion & Order, RE 50, PageID #876-880, 889-890. In any event, any such asserted injuries by plaintiff States cannot support the injunction's extension to non-parties. *See Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (holding that a state law that "simply purports to immunize [a state's] citizens from federal law … reflects no exercise of 'sovereign power,' for [a state] lacks the sovereign authority to nullify federal law").

necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Accordingly, the Supreme Court has narrowed injunctions that extended relief beyond the harms to "any plaintiff in th[e] lawsuit." *Lewis*, 518 U.S. at 358.

The district court contravened those limitations in issuing its injunction. Although it purported to restrict the relief "to the parties before the Court," Opinion & Order, RE 50, PageID #899, it enjoined the Executive Order as to all contractors in plaintiff States, *id.*, PageID #900, whether or not they are parties in this suit. But plaintiffs States have no capacity to assert claims against the federal government based on the economic well-being of contractors within their borders. *See supra* pp. 48-51. Non-party contractors are thus "not the proper object of th[e court's] remediation," *Lewis*, 518 U.S. at 358, and awarding them relief transgresses the boundaries of relief "traditionally accorded by courts of equity," *Grupo Mexicano*, 527 U.S. at 319. At a minimum, then, the district court's injunction should be narrowed to cover only plaintiffs' own contracts with the federal government.

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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February 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(A) because it contains 12,862 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.

s/ Anna O. Mohan
Anna O. Mohan

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 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. Plaintiffs-appellees are all registered CM/ECF users.

s/ Anna O. Mohan
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	**Description**	**PageID #Range**
RE 1	Plaintiffs' Complaint	1-50
RE 22	Plaintiffs' First Amended Complaint	405-464
RE 22-2	Exhibit to Plaintiffs' First Amended Complaint - Declaration of Benjamin M. Flowers	526-534
RE 27-1	Exhibit to Defendants' Response in Opposition to Motion for Temporary restraining Order and Preliminary Injunction - Declaration of Natalie Carr	700-701
RE 50	Opinion & Order granting Plaintiffs' Motion for Preliminary Injunction	872-900
RE 52	Notice of Appeal	903-905

ADDENDUM

TABLE OF CONTENTS

40 U.S.C. § 101

§ 101. Purpose

The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:

(1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.

(2) Using available property.

(3) Disposing of surplus property.

(4) Records management.

40 U.S.C. § 121

§ 121. Administrative

(a) Policies prescribed by the President.--The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.

(b) Accounting principles and standards.--

(1) Prescription.--The Comptroller General, after considering the needs and requirements of executive agencies, shall prescribe principles and standards of accounting for property.

(2) Property accounting systems.--The Comptroller General shall cooperate with the Administrator of General Services and with executive agencies in the development of property accounting systems and approve the systems when they are adequate and in conformity with prescribed principles and standards.

(3) Compliance review.--From time to time the Comptroller General shall examine the property accounting systems established by executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems. The Comptroller General shall report to Congress any failure to comply with the principles and standards or to adequately account for property.

(c) Regulations by Administrator.--

(1) General authority.--The Administrator may prescribe regulations to carry out this subtitle.

(2) Required regulations and orders.--The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

(d) Delegation of authority by Administrator.--

(1) In general.--Except as provided in paragraph (2), the Administrator may delegate authority conferred on the Administrator by this subtitle to an official in the General Services Administration or to the head of another federal agency. The Administrator may authorize successive redelegation of authority conferred by this subtitle.

(2) Exceptions.--The Administrator may not delegate--

(A) the authority to prescribe regulations on matters of policy applying to executive agencies;

(B) the authority to transfer functions and related allocated amounts from one component of the Administration to another under paragraphs (1)(C) and (2)(A) of subsection (e); or

(C) other authority for which delegation is prohibited by this subtitle.

(3) Retention and use of rental payments.--A department or agency to which the Administrator has delegated authority to operate, maintain or repair a building or facility under this subsection shall retain the portion of the rental payment that the Administrator determines is available to operate, maintain or repair the building or facility. The department or agency shall directly expend the retained amounts to operate, maintain, or repair the building or facility. Any amounts retained under this paragraph shall remain available until expended for these purposes.

(e) Assignment of functions by Administrator.--

(1) In general.--The Administrator may provide for the performance of a function assigned under this subtitle by any of the following methods:

(A) The Administrator may direct the Administration to perform the function.

(B) The Administrator may designate or establish a component of the Administration and direct the component to perform the function.

(C) The Administrator may transfer the function from one component of the Administration to another.

(D) The Administrator may direct an executive agency to perform the function for itself, with the consent of the agency or by direction of the President.

(E) The Administrator may direct one executive agency to perform the function for another executive agency, with the consent of the agencies concerned or by direction of the President.

(F) The Administrator may provide for performance of a function by a combination of the methods described in this paragraph.

(2) Transfer of resources.--

(A) Within Administration.--If the Administrator transfers a function from one component of the Administration to another, the Administrator may also provide for the transfer of appropriate allocated amounts from the component that previously carried out the function to the component being directed to carry out the function. A transfer under this subparagraph must be reported to the Director of the Office of Management and Budget.

(B) Between agencies.--If the Administrator transfers a function from one executive agency to another (including a transfer to or from the Administration), the Administrator may also provide for the transfer of appropriate personnel, records, property, and allocated amounts from the executive agency that previously carried out the function to the executive agency being directed to carry out the function. A transfer under this subparagraph is subject to approval by the Director.

(f) Advisory committees.--The Administrator may establish advisory committees to provide advice on any function of the Administrator under this subtitle. Members of the advisory committees shall serve without compensation but are entitled to transportation and not more than $25 a day instead of expenses under section 5703 of title 5.

(g) Consultation with federal agencies.--The Administrator shall advise and consult with interested federal agencies and seek their advice and assistance to accomplish the purposes of this subtitle.

(h) Administering oaths.--In carrying out investigative duties, an officer or employee of the Administration, if authorized by the Administrator, may administer an oath to an individual.