No. 24-232

In the Supreme Court of the United States

DUKE BRADFORD AND ARKANSAS VALLEY ADVENTURE, LLC, D/B/A AVA RAFTING AND ZIPLINE, PETITIONERS

v.

U.S. DEPARTMENT OF LABOR, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR TEXAS, ALABAMA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

TABLE OF CONTENTS

Page

Table of Authorities II
Interest of Amici Curiae 1
Summary of Argument 1
Background 3
- I. The Procurement Act 3
  - A. The Act's Modest Origins 3
  - B. The D.C. Circuit's Expansion of the Act. 4
  - C. The 2014 Minimum Wage Mandate 6
- II. President Biden's Wage Mandate 6
  - A. Congress's Rejection of a Wage Mandate 6
  - B. President Biden's Executive Order 7
  - C. Litigation over the Mandate 8

Argument 9
- I. The Mandate Exceeds Statutory Authority. 9
  - A. §101 does not support the Mandate. 9
  - B. §121 does not support the Mandate. 9
  - C. Structure and history defeat the Mandate. 11
- II. The Close-Nexus Test is Wrong and Irrelevant. 12
  - A. The close-nexus test is wrong. 13
  - B. The Mandate fails the close-nexus test. 14
- III. The Mandate Flunks the Major-Questions Doctrine. 16
  - A. The major-questions doctrine helps prevent Executive Branch usurpation. 16
  - B. The Mandate is a major question. 17
  - C. The Tenth Circuit's analysis again falters. 19

Conclusion 23

TABLE OF AUTHORITIES

Page(s)

Cases:

AFL-CIO v. Kahn,
618 F.2d 784 (D.C. Cir. 1979) (en banc) ...2, 5-6, 13-15, 22

Ala. Ass'n of Realtors v. HHS,
594 U.S. 758 (2021) (per curiam) 16

Allegheny Defense Project v. FERC,
964 F.3d 1 (D.C. Cir. 2020) (en banc)....................13-14

Am. Trucking Ass'ns v. United States,
344 U.S. 298 (1953) 10

Biden v. Nebraska,
143 S.Ct. 2355 (2023) 16, 21

BP PLC v. Mayor & City Council of Baltimore,
141 S.Ct. 1532 (2021) 14

Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 5

Collins v. Yellen,
594 U.S. 220 (2021) 21

Commonwealth v. Biden,
57 F.4th 545 (6th Cir. 2023).................. 4, 6, 9-12, 14, 18

Contractors Ass'n of E. Pa. v. Sec'y of Lab.,
442 F.2d 159 (3d Cir. 1971).. 22

Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz,
601 U.S. 42 (2024) 13

Epic Sys. Corp. v. Lewis,
584 U.S. 497 (2018) 13

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 11

Food Mktg. Inst. v. Argus Leader Media,
588 U.S. 427 (2019) 2-3

***Cases (ctd.)*:**

Georgia v. President of the United States,
46 F.4th 1283 (11th Cir. 2022) 2-3, 5-6, 12, 14
Gulf Fishermens Ass'n v. NMFS,
968 F.3d 454 (5th Cir. 2020) 10
Gundy v. United States,
139 S.Ct. 2116 (2019) 9, 16
Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA, 71 F.4th 59 (D.C. Cir. 2023) 17
Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.,
448 U.S. 607 (1980) 19
Kentucky v. Biden,
23 F.4th 585 (6th Cir. 2022) 2, 9, 11, 13, 18
King v. Burwell,
576 U.S. 473 (2015) 22
Kisor v. Wilkie,
588 U.S. 558 (2019) 13
Liberty Mut. Ins. Co. v. Friedman,
639 F.2d 164 (4th Cir. 1981) 14
Loper Bright Enterprises v. Raimondo,
144 S.Ct. 2244 (2024) 3, 22
Louisiana v. Biden,
55 F.4th 1017 (5th Cir. 2022) 2, 6, 9, 12, 14, 22
Marx v. Gen. Revenue Corp.,
568 U.S. 371 (2013) 12
Mayes v. Biden,
67 F.4th 921 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023) 14
McCulloch v. Maryland,
17 U.S. 316 (1819) 10
Medellin v. Texas,
552 U.S. 491 (2008) 22

***Cases (ctd.)*:**

Merck & Co., Inc. v. HHS,
385 F.Supp.3d 81 (D.D.C. 2019), *aff'd*,
962 F.3d 531 (D.C. Cir. 2020) 10

Mistretta v. United States,
488 U.S. 361 (1989) 19

RadLAX Gateway Hotel, LLC v. Amalgamated Bank,
566 U.S. 639 (2012) 12

Sturgeon v. Frost,
587 U.S. 28 (2019) 9, 13

Texas v. Biden,
694 F.Supp.3d 851 (S.D. Tex. 2023) 1, 8

Van Buren v. United States,
141 S.Ct. 1648 (2021) 9

West Virginia v. EPA,
597 U.S. 697 (2022) 2, 16-19, 21

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 17

Statutes:

29 U.S.C.:
§201 4
§206(a)(1)(C) 4

40 U.S.C.:
§101 .... 4, 9, 10-11, 13, 21
§121 .... 4, 9, 10, 21
§3142 4

41 U.S.C.:
§3301 11
§6502 4
§6703(1) 4

Other Authorities:

Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021) 1, 15, 17

Aaron Blake, *Kyrsten Sinema's Combustible Thumb*, WASH. POST (Mar. 6, 2021) 7

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 217 (2012) 9

Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021) 22

CBO, *The Budgetary Effects of the Raise the Wage Act of 2021* (Feb. 2021) 7

CBO, The Effects on Employment & Family Income of Increasing the Federal Minimum Wage (July 2019) 6

Dep't of Labor, *History of Executive Order 11246* 8

Emily Cochrane, *Top Senate Official Disqualifies Minimum Wage From Stimulus Plan*, N.Y. TIMES (Feb. 25, 2021, updated September 10, 2021) 7

Eugene Scalia & Rachel Mondl, *Obama's Minimum-Wage Increase is on Shaky Legal Ground*, WASH. POST (Feb. 20, 2014) 2, 21

Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014) 6

Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018) 6

Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (April 27, 2021) 7-8

Gary S. Becker, The Economics of Discrimination (1957) 12

James F. Nagle, A History of Government Contracting 411 (2d. ed. 1999) 3

***Other Authorities (ctd.)*:**

Minimum Wage for Federal Contracts Covered by Executive Order 14026, Notice of Rate Change in Effect as of January 1, 2024, 88 Fed. Reg. 66,906 (Sept. 28, 2023) 8

System, *Webster's New International Dictionary* (2d ed. 1959) 11

INTEREST OF AMICI CURIAE

States are often subject to the Biden Administration's unlawful Wage Mandate, *see* Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021) ("Wage Mandate" or "the Mandate"), because they contract with the federal government. Their citizens also bear the brunt of federal overreach, especially where, as here, such overreach stands to cause significant job losses while exacerbating inflation. To prevent these harms, Texas, Louisiana, and Mississippi, have secured an injunction against enforcement of the Mandate against them. *See Texas v. Biden*, 694 F.Supp.3d 851, 874 (S.D. Tex. 2023), *appeal pending* No. 23-40671 (5th Cir.). Together with their sister States, they agree this case warrants certiorari.[1]

SUMMARY OF ARGUMENT

The petition raises important questions about the Federal Property and Administrative Services Act ("Procurement Act" or "the Act") and the Wage Mandate. The Mandate contradicts plain statutory language. But, at minimum, the Act does not clearly authorize the Mandate because Congress did not clearly authorize this major policy. In holding otherwise, the Tenth Circuit erred—and aggravated a circuit split. The Court should grant certiorari and reverse.

I. Enacted in 1949, the Procurement Act serves an important but limited purpose: streamlining federal procurement. It does not empower the President to set a minimum wage. And for most of the Act's history, no one

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. Counsel of record for all parties timely received notice of amici's intention to file this brief.

disagreed. Indeed, the notion that a president could use the Act to set minimum wages would have been—and, in fact, *was*—lampooned. Yet in 2014, President Obama imposed a nationwide minimum-wage mandate on federal contractors and subcontractors. That 2014 executive order was controversial, and commentators warned that he just crossed a significant line. *See, e.g.*, Eugene Scalia & Rachel Mondl, *Obama's Minimum-Wage Increase is on Shaky Legal Ground*, WASH. POST (Feb. 20, 2014), https://tinyurl.com/WageWashPo.

President Biden, however, doubled down. On the campaign trail, he promised a $15/hour minimum wage. After Congress refused to enact one, he issued an executive order purporting to set wages for millions of workers—again misusing "pen-and-phone regulations as substitutes for laws passed by the people's representatives." *West Virginia v. EPA*, 597 U.S. 697, 753 (2022) (Gorsuch, J., concurring). Nor is this the only time that he has misused the Procurement Act. He also claimed it allowed him to unilaterally impose a vaccine mandate. Numerous courts properly rejected such overreach. *See, e.g.*, *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022); *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022); *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022). This Court should do the same here because the Mandate—and the theory on which it rests—contradicts basic rules of interpretation.

II. Because the federal government has no good answer for what the Procurement Act says, its defense of the Mandate rests largely on the D.C. Circuit's "close nexus" test. *AFL-CIO v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979) (en banc); *see also* App.21a. Yet that test is another "relic from a bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427,

437 (2019). Courts today focus on what Congress wrote and do not put their thumbs on the scale in favor of agencies. *See, e.g.*, *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024). Regardless, the Mandate flunks the close-nexus test.

III. The unlawfulness of the Mandate is underscored by the major-questions doctrine. Imposing a wage mandate on hundreds of thousands of companies who employee millions of workers is an issue of vast economic and political significance. This is even clearer because the federal government's reading of the Act has no limiting principle and raises significant nondelegation concerns. The Tenth Circuit failed to properly apply the major-questions doctrine, and it produced its own major-questions test that departs from this Court's precedent. Especially combined with its erroneous reading of the Procurement Act, the Tenth Circuit's ruling regarding the major-questions doctrine warrants review.

BACKGROUND

I. The Procurement Act

A. The Act's Modest Origins

During World War II, federal procurement was as a "free-for-all" with "many kinks to work out." James F. Nagle, A History of Government Contracting 411 (2d. ed. 1999). The Hoover Commission thus sought to improve the Executive Branch's efficiency in procurement, among other areas. *Georgia*, 46 F.4th at 1293.[2] "In line with the Hoover Commission's recommendations, the Procurement Act consolidated several procurement-related agencies into the newly created General Services Administration." *Id.* at 1293.

[2] All citations to *Georgia* refer to Judge Grant's opinion, which is designated "Opinion of the Court." 46 F.4th at 1287.

Two sections of the Act are particularly relevant here. *First*, §101—the Act's statement of purpose—says "[t]he purpose of this subtitle is to provide the Federal Government with an economical and efficient system," for, *inter alia*, "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. §101. *Second*, §121—one of the Act's grants of implementing authority—says the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle." 40 U.S.C. §121(a). Such policies or directives "must be consistent with this subtitle." *Id.*

Neither of these provisions speaks to minimum wages. That is because other laws govern that issue. Enacted in 1938, for example, the Fair Labor Standards Act requires nearly all U.S. employers to pay a minimum wage and overtime. 29 U.S.C. §201 *et seq.* The current minimum wage is $7.25/hour. *Id.* §206(a)(1)(C). Congress has also prescribed wages for some government contractors. The Davis–Bacon Act requires at least the locally prevailing wages on construction contracts. 40 U.S.C. §§3142(a)-(c). The McNamara–O'Hara Service Contract Act requires at least locally prevailing wages or collective-bargaining agreement wages for services. 41 U.S.C. §6703(1). And the Walsh–Healey Public Contracts Act also requires local prevailing wages for materials, supplies, articles, or equipment. 41 U.S.C. §6502.

B. The D.C. Circuit's Expansion of the Act.

Since 1949, presidents have generally read the Act narrowly. For example, "President Eisenhower prescribed rules for the establishment and maintenance of interagency motor-vehicle pools, and directed agencies to obtain new flags upon Hawaii's admission as a State." *Commonwealth v. Biden*, 57 F.4th 545, 549 (6th Cir. 2023) (citations omitted). And when this Court first

addressed the Act, it "suggested that the President's authority should be based on a 'specific reference' within the Act," and viewed "the Act as a limited grant of authority, empowering the President to carry out the Act's specific provisions—but not more." *Georgia*, 46 F.4th at 1294-95 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979)).

Presidents, however, have not always been able to resist the temptation to abuse the federal government's awesome purchasing clout—especially after the D.C. Circuit's decision in *Kahn*. There, that court addressed whether presidents can prevent contractors from raising wages and prices as an anti-inflation tool. *Id.* at 1299. The *Kahn* majority upheld such authority by announcing a "close nexus" test that asks not whether a specific provision of the Procurement Act authorizes a president's directive, but instead whether a directive has a "close nexus" with the Act's "values of 'economy' and 'efficiency.'" 618 F.2d at 792.

A dissent in *Kahn* mocked that flabby test and suggested—as part of a parade of horribles—that it would allow presidents to "seize control of the oil companies" or require "government contractors [to] pay a certain minimum wage." *Id.* at 806 (MacKinnon, J., dissenting). The majority, however, disagreed that its test "write[s] a blank check for the President," and emphasized that permissible uses of the Act must at least "likely have the direct and immediate effect of holding down the Government's procurement costs." *Id.* at 792-93. The majority also suggested presidents cannot use the Act for policies Congress refused to "enact[]." *Id.* at 793 n.50.

Although the D.C. Circuit continues to apply *Kahn*, other courts disagree. In rejecting President Biden's vaccine mandate, the Fifth and Eleventh Circuits both

cast significant doubt on the close-nexus test. *See, e.g.*, *Louisiana*, 55 F.4th at 1026 n.25 (citing *Georgia*, 46 F.4th at 1297-1300). And the Sixth Circuit now outright rejects *Kahn* as contrary to the Act's "textual delegation of authority." *Commonwealth*, 57 F.4th at 553.

C. The 2014 Minimum Wage Mandate

In *Kahn*, the notion that the Act could be used to mandate a minimum wage was ridiculed by the dissent and nowhere defended by the majority, and for good reason. After all, nothing in the Act addresses minimum wages; that is the province of *different* statutes. By contrast, the Procurement Act is a poor fit for such policies, which do not "have the *direct and immediate effect* of holding down the Government's procurement costs"—a key requirement of even the close-nexus test. 618 F.2d at 792 (emphasis added).

Nonetheless, in 2014, President Obama directed the Department of Labor to impose a minimum wage on federal contractors, *see* Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014)—right after his party lost control of Congress. In 2018, President Trump cut back on that order by exempting recreational services. *See* Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018).

II. President Biden's Wage Mandate

A. Congress's Rejection of a Wage Mandate

In 2019, the Congressional Budget Office concluded that raising the minimum wage to $15/hour would increase unemployment and causes prices to rise. *See CBO, The Effects on Employment & Family Income of Increasing the Federal Minimum Wage* (July 2019), https://www.cbo.gov/system/files/2019-07/CBO-55410-MinimumWage2019.pdf. During the 2020 campaign, however, then-candidate Biden pledged to raise the

minimum wage to $15/hour. The New York Times described this policy as "a crucial plank of Mr. Biden's plan." Emily Cochrane, *Top Senate Official Disqualifies Minimum Wage From Stimulus Plan*, N.Y. TIMES (Feb. 25, 2021, updated September 10, 2021), https://tinyurl.com/nhf47bvv.

At first, President Biden turned to Congress. On January 26, 2021, members of Congress reintroduced a bill to increase the minimum wage. In February 2021, however, the CBO threw cold water on that plan. *See* CBO, *The Budgetary Effects of the Raise the Wage Act of 2021* (Feb. 2021), https://www.cbo.gov/system/files/2021-02/56975-Minimum-Wage.pdf. According to the CBO, "employment would be reduced by 1.4 million workers," which number "could be much higher." *Id.* at 8-9. Unwilling to impose such a burden on the American people, a bipartisan group of Senators in March 2021 killed that legislation, prompting extreme displeasure among the President's "most passionate activists." Aaron Blake, *Kyrsten Sinema's Combustible Thumb*, WASH. POST (Mar. 6, 2021), https://tinyurl.com/SinemaWages.

B. President Biden's Executive Order

After that defeat, President Biden shifted course. In April 2021, he issued Executive Order 14,026, which ordered agencies to ensure that their contracts and "contract-like instruments" provide that contractors and any covered subcontractors pay a $15/hour minimum wage (with inflation adjustments) to workers "employed in the performance of the contract or any covered subcontract." Exec. Order No. 14,026, 86 Fed. Reg. 22,835, 22-835-36 (April 27, 2021).

The Department of Labor issued a final rule to that effect. It initially calculated that the Mandate would cause $18 billion in transfer payments over ten years,

serve as a wage floor for up to 1.8 million workers, and affect more than 500,000 private firms. *Id.* at 67,204. The Department has since admitted, however, that those figures undersell the Mandate's true effects, *see* U.S. Reply Br. 20-21, *Texas v. Biden*, No. 23-40671 (5th Cir. Apr. 26, 2024), which is hardly surprising given that "workers employed by federal contractors" comprise "approximately one–fifth of the entire U.S. labor force," Dep't of Labor, *History of Executive Order 11246*, https://perma.cc/6ZXJ-WGR8. And as the petition explains, the Mandate captures small businesses that are not even federal contractors. Due to inflation, the Mandate's minimum wage currently is $17.20/hour. *See* Minimum Wage for Federal Contracts Covered by Executive Order 14026, Notice of Rate Change in Effect as of January 1, 2024, 88 Fed. Reg. 66,906 (Sept. 28, 2023).

C. Litigation over the Mandate

The Mandate has prompted litigation in three circuits. The Tenth Circuit initially enjoined it pending appeal with respect to seasonal recreational services because the challengers' "right to relief [was] clear and unequivocal." Order at 2, *Bradford v. U.S. Dep't of Labor*, No. 22-1023 (10th Cir. Feb. 17, 2022) (quotation omitted). It later reversed course and upheld the mandate over the dissent of Judge Eid, prompting this petition.

Meanwhile, the Southern District of Texas has enjoined enforcement of the Wage Mandate with respect to Texas, Louisiana, and Mississippi. *Texas*, 694 F.Supp.3d at 874. The federal government has appealed that decision and the Fifth Circuit held oral argument last month. The Ninth Circuit is also considering a separate challenge after a district court refused to enjoin the Mandate. *Nebraska v. Walsh*, No. 23-15179 (9th Cir.) (oral argument held Feb. 6, 2024).

ARGUMENT

I. The Mandate Exceeds Statutory Authority.

The Tenth Circuit upheld the Wage Mandate using a deferential standard. Statutory interpretation, however, must begin where it "always" does: "with the text of the statute." *Van Buren v. United States*, 141 S.Ct. 1648, 1654 (2021). The Tenth Circuit focused on two provisions of the Act—§101 and §121. Neither supports the Mandate.

A. §101 does not support the Mandate.

No statute authorizes the Mandate. Instead, the Tenth Circuit, echoing the federal government, relied on the Act's statement of purpose in §101. 40 U.S.C. §101; *see also, e.g.*, App.22a. But just five years ago, this Court unanimously held that "statements of purpose … cannot override a statute's operative language." *Sturgeon v. Frost*, 587 U.S. 28, 57 (2019) (cleaned up); *see also Commonwealth*, 57 F.4th at 551.

Sturgeon thus confirms the important rule that purpose statements are "not part of the congressionally legislated or privately created set of rights and duties." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 217 (2012). This is not to say that purpose statements are irrelevant, for they can be "an appropriate guide to the meaning of the statute's operative provisions." *Louisiana*, 55 F.4th at 1023 n.17 (quoting *Gundy v. United States*, 139 S.Ct. 2116, 2127 (2019) (plurality opinion)) (cleaned up). But they are not operative provisions, much less "latent well[s] of authority." *Kentucky*, 23 F.4th at 606.

B. §121 also does not support the Mandate.

Equally unavailing is §121, which says the "President may prescribe policies and directives that the President

considers necessary to carry out this subtitle," but only if "consistent with this subtitle." 40 U.S.C. §121(a); *see also, e.g.*, App.30a. Such a general grant of authority must be "geared to and bounded by the limits of the regulatory system of the Act which it supplements." *Am. Trucking Ass'ns v. United States*, 344 U.S. 298, 313 (1953). Because a "grant of authority to promulgate 'necessary' regulations cannot expand the scope of the provisions the agency is tasked with 'carrying out,'" courts do not "read such provisions to expand the agency's power beyond the statute's terms." *Gulf Fishermens Ass'n v. NFMS*, 968 F.3d 454, 465 (5th Cir. 2020) (cleaned up).

The notion that a gap-filling power requires a connection to a specific operative provision is deeply rooted in American law. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819). As relevant here, "general rulemaking authority plus statutory silence does not … equal congressional authorization." *Merck & Co., Inc. v. HHS*, 385 F.Supp.3d 81, 92 (D.D.C. 2019), *aff'd*, 962 F.3d 531 (D.C. Cir. 2020). Here, "[t]hrough dozens of operative provisions, Congress chose the means by which to pursue the ends declared in § 101," and it is not for courts "to construe § 121(a) as authorizing the President to ignore the limits inherent in the [Procurement] Act's operative provisions in favor of an 'anything-goes' pursuit of a broad statutory purpose." *Commonwealth*, 57 F.4th at 552.

This is basic statutory interpretation that applies across the U.S. Code. Indeed, when the Sixth Circuit asked counsel for the federal government "to provide examples (outside of the [Procurement] Act) of a court countenancing an agency's attempt to carry out a purpose provision, in addition to its operative provisions, the government could not provide a single one." *Id.*

C. Structure and history also defeat the Mandate.

Statutory structure and history—both within the Act and across provisions dealing with government contracting—reinforce what the Procurement Act says.

1. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Id.* (cleaned up).

The Procurement Act concerns an "economical and efficient *system*" to "procure[]" property and services. 40 U.S.C. §101 (emphasis added). "'System,' in context, refers to '[a] formal scheme or method of governing organization, arrangement.'" *Kentucky*, 23 F.4th at 604 (quoting System, *Webster's New International Dictionary* (2d ed. 1959) (alteration in original)). The Act thus is directed at the economy and efficiency of *the government*, not *contractors*. *Id.* Because the Act focuses on improving the federal government's efficiency, it is not a license to direct how contractors manage their own affairs. *Id.*; *Commonwealth*, 57 F.4th at 553. To the contrary, the Act emphasizes "full and open competition." 41 U.S.C. §3301. Because the object of such a system is lower prices, inflating prices inherently frustrates Congress's statutory scheme.

Examination of government contracting more broadly confirms that the Act was not designed to address a minimum wage. "It is a commonplace of statutory construction that the specific governs the general. That is particularly true where … Congress has enacted a

comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (cleaned up). Here, Congress has enacted minimum-wage laws—just not in the Procurement Act. Yet "when Congress wants to further a particular economic or social policy among federal contractors through the procurement process—beyond full and open competition—it enacts explicit legislation." *Georgia*, 46 F.4th at 1297. "Congress knows how to" assure that federal contractors and subcontractors are paid a minimum wage but chose not to do so here. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013).

2. Decades of practice also confirm that the Act is not a font of broad presidential power to set wages. "Presidents' earliest invocations of the Property Act matched its relatively modest scope," *Commonwealth*, 57 F.4th at 549, and recognized that they had to connect directives regarding anti-discrimination initiatives with cost reduction—"a significant limitation on the President's authority," *Louisiana*, 55 F.4th at 1024; *see also* Gary S. Becker, The Economics of Discrimination 8 (1957) (employment discrimination raises costs by limiting supply of available labor). Here, the Mandate goes much further, asserting a theory that making federal procurement more expensive will somehow lower the federal government's costs. Such an upside-down view of the statute is a modern invention.

II. The Close-Nexus Test is Wrong and Irrelevant.

As the petition explains, the Tenth Circuit barely engaged with the Procurement Act's text, structure, or historical use—despite contrary holdings from the Fifth, Sixth, and Eleventh Circuits. Instead, the Tenth Circuit followed the D.C. Circuit's close-nexus test. That was

error in two respects. Not only is the close-nexus test wrong, but the Mandate fails even that test.

A. The close-nexus test is wrong.

The D.C. Circuit upheld anti-inflationary cost measures in *Kahn* because it believed there was a "sufficiently close nexus" between those measures and the federal government's "'economy' and 'efficiency.'" 618 F.2d at 792. The close-nexus test, however, rests on interpretative tools that courts today reject. For example, it treats the Act's purpose as a "well of authority." *Kentucky*, 23 F.4th at 606. Nothing in the Act, however, authorizes decision-making based on §101 at all. *Kahn* cannot be reconciled with this Court's decision in *Sturgeon*.

The D.C. Circuit also emphasized "legislative history." *Kahn*, 618 F.2d at 792. Yet not only did it fail to identify history that would support a close-nexus test, *see e.g.*, *id.* at 788 (emphasizing "the leadership role of the President," which is relevant at most to the holder rather than scope of authority), but courts no longer use legislative history this way, *see e.g.*, *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 58 (2024). After all, "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018).

The close-nexus test is also manipulable. A recurring feature of administrative law is that deference doctrines metastasize over time. For example, *Seminole Rock* deference began modestly, but agencies eventually abused it—prompting the Court to step in, *see Kisor v. Wilkie*, 588 U.S. 558 (2019). A similar if-you-give-a-mouse-a-cookie dynamic helped doom *Chevron*. And the D.C. Circuit has experienced buyer's remorse regarding one of its own agency-empowering tests. *See Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc). It concluded that stare decisis was no obstacle because

"intervening … precedent" from this Court "emphatically establishes that courts must take statutory language at its word." *Id.* at 18. Experience teaches all too well that "an agency given an inch might be tempted to take a mile." *Id.* at 21 (Griffith, J., concurring).

The federal government insists that because Congress recodified the Act in 2002, Congress incorporated *Kahn*'s close-nexus test. Not so. The First, Second, Third, Seventh, and Eighth Circuits have never cited *Kahn*, and the Fourth, Fifth, and Eleventh Circuits have declined to adopt it. *See Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981); *Louisiana*, 55 F.4th at 1026 n.25; *Georgia*, 46 F.4th at 1300. The Sixth Circuit, moreover, flatly rejects it. *See Commonwealth*, 57 F.4th at 553. True, the Ninth Circuit adopted it, but in a case that was vacated, *Mayes v. Biden*, 67 F.4th 921, 940 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023), and the Mandate's legality is now pending before the Ninth Circuit. Suffice it to say, it is "most unlikely … that a smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it,'" especially "where, as here, 'the text and structure of the statute are to the contrary.'" *BP PLC v. Mayor & City Council of Baltimore*, 141 S.Ct. 1532, 1541 (2021) (citation omitted).

B. The Mandate fails the close-nexus test.

Even if the close-nexus test were the law, the Mandate would fail. As the Fourth Circuit has explained, when the connection between cost savings and a presidential directive becomes "too attenuated," the directive exceeds statutory authority. *Friedman*, 639 F.2d at 171. Even *Kahn* emphasized the "likely savings to the Government" and "the direct and immediate effect of holding

down the Government's procurement costs." 618 F.2d at 792-93. *Kahn* also stressed that its test does "not write a blank check for the President" and suggested it would not uphold a directive that conflicted with a policy that Congress refused to enact. *Id.* at 793 & n.50.

Whatever one may think about the Mandate as a policy matter, it rests on a causation chain that does not have "the *direct and immediate effect* of holding down the Government's procurement costs." *Id.* at 792 (emphasis added). In fact, the Department admits "Government expenditures may rise." 86 Fed. Reg. at 67,206. To offset those increased costs, the Department's reasoning seems to be something like the following: **(i)** higher wages will improve employee morale; **(ii)** improved morale will lead to longer-term employment; **(iii)** longer-term employment will lead to more talented workers; **(iv)** more talented workers will do higher quality work; and **(v)** that higher quality work will so offset any price increases that overall the government will get a better deal than just purchasing higher-quality goods elsewhere to begin with. *See, e.g.*, *id.* at 67,212-15.

There are a host of problems with the federal government's counterintuitive (but politically convenient) analysis, but it is enough here to observe that is not a "direct and immediate" causation chain, *Kahn*, 618 F.2d at 792. And the Tenth Circuit's contrary ruling did nothing to fill the gap. It did not require the federal government to actually show a "direct and immediate" connection between the Mandate and lower federal procurement costs. *But see id*. Nor did it put weight on the fact that Congress refused to enact a $15/hour minimum wage just weeks before the President created one by executive fiat. *But see id.* at 793 n.50. The Tenth Circuit thus turned the

close-nexus test into the very "blank check" the D.C. Circuit rejects.

III. The Mandate Flunks the Major-Questions Doctrine.

Although the Court need not reach the issue to reverse, "this is a major questions case." *West Virginia*, 597 U.S. at 724. Like the vaccine mandate that three circuits rejected, the Mandate is a breathtaking exercise of authority that implicates nationally pressing issues without clear authorization from Congress.

A. The major-questions doctrine helps prevent Executive Branch usurpation.

The major-questions doctrine serves two purposes. *First*, it "is a tool for discerning—not departing from—the text's most natural interpretation." *Biden v. Nebraska*, 143 S.Ct. 2355, 2376 (2023) (Barrett, J., concurring). It thus starts from the premise that Congress "speak[s] clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam) (cleaned up).

Second, it also helps effectuate the nondelegation doctrine. "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine." *West Virginia*, 597 U.S. at 740 (Gorsuch, J., concurring). A delegation "is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority.'" *Gundy*, 139 S.Ct. at 2129 (citation omitted). Further, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred," and Congress "must provide

substantial guidance" with respect to "standards that affect the entire national economy." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

By requiring a clear statement from Congress before the Executive Branch makes decisions of vast political and economic significance, the major-questions doctrine prevents usurpation of legislative power and safeguards the liberty-protecting benefits of bicameralism and presentment.

B. The Mandate is a major question.

The Wage Mandate is a major question by any measure. For one, imposing a new wage floor for hundreds of thousands of employers and millions of employees is economically significant. The Department estimated that the Mandate would cost $18 billion and act as a wage floor for over half a million employers, 86 Fed.Reg. 67,194-95, and now seems to admit that even those astronomical numbers are undercounts, *supra* p. 8. Nor, critically, has the federal government offered any reason why, if a $15/hour minimum wage is permissible, a $150/hour minimum wage would not be.[3]

The Mandate also has vast political significance. The nation routinely engages in contentious debates over minimum wages. Indeed, this issue was a focal point of the 2020 election. Congress too repeatedly has considered, but rejected, such legislation, thus demonstrating the "importance of the issue." *West Virginia*, 597 U.S. at 732; *see also id.* at 743 n.4 (Gorsuch, J., concurring).

---

[3] Even if the major-questions doctrine did not apply, the Department's claim to such expansive power would still fail under the elephants-in-mouseholes doctrine, which is not limited to major questions. *See, e.g.*, *Heating, Air Conditioning & Refrigeration Distribs. Int'l v. EPA*, 71 F.4th 59, 67-68 (D.C. Cir. 2023).

The Mandate therefore requires clear congressional authorization. Yet the Act says nothing about a minimum-wage mandate, and "the age and focus of the statute" does not align with "the problem the" President "seeks to address." *Id.* at 747 (Gorsuch, J., concurring). The Procurement Act was passed in 1949 to make procurement more efficient; it was not designed for social policies that make procurement more expensive. "[S]kepticism may be merited when there is a mismatch between … [the] challenged action" and the "congressionally assigned mission and expertise." *Id.* at 748.

The federal government's contrary arguments depart from "common sense." *Id.* at 722 (maj. op.) (quotation omitted). In its view, the Act only has two conditions: **(i)** a President must consider a directive appropriate to fulfill the Act's purposes; and **(ii)** the directive must not be inconsistent with any substantive provisions of the Act. *See* U.S. Br. 22, 24, *Texas v. Biden*, No. 23-40671 (5th Cir. Jan. 22, 2024). Yet under such a test, the White House could unilaterally:

- Implement a vaccine mandate, *but see, e.g.*, *Commonwealth*, 57 F.4th at 555;
- Require "wear[ing] masks in perpetuity," *but see Kentucky*, 23 F.4th at 608;
- Mandate contractors to invest in—or divest from—fossil-fuel interests;
- Mandate government contractors to only use—or never use—electric vehicles;
- Mandate contractors to relocate to—or away from—pro-union States; or
- Impose virtually any condition on a permittee accessing federal lands.

Congress did not empower presidents to impose national social policies in a statute designed to

streamline procurement. And if Congress did do such a thing, it would violate the nondelegation doctrine. "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (plurality). Constitutional avoidance thus requires reading the Act narrowly. *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

C. The Tenth Circuit's analysis again falters.

The Tenth Circuit incorrectly applied the major-questions doctrine and diverged from the Fifth Circuit which applied the doctrine just two years ago with respect to the vaccine mandate. Without correction, it is likely to continue misapplying the doctrine.

This Court applies the major-questions doctrine by first determining whether the agency action concerns a "major question," and then looking for clear congressional authorization. *E.g.*, *West Virginia,* 597 U.S. at 746 (Gorsuch, J., concurring). As discussed above, this approach ensures a proper respect for federalism and the separation of powers and keeps the Executive Branch within its constitutional bounds.

The Tenth Circuit took a different approach. Instead of asking whether the Mandate is a major question and then looking for clear authorization, it appears to have treated the doctrine as an arbitrary, technical test unconnected to any constitutional rationale. It noted situations in which this Court has applied the major-questions doctrine and looked for similarities with the Mandate. App.29a. In so doing, the Tenth Circuit departed from principles this Court has articulated.

Specifically, its test seems to be that the "so-called Major Questions Doctrine" *only* applies when an agency: **(i)** "seeks to locate expansive authority in modest words,

vague terms or ancillary provisions"; **(ii)** seeks a "transformative expansion in ... regulatory authority without clear congressional authorization"; **(iii)** "claim[s] to discover regulatory authority for the first time in a long-extant statute"; and (**iv**) "lacks expertise in the relevant area of policymaking." App.29a-34a. (citations omitted). Applying that test, the Tenth Circuit decided that the Mandate did not fall cleanly within those boxes. App. 35a.

That analysis is wrong, both conceptually and even on the Tenth Circuit's own terms. The Tenth Circuit's test mixes up the two aspects of the doctrine—the "major-ness" of the question and whether clear authorization exists—and seemingly analyzes them simultaneously. Indeed, the Tenth Circuit addressed the issue by (it appears) "assum[ing]" the economic effect of the Mandate makes it a major question. App. 29a. But in the next part of its analysis, the Tenth Circuit all but nullified that assumption by claiming the Mandate is not an expansion of regulatory authority because it is not an exercise of regulatory authority at all. App.31a.

All the while, other parts of the Tenth Circuit's analysis seemingly examine whether clear authorization exists, but the Tenth Circuit never actually found such authorization here. Instead, it looked to three indicia—"elephants in mouseholes," a "long-extant statute [justifying] an unheralded power," and a lack of agency expertise—and apparently concluded that where these indicia are *absent*, clear authorization must exist. App.29a-35a. Yet there cannot be clear authorization unless the statute's language provides it. The Tenth Circuit's test also fails to respect the federalism and separation-of-powers concerns that inform the major-questions doctrine, which will never be properly applied

in the Tenth Circuit if it continues to use this test.

In all events, the Tenth Circuit's analysis fails on its own terms. Indeed, each of the reasons it gave for not applying the major-questions doctrine is mistaken.

First, the Tenth Circuit contended that the Procurement Act's language is broad—yet it could only point to §101 (an inoperative provision) and §121 (a necessary-and-proper clause, which must be tied to an operative provision). App.30a. Under ordinary rules of interpretation, the first provides the President with no authority, and the second with only incidental authority that must be tied to other operative provisions in the Act. They are also the "vague statutory grant[s]" that come nowhere "close to the sort of clear authorization required." *West Virginia*, 597 U.S. at 732.

Second, the Tenth Circuit emphasized that the Procurement Act does not involve regulation but instead government contracts. App.31a-32a. Yet this Court "has never drawn" such a "line" because "[i]t would be odd to think that separation of powers concerns evaporate" whenever the government is not "imposing obligations." *Nebraska*, 143 S.Ct. at 2374-75. Rather, the separation of powers "serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives." *Collins v. Yellen*, 594 U.S. 220, 255 (2021). The Tenth Circuit said nothing about *Nebraska* or *Collins*. Nor does its distinction make sense, as not every significant policy issue involves regulatory power.

Third, the Tenth Circuit observed that President Obama created a wage mandate, and President Trump only narrowed it. App.32a-33a. Leaving aside that this assertion of power was never free from controversy, *e.g.*,

Scalia & Mondl, *supra*, this "Court has been careful to note that '[p]ast practice does not, by itself, create power.'" *Medellin v. Texas*, 552 U.S. 491, 531-32 (2008) (citation omitted). The Mandate not only raised the wage by essentially 50% (and growing), but President Biden picked a number that happened to match his campaign promise and Congress rejected just weeks earlier. The major-questions doctrine does not allow presidents to refashion statutes in this self-serving manner.

That is particularly so here given that 2014 is hardly contemporaneous with a statute passed in 1949. And although *Kahn* missed the mark, it at least pointed the right way: A policy's "direct and immediate effect" must be to *lower* costs. 618 F.2d at 792. Here, by contrast, the effect will be to *raise* procurement costs. The Wage Mandate thus is not an extension of *Kahn*; it is a revolutionary inversion. And anti-discrimination policies—which have existed since before the Act, *see e.g.*, *Louisiana*, 55 F.4th at 1030—cut against the Mandate because, again, discrimination *raises* prices, *see, e.g.*, *id.*, at 1024 (quoting *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 171 (3d Cir. 1971)).

Finally, the Tenth Circuit observed that the Department has expertise regarding wages. App.34a–35a. Yet it relied on *King v. Burwell*, 576 U.S. 473 (2015), which is not a clear-statement case at all but instead created a "*Chevron* carve-out." Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 482-83 (2021). The question here, however, is not whether *Chevron* applies (indeed, that will never be the question again), but rather whether Congress clearly authorized the President to resolve this major question. Especially after *Loper Bright*, the Tenth Circuit's bow to supposed agency expertise warrants correction.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Aaron.Nielson@oag.texas.gov
(512) 936-1700

AARON L. NIELSON
Solicitor General
Counsel of Record

LANORA C. PETTIT
Principal Deputy Solicitor General

SEPTEMBER 2024

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

RAÚL LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

BRENNA BIRD
Attorney General
State of Iowa

KRIS KOBACH
Attorney General
State of Kansas

ELIZABETH B. MURRILL
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW WRIGLEY
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

JONATHAN SKRMETTI
Attorney General
State of Tennessee

SEAN D. REYES
Attorney General
State of Utah

PATRICK MORRISEY
Attorney General
State of West Virginia