No. 24-232

In the Supreme Court of the United States

DUKE BRADFORD, ET AL., PETITIONERS

v.

DEPARTMENT OF LABOR, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Property and Administrative Services Act of 1949, Ch. 288, 63 Stat. 377, authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" specified provisions of Titles 40 and 41. 40 U.S.C. 121(a). This case concerns a series of Executive Orders issued in reliance on Section 121(a) to require that federal agencies enter into contracts and contract-like instruments only with businesses that pay the employees who work on or in connection with those agreements a specified minimum wage. In 2021, President Biden continued that preexisting procurement policy and increased the specified minimum wage, while also eliminating a prior exemption relating to the provision of seasonal recreational services on federal lands. The questions presented are:

1. Whether the court of appeals correctly determined that Section 121(a) authorizes the President to adopt the minimum-wage policy, including as applied to contracts and contract-like instruments relating to seasonal recreational services.

2. Whether the court of appeals correctly determined that Section 121(a) does not violate the nondelegation doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-64a) is reported at 101 F.4th 707. The opinion of the district court (Pet. App. 65a-114a) is reported at 582 F. Supp. 3d 819. An additional order of the district court is not published in the Federal Supplement but is available at 2022 WL 266805.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2024. On July 12, 2024, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 28, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Property and Administrative Services Act of 1949 (FPASA), Ch. 288, 63 Stat. 377, "to provide the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services, and performing related functions including contracting." 40 U.S.C. 101(1).

The Act responded to the recommendations of a commission, headed by former President Hoover, that "the Government's method of doing business be streamlined and modernized." *AFL-CIO* v. *Kahn*, 618 F.2d 784, 787 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979). Among other things, the Hoover Commission had concluded that civilian procurement "suffer[ed] from a lack of central direction," and it recommended the creation of a new agency within the Executive Office of the President to provide such direction. *Hoover Commission Report* 75-76 (1949). Congress determined that the proposed agency would need to be sufficiently large that housing it within the Executive Office would be "unworkable." *Kahn*, 618 F.2d at 788 n.19 (citation omitted). Congress instead established a standalone agency, the General Services Administration (GSA), to prescribe governmentwide policies for procurement and contracting. FPASA § 101, 63 Stat. 379; see 40 U.S.C. 301.

Even as it took that step, however, Congress preserved a "leadership role" for the President in formulating federal procurement policy, as the Hoover Commission had recommended. *Kahn*, 618 F.2d at 788. Specifically, Congress authorized the President to "prescribe such policies and directives" as he deemed necessary to effectuate the Act, and it confirmed that those policies would in turn "govern [GSA] and executive

agencies in carrying out their respective functions" under the Act. FPASA § 205(a), 63 Stat. 389.

The President's authority under FPASA is now codified at 40 U.S.C. 121(a). As amended, Section 121(a) provides that the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle." 40 U.S.C. 121(a); cf. 40 U.S.C. 111 (defining "this subtitle" to include not only Subtitle I of Title 40 but also most provisions of Division C of Subtitle I of Title 41). Section 121(a) further provides that any such policies or directives "must be consistent with this subtitle." 40 U.S.C. 121(a).

2. For decades, presidents have relied on FPASA to require that federal agencies enter into contracts only with contractors satisfying certain criteria—for example, only those contractors who agree not to engage in discriminatory hiring, see Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12,319, 12,320 (Sept. 28, 1965); who agree to inform their employees of the right not to pay union dues, see Exec. Order No. 12,800, § 2(a), 57 Fed. Reg. 12,985, 12,985 (Apr. 14, 1992); or who agree to use the E-Verify system to ensure that their employees are authorized to work in the United States, see Exec. Order No. 13,465, § 3, 73 Fed. Reg. 33,285, 33,286 (June 11, 2008). This case concerns a series of Executive Orders directing agencies to enter into contracts only with employers who agree to pay specified minimum wages to their covered employees for work on or in connection with a covered contract.

In 2014, President Obama invoked the authority vested in him by FPASA to require federal agencies to include a clause in "new contracts, contract-like instruments, and solicitations" (or renewals) obligating the contractor to pay its employees a minimum wage of

about $10 per hour, to be adjusted for inflation, when engaged in "the performance of the contract or any subcontract." Exec. Order No. 13,658, § 2(a), 79 Fed. Reg. 9851, 9851 (Feb. 20, 2014) (EO 13,658). The 2014 order specified that the "contract[s]" to which the new policy would apply included agreements "entered into with the Federal Government in connection with Federal property or lands and relating to offering services for * * * the general public." § 7(d)(i)(D), 79 Fed. Reg. at 9853. In an implementing rule, the Department of Labor confirmed that the minimum-wage policy applied when agencies issued permits to authorize businesses to provide services to the public on federal lands, such as by providing guided tours in national parks. 79 Fed. Reg. 60,634, 60,655-60,656 (Oct. 7, 2014).

In 2018, President Trump invoked FPASA to exempt certain "outfitters and guides operating on Federal lands" from the scope of EO 13,658, while otherwise leaving the prior minimum-wage policy in place. Exec. Order No. 13,838, § 1, 83 Fed. Reg. 25,341, 25,341 (June 1, 2018) (EO 13,838). President Trump stated that "[s]easonal recreational workers have irregular work schedules" and "a high incidence of overtime pay," and that requiring their employers to pay them a minimum wage "threaten[ed] to raise significantly the cost of guided hikes and tours on Federal lands." *Ibid.* He therefore amended EO 13,658 to state that the policy set forth there "shall not apply to contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands," except for "lodging and food services." § 2, 83 Fed. Reg. at 25,341.

In 2021, President Biden invoked FPASA to revise the preceding minimum-wage policies. See Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 30, 2021) (EO 14,026). President Biden determined that making the payment of minimum wages a condition of entering into contracts with the federal government would "promote[] economy and efficiency in Federal procurement," including by reducing absenteeism and lowering training costs. § 1, 86 Fed. Reg. at 22,835. President Biden adjusted the minimum wage to $15 per hour for employees when engaged in the performance of federal contracts, again subject to adjustment for inflation. § 2, 86 Fed. Reg. at 22,835. He also rescinded the prior exception for seasonal recreational services. § 6, 86 Fed. Reg. at 22,836-22,837.

The Department of Labor issued a final rule, after notice and comment, to implement EO 14,026. 86 Fed. Reg. 67,126 (Nov. 24, 2021). The preamble to the rule explained that EO 14,026 applies "to traditional procurement construction and service contracts as well as a broad range of concessions agreements and agreements in connection with Federal property or lands and related to offering services, regardless of whether the parties involved typically consider such arrangements to be 'contracts.'" *Id.* at 67,134-67,135. The preamble further explained that the terms "contract and contract-like instrument" include "outfitter and guide permits," through which the federal government enters into a binding agreement with the permittee to "authorize the use of Federal land for specific purposes in exchange for the payment of fees to the Federal Government." *Id.* at 67,151 (emphasis omitted).

3. In December 2021, petitioners Arkansas Valley Adventure, LLC (AVA), and its owner, Duke Bradford,

brought this action in the United States District Court for the District of Colorado to challenge the Department of Labor's rule implementing the minimum-wage policy in EO 14,026. Pet. App. 70a. As relevant here, petitioners assert that the President lacks authority under Section 121(a) to apply the minimum-wage policy in connection with the issuance of permits to provide seasonal recreational services and, alternatively, that Section 121(a) violates the nondelegation doctrine. *Ibid.*

AVA "provide[s] outdoor excursions in central Colorado," such as rafting trips. Pet. App. 70a. AVA provides those services to its customers on both "federal and non-federal land." *Id.* at 70a-71a. For its tours on federal lands, AVA operates under two federal permits. *Id.* at 71a-72a. The types of permits at issue are among the contracts or contract-like instruments to which EO 14,026 applies. See 86 Fed. Reg. at 67,151. AVA alleges that complying with the minimum-wage policy will raise its labor costs and may require altering the number of days its seasonal guides work and the services that it offers to the public. Pet. App. 73a-74a.

The district court denied petitioners' motion for a preliminary injunction. Pet. App. 65a-114a. The court concluded that petitioners are not likely to succeed on the merits, thus obviating any need to address the other preliminary-injunction factors. *Id.* at 82a, 114a. Petitioners contended that the President's authority to prescribe policies that he "considers necessary" under Section 121(a), 40 U.S.C. 121(a), was limited by Section 101, which states that the purpose of FPASA is to provide the government with an "economical and efficient system for," among other things, "[p]rocuring and supplying * * * nonpersonal services," 40 U.S.C. 101(1). Petitioners further contended that permittees like AVA

are not covered because they are not engaged in "supplying * * * nonpersonal services" to the government, *ibid.*, and instead offer their services to the public. See Pet. App. 83a-84a. The court rejected that contention, explaining that the government, in granting permits to outfitters like AVA, is "contract[ing] with outfitters to supply recreational services to the public," *id.* at 85a, and those services are themselves "nonpersonal services," *id.* at 84a (citation omitted). The court also rejected petitioners' constitutional claims. *Id.* at 108a-114a. Petitioners filed a notice of appeal and moved for an injunction pending appeal, which the district court denied. 2022 WL 266805.

4. A motions panel of the court of appeals initially granted petitioners' request for an injunction pending appeal, enjoining the government from enforcing the minimum-wage policy for contracts regarding "seasonal recreational services" or equipment rental. C.A. Order 2 (Feb. 17, 2022). After further briefing and argument, however, the court of appeals affirmed the denial of a preliminary injunction, over the dissent of Judge Eid. Pet. App. 1a-64a.

a. Like the district court, the court of appeals determined that petitioners are not likely to succeed on any of their claims. Pet. App. 6a. With respect to petitioners' challenge to the validity of the minimum-wage policy as applied to permittees like AVA, the court of appeals explained that FPASA "authorizes the President to issue 'policies and directives' that are consistent with the statute's purposes," "including regulating the supply of nonpersonal services," without "specify[ing] any particular entity that must receive the nonpersonal services to which it refers." *Id.* at 17a. The court further explained that petitioners "'supply[]' services" to the

public "through the guided tours they offer." *Id.* at 18a (citation omitted). And, the court concluded, "the government's provision of federal permits to [petitioners] is a part of 'an economical and efficient system' for supplying those nonpersonal services to the public." *Ibid.*

Petitioners alternatively contended that FPASA does not authorize the President to adopt the minimum-wage policy because "the President's authority is 'limited to actions that he considers 'essential' or 'indispensable' to provide the 'prudent use' of government resources 'without wasting materials.'" Pet. App. 21a (citation omitted). The court of appeals rejected that narrow view of the President's authority, adhering to precedent establishing that policies or directives adopted by the President under Section 121(a) are valid if they "have a 'sufficiently close nexus' to the values of economy and efficiency" reflected in Section 101. *Ibid.* (quoting *UAW-Labor Emp. & Training Corp.* v. *Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003), cert. denied, 541 U.S. 987 (2004)) (brackets omitted). The court further explained that "'economy' and 'efficiency' are not narrow terms." *Id.* at 21a-22a (brackets and citation omitted). Instead, the terms naturally encompass "those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 22a (quoting *Kahn*, 618 F.2d at 789).

The court of appeals also found a "sufficiently close nexus" to economy and efficiency in the particular circumstances here. Pet. App. 22a (citation omitted). Both the President and the Department of Labor had determined that increased minimum wages would promote economy and efficiency in federal procurement in multiple ways, including by causing contractors to attract and retain more productive employees and by reducing

"absenteeism and turnover." *Ibid.* (citation omitted). The court declined to second-guess those judgments. *Ibid.* It also explained, however, that the minimum-wage policy would be within the scope of the President's authority under FPASA even "under [petitioners'] stringent interpretation." *Id.* at 23a. The court observed that, to the extent petitioners contend that Section 121(a) permits the President to adopt only cost-saving measures, the Department of Labor had made clear in the rulemaking that it anticipated realizing cost savings from the challenged policy because the policy's "economy and efficiency benefits" would offset its "potential costs." *Ibid.* (quoting 86 Fed. Reg. at 67,152).

The court of appeals rejected petitioners' arguments for a narrowing construction of the statute. Pet. App. 28a. In particular, the court was "unpersuaded" by petitioners' invocation of the major-questions doctrine, explaining that "this is not a case in which the executive branch seeks to locate expansive authority in 'modest words,' 'vague terms or ancillary provisions'"; that the policy at issue is an exercise of "the government's proprietary authority," rather than a regulation of private conduct; that there is a long history of similar presidential actions under FPASA; and that "this is not a case in which the agency * * * lacks 'expertise' in the relevant area." *Id.* at 28a-35a (citations omitted). Finally, the court concluded that the statute raises no serious nondelegation concern. *Id.* at 35a-39a.

b. Judge Eid dissented on the last point. Pet. App. 46a-64a. She would have held that FPASA fails to provide an intelligible principle to guide the President's discretion under Section 121(a). *Id.* at 50a.

c. Petitioners did not seek rehearing en banc. On June 18, 2024, the court of appeals granted petitioners'

motion to stay the issuance of the appellate mandate pending the filing and disposition of a petition for a writ of certiorari. C.A. Order 2. The court also modified the injunction *pendente lite* that it had previously granted, narrowing the scope of the injunction so that it covers only petitioners, rather than operating universally, and extending the duration of the injunction until further order of the court. *Id.* at 2-3.

ARGUMENT

Petitioners renew (Pet. 15-31) their contention that the President lacked statutory authority to issue the minimum-wage policy for government contractors and that the policy is invalid as applied in the context of federal permits authorizing the provision of seasonal recreational services on federal lands. The court of appeals correctly rejected those contentions, and its decision does not implicate any division of authority warranting this Court's review at the present time. The decisions of other circuits that petitioners invoke addressed a prior executive order, which has since been revoked, concerning COVID-19 vaccinations for employees of federal contractors. The analysis in those cases would not necessarily dictate an outcome with respect to the materially different policy at issue here.

Petitioners also contend (Pet. 31-35) that Section 121(a) violates the nondelegation doctrine. The court of appeals correctly rejected that contention under this Court's settled precedent; no other court of appeals has ever disagreed; and petitioners do not identify any other sound basis for further review. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Rejected Petitioners' Narrow Interpretation Of Section 121(a)

1. In FPASA, Congress vested the President with express statutory authority to "prescribe policies and directives that the President considers necessary to carry out this subtitle," subject to the requirement that any such policies or directives be "consistent with this subtitle." 40 U.S.C. 121(a). The relevant "subtitle" is defined to include most of Division C of Subtitle I of Title 41 and all of Subtitle I of Title 40, which together contain some of the foundational authorities for federal procurement and property management. 40 U.S.C. 111(4). As particularly relevant here, the "subtitle" includes 40 U.S.C. 101. That provision states that the "purpose of this subtitle is to provide the Federal Government with an economical and efficient system for" a list of activities, including "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. 101(1).

By its plain terms, Section 121(a) confers on the President broad authority to establish federal procurement policy as "necessary" to carry out the Act. 40 U.S.C. 121(a). The word "necessary" has a range of meanings in various contexts, but "it frequently imports no more than that one thing is convenient, or useful, or essential to another." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). That interpretation is particularly apt here because the statute is phrased in terms of measures that the "President considers necessary," thus emphasizing that necessity is a matter of presidential judgment in the first instance. 40 U.S.C. 121(a). Indeed, the original text of FPASA referred to policies and directives that the President "shall *deem* necessary." FPASA § 205(a), 63 Stat. at 389 (emphasis added); see 40 U.S.C. 486(a) (2000). This Court has con-

strued similar "'shall *deem* * * * necessary'" language as "fairly exud[ing] discretion." *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (citation omitted). The provision was restyled to its present form in 2002 as part of a recodification of Title 40, but those changes were intended to be stylistic only. See Act of Aug. 21, 2002 (2002 Act), Pub. L. No. 107-217, § 5(b)(1), 116 Stat. 1303. Construing Section 121(a) to vest broad authority in the President is also consistent with the history of FPASA, which shows that Congress deliberately preserved a central leadership role for the President in managing federal procurement. See pp. 2-3, *supra*.

The President's discretion is not, however, without limits. Section 121(a) states that any policies or directives adopted under that provision must be "consistent with this subtitle." 40 U.S.C. 121(a). The term "consistent" generally means "congruous" or "compatible." 3 *Oxford English Dictionary* 773 (2d ed. 1989). Section 121(a) thus vests the President with authority to issue policies and directives that he considers useful to carry out the set of contracting functions covered by "this subtitle," but only if those policies or directives are compatible or congruent with the subtitle's other provisions, including the statement of purpose in Section 101. 40 U.S.C. 121(a).

Since 1949, Presidents have adopted a broad range of policies and directives to manage federal procurement and contracting, including by specifying the terms on which the government is willing to do business, and the lower federal courts have recognized the President's authority to do so under FPASA. For example, in *AFL-CIO* v. *Kahn*, 618 F.2d 784, cert. denied, 443 U.S. 915 (1979), the en banc D.C. Circuit held that President Carter was acting within the scope of his authority

under what is now Section 121(a) when he adopted a policy requiring federal contractors to certify their compliance with certain "wage and price standards" designed to reduce inflation, *id.* at 785-786. After reviewing the history of FPASA and Executive practice, see *id.* at 787-791, the D.C. Circuit reasoned that any policies or directives adopted under Section 121(a) "must accord with" the "'economy' and 'efficiency'" objectives articulated in Section 101, *id.* at 792. And the court found a "sufficiently close nexus between those criteria and the" challenged order on the facts of that case. *Ibid.* Notably, the court acknowledged that compliance with the order could increase government costs in the short run, but it saw "no basis for rejecting the President's conclusion that any higher costs" in the short run "will be more than offset by the advantages gained" over the long run. *Id.* at 793.

The D.C. Circuit has adhered to that approach in more recent cases, and other courts have taken a similar view of the President's authority. In 2003, for example, the D.C. Circuit rejected a challenge to President George W. Bush's authority under FPASA to require federal contractors to post notices of certain labor rights. *UAW-Labor Emp. & Training Corp.* v. *Chao*, 325 F.3d 360, 366-367 (2003), cert. denied, 541 U.S. 987 (2004). President Bush had determined that "better inform[ing]" workers of their rights would "enhance[]" their productivity, *id.* at 366 (citation omitted), and the D.C. Circuit found his judgment sufficient to demonstrate a nexus to economy and efficiency in federal procurement. *Id.* at 367. Other circuits have likewise long recognized the President's broad authority under what is now Section 121(a). See, *e.g.*, *Mayes* v. *Biden*, 67 F.4th 921, 941 (9th Cir.), vacated as moot, 89 F.4th 1186

(9th Cir. 2023); *City of Albuquerque* v. *United States Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004); *United States* v. *Mississippi Power & Light*, 638 F.2d 899, 905 (5th Cir.), cert. denied, 454 U.S. 892 (1981); *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 170 (3d Cir.), cert. denied, 404 U.S. 854 (1971); *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir.), cert. denied, 389 U.S. 977 (1967).

Congress has also taken steps to ratify that settled understanding of the President's authority. Under this Court's precedent, Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Congress did exactly that when, in 2002, it recodified both FPASA's statement of purpose and the provision authorizing the President to adopt contracting policies consistent with those purposes. See 2002 Act, sec. 1, §§ 101, 121(a), 116 Stat. 1063, 1068. In reenacting the relevant language without substantive change, Congress acted in light of the many decisions that "had interpreted the President's [FPASA] authority and the statutory terms 'economy' and 'efficiency' broadly," and its reenactment of the statute reflects its "affirmation of the broad understandings of those terms." *Mayes*, 67 F.4th at 938.

2. The court of appeals correctly rejected petitioners' contrary view of Section 121(a) and, specifically, petitioners' contention that Section 121(a) does not authorize the minimum-wage policy set forth in EO 14,026. See Pet. App. 16a-39a. EO 14,026 directs federal agencies to enter into covered contracts and contract-like instruments only with counterparties willing to pay their workers a prescribed minimum wage for work on or in

connection with those particular contracts, on the basis of the President's judgment that "[r]aising the minimum wage" for work on federal contracts would "bolster economy and efficiency in Federal procurement." § 1, 86 Fed. Reg. at 22,835. The President determined that a higher minimum wage "enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." *Ibid.*

The Department of Labor has promulgated a rule to implement EO 14,026, and the rulemaking record further confirms the President's judgment. See 86 Fed. Reg. at 67,212-67,215. The agency explained in the preamble to its final rule that "higher-paying contractors may be able to attract higher quality workers who are able to provide higher quality services, thereby improving the experience of citizens who engage with these government contractors"—a view supported by empirical research. *Id.* at 67,212. It further explained, citing numerous studies, that a higher minimum wage for employees working on federal contracts could make them more productive, reduce their rate of turnover, and reduce absenteeism. *Id.* at 67,213-67,214.

Those effects, particularly the expected increase in the quality of work performed by employees working on federal contracts, inure to the benefit of the government. The Department of Labor acknowledged in its rulemaking that the government's expenditures could rise if the minimum-wage policy "increase[d] employers' costs (beyond offsetting productivity gains and cost-savings), and contractors pass[ed] along part or all of the increased cost to the government in the form of higher contract prices." 86 Fed. Reg. at 67,206. But it

explained that "benefits" to the government "attributable to the Executive order are expected to accompany any such increase in expenditures, resulting in greater value to the Government" overall, and "that any potential increase in contract prices" would likely "be negligible." *Ibid.*

The court of appeals was thus correct to conclude that EO 14,026 bears a "'sufficiently close nexus' to the values of economy and efficiency" to come well within the scope of the President's authority under Section 121(a). Pet. App. 22a (quoting *Kahn*, 618 F.2d at 792). Both the President and the Department of Labor explained how the policy would further the objectives of economy and efficiency in federal procurement, and petitioners offer no sound basis for disregarding those judgments—which, again, the statutory text indicates are primarily for the President to make. See p. 11, *supra.* Indeed, the court reviewed the record here and determined that EO 14,026 was within the President's statutory authority *even accepting* petitioners' incorrect understanding of Section 121(a), under which the provision authorizes only those policies and directives that will result in "likely savings to the Government." Pet. App. 23a (quoting Pet. C.A. Br. 22); see 86 Fed. Reg. at 67,152-67,153 (discussing the "anticipate[d]" net benefits from the minimum-wage policy, with benefits "offset[ting] potential costs").

It was likewise reasonable for the President to conclude that the government would benefit from the payment of a higher minimum wage to employees of federal permittees, such as petitioner AVA, that provide seasonal recreational services on public lands. See EO 14,026, §§ 6, 8(a), 86 Fed. Reg. at 22,836-22,837. The Department of Labor explained that a higher minimum

wage can, among other benefits, "increase the quality of services provided to the Federal Government and the general public" and thus "attract more customers and result in increased sales." 86 Fed. Reg. at 67,153.[1]

3. Petitioners' criticisms of the decision below lack merit. Petitioners principally contend that the court of appeals erroneously construed Section 121(a) to "allow the President to regulate private parties," whereas petitioners understand the statute to confer only authority to prescribe policies and directives for "improv[ing] the government's internal procurement system." Pet. 15; see Pet. 16-20. But petitioners are simply mistaken in asserting (Pet. 19) that EO 14,026 "regulates * * * private business practices," or that the decision below construes Section 121(a) to allow such regulation.

The court of appeals properly recognized that the minimum-wage policy is an exercise of the government's "proprietary authority," not regulatory authority. Pet. App. 31a. The order does not regulate any private conduct. It specifies a condition—compliance with the prescribed minimum wages for covered employees—for doing business with the federal government. See *ibid.* (describing the policy as "the President's management decision that the federal government will do business with companies only on terms he regards as promoting economy and efficiency"). Petitioners and other

[1] President Trump had exempted certain agreements relating to seasonal recreational services from the scope of the then-in-force minimum-wage policy. EO 13,838, § 1, 83 Fed. Reg. at 25,341. But that exemption reflected a policy judgment and does not support petitioners' position here. In creating the exemption, President Trump maintained a minimum-wage policy for "lodging and food services associated with seasonal recreational services," and also for the other types of contractors, lessors, licensees, and permittees that were already covered. § 2, 83 Fed. Reg. at 25,341.

private businesses are under no legal obligation to comply with the minimum-wage policy unless they choose to enter into an agreement with the federal government; if they do enter into such an agreement, it is the agreement itself rather than EO 14,026 that creates an obligation to pay minimum wages; and even then the policy applies only with respect to work performed "in the performance of the contract or any covered subcontract." EO 14,026, § 2(a), 86 Fed. Reg. at 22,835.

Petitioners alternatively contend that the authority conferred by Section 121(a) does not "reach permittees" such as AVA. Pet. 20; see Pet. 20-25. The court of appeals correctly rejected that contention, explaining that the "plain text" of FPASA forecloses petitioners' theory that Section 121(a) contains an implicit or unstated exception for permits issued in connection with seasonal recreational services on federal lands. Pet. App. 16a; see *id.* at 16a-21a. Petitioners state (Pet. 21) that they supply their "outfitting services to the public," not the government. But the scope of the President's authority to manage federal procurement policy does not turn on whether a given contractor or permittee is providing services to the government itself or to the public. For a permittee like AVA, the federal government enters into a binding agreement that authorizes the permittee to engage in its business on federal lands, and Section 121(a) empowers the President to set policies and directives for entering into such agreements, which are "contract[s]" or "contract-like instrument[s]" for purposes of EO 14,026. See 86 Fed. Reg. at 67,151.

Section 101 reinforces that conclusion. As the court of appeals explained, Section 101 states that a purpose of FPASA is to provide the government with an efficient and economical system for procuring and supplying

"nonpersonal services," 40 U.S.C. 101(1), which are defined to mean "contractual services * * * other than personal and professional services," 40 U.S.C. 102(8).[2] The definition of "nonpersonal services" would include arrangements in which the government contracts with a business to provide such services to the government, but so too it would include arrangements in which the government contracts with a business to provide services to the public. Either arrangement entails the supply of "contractual services." *Ibid.* Thus, authorizing an outfitter like AVA to provide recreational services to the public on federal lands can itself be part of the government's system for "supplying" those "nonpersonal services." Pet. App. 20a (quoting 40 U.S.C. 101(1)). And it follows under longstanding precedent that the President may take steps to further the efficiency and economy of that supply of nonpersonal services by adopting appropriate policies under Section 121(a).

Petitioners suggest (Pet. 23-24) that FPASA would have limitless breadth if it were read to authorize the President to prescribe policies governing the terms on which the federal government will issue all manner of federal permits. Those concerns are misplaced. Section 121(a) authorizes only those policies and directives that the President "considers necessary to carry out this subtitle." 40 U.S.C. 121(a). The statute is not a font of authority for attaching new conditions on federal permits that lack a relationship to carrying into effect the provisions of "this subtitle."

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[2] A contract for "personal" services refers in this context to a contract for employment, whereas a contract for "nonpersonal" services means that the contractor is not subject "to the supervision and control usually prevailing in relationships between the Government and its employees." Pet. App. 18a (citations omitted).

4. Petitioners separately contend (Pet. 25-30) that the court of appeals erred in declining to apply the major-questions doctrine. This Court has held that in certain "extraordinary cases" of vast "economic and political significance," an agency's authority to act will be sustained only if the agency can "point to 'clear congressional authorization'" for the action it has taken. *West Virginia* v. *EPA*, 597 U.S. 697, 721, 723 (2022) (citations omitted). This case does not implicate that doctrine.

First, as the court of appeals recognized, "this is not a case in which the executive branch seeks to locate expansive authority in 'modest words,' 'vague terms or ancillary provisions.'" Pet. App. 30a (quoting *Whitman* v. *American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001)). Nor is it one where an "'agency claim[s] to discover' regulatory authority for the first time 'in a long-extant statute.'" *Id.* at 32a (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014)). Petitioners suggest (Pet. 25-26) that the minimum-wage policies promulgated by President Obama and then modified by Presidents Trump and Biden marked a significant departure from prior practice. But as discussed above, Section 121(a) has long been understood to confer broad authority on the President, consistent with its text, purpose, and history.

Second, as the court of appeals further explained, the challenged requirement is an exercise of "the government's proprietary authority," Pet. App. 31a, not its "regulatory authority," Pet. 25 (citation omitted). The government is not regulating private conduct, nor is it providing government benefits—unlike, for example, in the student-loan actions at issue in *Biden* v. *Nebraska*, 600 U.S. 477 (2023). Instead, EO 14,026 is a directive by the Chief Executive to his subordinates about how to

exercise the Executive's contracting authority. When the government acts "in its capacity 'as proprietor' and manager of its 'internal operation'"—in this case, by specifying the terms on which it will do business with companies—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) (citation omitted).

Third, the fact that Section 121(a) vests authority in the President himself is significant. This Court has never applied the major-questions doctrine to a statute conferring authority on the President, and there are substantial reasons not to extend the doctrine in that manner. The President is not an agency established by Congress, but rather is the Head of a coordinate Branch of government, established by Article II and vested with "[t]he executive Power," U.S. Const. Art. II, § 1, Cl. 1, including oversight of the operation of the various departments and agencies. Thus, unlike with an agency, it cannot be said that the President exercises "only those powers given to [him] by Congress." *West Virginia*, 597 U.S. at 723. And any background assumption about whether or when Congress would empower an agency of its own creation to make "major policy decisions," *ibid.* (citation omitted), does not readily apply to the President, who frequently makes such decisions on behalf of the Nation.

Finally, the challenged minimum-wage policy does not concern an issue of "vast 'economic and political significance.'" *Utility Air Regulatory Group*, 573 U.S. at 324 (citation omitted). The Department of Labor estimated that the policy could "potentially" affect the pay of roughly 1.8 million workers but that only about "327,300 [would] be affected and see an increase in wages" during the first year of the policy's existence,

because many employees already earn more than the specified minimum wage. 86 Fed. Reg. at 67,200. The Department of Labor further estimated that the policy would cause a transfer of approximately $1.7 billion per year to employees, but that employers are likely to offset those costs through increased productivity and other benefits. *Id.* at 67,194. Even taking the $1.7 billion figure at face value, that figure represents only a tiny fraction of the hundreds of billions of dollars that federal agencies obligate for contracts each year. See, *e.g.*, Gov't Accountability Office, *Snapshot of Government-Wide Contracting for FY 2023* (June 25, 2024) ($759 billion in 2023). That figure also underscores that the policy at issue here is far less economically significant than other recent agency actions that this Court has treated as implicating major questions. See, *e.g.*, *West Virginia*, 597 U.S. at 714 (agency estimated that new policy would "entail billions of dollars in compliance costs," "require the retirement of dozens of coal-fired plants," and "eliminate tens of thousands of jobs").

B. The Court Of Appeals' Interpretation Of Section 121(a) Does Not Warrant Further Review

Petitioners do not identify any substantial basis for further review at this time of the question whether Section 121(a) authorizes the President to adopt the minimum-wage policy, much less the more specific question whether the President may apply that policy to federal permittees who provide recreational services on federal lands.

1. Petitioners' arguments that a circuit conflict exists (Pet. 18-20, 30-31) rest on perceived differences between the Tenth Circuit's reasoning in this case and the reasoning of several other courts of appeals addressing a materially different policy concerning COVID-19 vac-

cinations. In 2021, the President invoked his authority under FPASA to adopt a policy directing that new contracts and contract-like instruments contain a clause requiring the contractor to certify compliance with COVID-19 safety protocols to be issued by a federal task force, which ultimately included a requirement for contractors to ensure that their covered employees were vaccinated against COVID-19. Exec. Order No. 14,042, § 2(a), 86 Fed. Reg. 50,985, 50,985 (Sept. 14, 2021). In 2023, the President revoked that policy in light of changed public-health circumstances. Exec. Order No. 14,099, § 2, 88 Fed. Reg. 30,891, 30,891 (May 15, 2023).

Before the safety-protocols policy was revoked, it was the subject of several preliminary injunctions and related appellate proceedings. In *Mayes* v. *Biden*, *supra*, the Ninth Circuit vacated one such preliminary injunction after concluding that the plaintiffs in that case were unlikely to succeed in showing that the policy exceeded the scope of the President's authority under FPASA. 67 F.4th at 926; see *id.* at 932-942. The Ninth Circuit's analysis in that case is consistent with the decision below. Compare, *e.g.*, *id.* at 940 (sustaining the challenged policy in light of its "sufficiently close nexus" to the purposes set forth in Section 101) (citation omitted), with Pet. App. 21a-22a (similar). After the President revoked the challenged policy, the Ninth Circuit vacated its decision in *Mayes* as moot. See *Mayes*, 89 F.4th at 1188.

On the other hand, in *Louisiana* v. *Biden*, 55 F.4th 1017 (2022), the Fifth Circuit upheld a preliminary injunction forbidding the government from enforcing the COVID-19 safety-protocols policy with respect to particular plaintiffs. The Fifth Circuit acknowledged that

other courts had generally upheld presidential policies adopted under Section 121(a) that bore a "sufficiently close nexus" to furthering the statutory purposes of economy and efficiency, *id.* at 1026 (citation omitted)—a standard that mirrors the one the Tenth Circuit applied in this case. But the Fifth Circuit determined that the particular policy at issue in that case implicated the major-questions doctrine, and that FPASA failed to provide the requisite "clear statement by Congress" authorizing the policy. *Id.* at 1031; cf. *id.* at 1038-1040 (Graves, J., dissenting) (criticizing the majority's reliance on the major-questions doctrine and concluding that FPASA "authorizes the President's action").

Petitioners contend (Pet. 30-31) that the Fifth Circuit's reasoning in *Louisiana* conflicts with the Tenth Circuit's reasoning in this case. But the Fifth Circuit rested its decision to apply the major-questions doctrine on what it perceived as the "dramatic difference between [the vaccination] mandate and other exercises of Procurement Act authority," in that a vaccination requirement implicated the "individual healthcare decisions" of the covered employees in a way that "'cannot be undone at the end of the workday.'" *Louisiana*, 55 F.4th at 1030; see *id.* at 1030 n.39 (stating that the challenged policy "requires employees to take an action not limited temporally or physically to their place of employment and unrelated to any statutory scheme—that is, to get vaccinated or lose their job"). Those concerns are not present here. The minimum-wage policy does not, directly or indirectly, govern the conduct of employees in their private lives or have any bearing on employees' healthcare decisions. It merely requires companies, as a condition of eligibility to enter into contracts with the federal government, to pay a specified

wage to particular employees for the particular hours that those employees spend working on or in connection with covered contracts.

The Sixth Circuit also upheld a preliminary injunction forbidding enforcement of the same COVID-19 policy with respect to particular plaintiffs. See *Kentucky* v. *Biden*, 57 F.4th 545, 555-556 (2023) (*Kentucky II*); see also *Kentucky* v. *Biden*, 23 F.4th 585, 612 (2022) (*Kentucky I*). Petitioners are correct (Pet. 18-20) that aspects of the Sixth Circuit's reasoning are inconsistent with the reasoning of the Tenth Circuit here (and also with the reasoning of other courts of appeals). The Sixth Circuit stated that "[t]he operative language in § 121(a) empowers the President to issue directives necessary to effectuate the Propery Act's substantive provisions, not its statement of purpose" in Section 101, *Kentucky II*, 57 F.4th at 552—notwithstanding that Section 101 is within the statutorily defined "subtitle" to which Section 121(a) refers. The Sixth Circuit also stated that, even if Section 121(a) authorizes the President to prescribe policies that he considers necessary to "provide the Federal Government" with a more "economical and efficient system" of federal procurement, 40 U.S.C. 101, the President's authority does not extend to measures designed to "make contractors more efficient" or to make the "goods and services" that they provide "cheaper." *Kentucky II*, 57 F.4th at 553 (emphasis omitted). The Sixth Circuit instead understood Section 121(a) as authorizing only those presidential policies or directives that make "the government's system of entering into contracts * * * more efficient." *Ibid.*

The Sixth Circuit did not explain why measures that cause federal contractors to operate more efficiently or

economically would not also make the "government's system" of procurement more efficient or economical—the same goods and services can be had at lower prices, or with improved quality and greater reliability. *Kentucky II*, 57 F.4th at 553. To the extent the Sixth Circuit understood the President to have authority to prescribe only policies regarding the government's "method of contracting," *Kentucky I*, 23 F.4th at 604, the court identified no sound basis for that novel limitation. The "subtitle" that the President is authorized to carry into effect under Section 121(a) includes provisions about the government's methods of contracting, see, *e.g.*, 41 U.S.C. 3301 (procurements after full and open competition), but is not limited to that subject. Nor is Section 121(a).

The Sixth Circuit's narrow understanding of the scope of the President's authority under Section 121(a) is incorrect, but that decision arose in a quite different context and does not furnish a substantial basis for further review in this case. Among other things, the Sixth Circuit has not yet had occasion to determine whether en banc consideration may be warranted in a future case in light of the *Kentucky II* panel's express acknowledgement that its approach departed significantly from the approach of other courts of appeals. See 57 F.4th at 553-554. Moreover, even the Sixth Circuit's incorrect interpretation of Section 121(a) would seem to leave open the possibility that future presidential policies might be sustained where they not only make contractors themselves more efficient or economical but also where the President could reasonably conclude that the policies make the government's overall procurement system more efficient or economical.

Petitioners are therefore incorrect to suggest (Pet. 20) that *Kentucky II* would necessarily compel a future panel of the Sixth Circuit to treat EO 14,026 as beyond the scope of the President's authority. Determining uniform specifications for work to be performed on certain categories of federal contracts is reasonably viewed as a means of improving the federal government's contracting "system." Cf. *Mayes*, 67 F.4th at 941 ("[T]he President was justified in finding that prescribing vaccination-related steps contractors must take in order to work on government contracts would directly promote an economical and efficient 'system' for both procuring services and performing contracts."). The scope and practical importance of the Sixth Circuit's error is therefore unclear.

In addition to the decisions discussed above, the Eleventh Circuit upheld a preliminary injunction regarding the same COVID-19 safety-protocols policy in *Georgia* v. *President of the United States*, 46 F.4th 1283 (2022). But that fractured decision did not produce any majority opinion. Judge Grant concluded that the safety-protocols policy likely exceeded the President's statutory authority based on her view that "requiring widespread COVID-19 vaccination" was sufficient to trigger the major-questions doctrine, *id.* at 1296; Judge Edmonson "concur[red] in the result Judge Grant reache[d]" but did not join her opinion or otherwise explain his reasoning, *id.* at 1308; and Judge Anderson dissented in relevant part because he concluded that Section 121(a) "clearly authorize[d] the President's action," *ibid.* Petitioners invoke (Pet. 19) Judge Grant's opinion, but they do not explain why that opinion would bind any future panel in the Eleventh Circuit.

2. After the petition for a writ of certiorari was filed, a divided panel of the Ninth Circuit held in *Nebraska* v. *Su*, 121 F.4th 1 (2024), that the same minimum-wage policy challenged in this case "exceed[ed] the authority granted to the President" in FPASA. *Id.* at 7. The panel majority concluded that Section 121(a) only authorizes the President to adopt polices to carry out what the majority called the "operative provision[s]" of FPASA, rejecting the view of other circuits that the President may adopt policies and directives necessary to further the statutory purposes set forth in Section 101. *Ibid.*; see *id.* at 7-10. The panel majority also concluded that none of "FPASA's operative sections" authorizes the minimum-wage policy. *Id.* at 11. Judge Sanchez dissented. *Id.* at 22-32. He would have upheld the challenged policy as consistent with "the plain text of [FPASA], longstanding judicial precedent, and executive practice since its enactment." *Id.* at 23.

The Ninth Circuit's decision in *Nebraska* conflicts with the Tenth Circuit's decision here. That conflict of authority may warrant further review by this Court at an appropriate time, but intervention now would be premature. The Solicitor General has authorized the government to file a petition for rehearing en banc in *Nebraska*, and that process could itself eliminate the current conflict without any need for this Court's intervention. Among other things, the majority opinion in *Nebraska* explicitly rejected much of the reasoning of the Ninth Circuit's unanimous prior opinion in *Mayes*, *supra*, which was vacated as moot but remains instructive in that circuit. See *Nebraska*, 121 F.4th at 9 n.2 (acknowledging the panel majority's departure from the reasoning of *Mayes*); *id.* at 23-29 (Sanchez, J., dissenting) (repeatedly invoking *Mayes*). It would be appro-

priate to permit the Ninth Circuit to address in first instance whether and how to reconcile those competing views. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").[3]

C. Petitioners' Constitutional Arguments Also Provide No Sound Basis For Further Review

Petitioners briefly contend (Pet. 31-35) that the court of appeals erred in rejecting their argument that Section 121(a) violates the nondelegation doctrine. The court of appeals correctly rejected that contention based on settled precedent; that aspect of its decision does not conflict with any decision of this Court or another court of appeals; and petitioners identify no other sound basis for further review.

This Court has long held that Congress may vest the Executive Branch with "substantial discretion * * * to implement and enforce the laws," without running afoul of Article I's vesting of "'[a]ll legislative Powers'" exclusively in Congress, as long as Congress supplies "an intelligible principle to guide the delegee's use of discretion." *Gundy* v. *United States*, 588 U.S. 128, 135 (2019) (plurality opinion) (quoting U.S. Const. Art. I, § 1) (brackets in original); see *id.* at 148-149 (Alito, J., concurring in the judgment); cf. *Loving* v. *United States*, 517 U.S. 748, 772-773 (1996) (discussing Congress's especially broad leeway to delegate authority to the President in areas where he "'possesses independent authority'") (citation omitted). The court of appeals correctly identified those governing principles. Pet. App. 36a-37a. The court also correctly determined that

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[3] A challenge to the minimum-wage policy is also pending in the Fifth Circuit. *Texas* v. *Biden*, No. 23-40671 (argued Aug. 6, 2024).

petitioners' "nondelegation challenge is untenable under" this Court's existing precedent. *Id.* at 37a.

The Act contemplates the adoption of by the President of measures for "economical and efficient" government contracting. 40 U.S.C. 101. In addition, the court of appeals observed that Section 121(a) authorizes only those measures that "the President considers *necessary*," Pet. App. 37a (citation omitted)—a standard for the exercise of his judgment and discretion that is not materially different from statutory language that this Court has construed in other cases as providing an intelligible principle to guide agency officials, see, *e.g.*, *Whitman*, 531 U.S. at 472-473 (rejecting nondelegation challenge to statute that required agency to set certain air quality standards at levels "requisite to protect the public health," where requisite means "sufficient, but not more than necessary") (citations omitted); see also *Gundy*, 588 U.S. at 146 (plurality opinion) (additional examples). In addition, Section 121(a) provides that any policies the President adopts under that provision must be "consistent with this subtitle." 40 U.S.C. 121(a).

Petitioners do not meaningfully dispute that the decision below faithfully applied "cases from this Court that upheld broad delegations," such as statutes authorizing an agency to regulate particular matters "in the 'public interest.'" Pet. 34-35 (quoting, indirectly, *NBC* v. *United States*, 319 U.S. 190, 216 (1943)). Petitioners nonetheless maintain (Pet. 32-33) that the court of appeals should instead have treated Section 121(a) as an unconstitutional delegation of legislative authority based on the earlier reasoning of this Court's decisions in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). But in each of those cases, "'Con-

gress had failed to articulate *any* policy or standard' to confine discretion." *Gundy*, 588 U.S. at 146 (plurality opinion) (citation omitted); see *Whitman*, 531 U.S. at 474 (describing the statute at issue in *Panama Refining* as having "provided literally no guidance for the exercise of discretion," and the one at issue in *Schechter Poultry* as having "conferred authority to regulate the entire economy on the basis of no more precise a standard than * * * 'fair competition'"). The same cannot be said of Section 121(a).

Moreover, petitioners misunderstand the distinctive delegation problems in the two cases they invoke, which do not remotely resemble this one. In *Panama Refining*, the statute effectively gave the President discretion to "make federal crimes of acts that never had been such before." *Fahey* v. *Mallonee*, 332 U.S. 245, 249 (1947). And in *Schecter Poultry*, Congress had purported to authorize private industry groups to set "codes of fair competition" for their own industries, without providing any "standards to which those codes were to conform." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). Section 121(a) does not involve any delegation to private parties, nor any power to criminalize otherwise lawful conduct.

Petitioners suggest (Pet. 35) that further review is warranted to vindicate what they nevertheless perceive to be a better reading of *Panama Refining* and *Schecter Poultry* as against the many later cases of this Court rejecting nondelegation challenges. But petitioners have not offered anything like the sort of "special justification" that this Court demands before overruling a precedent, *Gamble* v. *United States*, 587 U.S. 678, 691 (2019) (citation omitted), let alone a long line of prece-

dents spanning the nine decades since the Court last invalidated a federal statute on nondelegation grounds.

In any event, this case would be an unsuitable vehicle in which to reconsider the intelligible-principle test. Unlike the delegations of regulatory authority at issue in *Panama Refining* and *Schecter Poultry*, this case involves a statute authorizing the President to direct how agencies under his supervision will operate in the government's proprietary capacity—how the government itself does business, rather than how it regulates the business of others. See pp. 20-21, *supra.* This Court long ago established that the capacity of the federal government to enter into contracts is an incident of "sovereignty," not a power that need be derived from a specific statute. *United States* v. *Tingey*, 30 U.S. (5 Pet.) 115, 122 (1831) (Story, J.). Thus, as a matter of first principles, it is at best unclear whether Section 121(a)'s vesting of authority in the Head of a coordinate Branch with respect to proprietary matters under his purview would constitute a delegation of Article I authority even if—contrary to our submission above—the statute lacked any intelligible principle to guide the President. At a minimum, the distinctive constitutional considerations surrounding the President's oversight and direction of the government's own proprietary undertakings would complicate any further review. Cf. *Gundy*, 588 U.S. at 170-171 (Gorsuch, J., dissenting) (observing that "Congress may assign the President broad authority regarding * * * matters where he enjoys his own inherent Article II powers").[4]

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[4] Petitioners also invoke (Pet. 34) a recent decision by the Fifth Circuit holding that a provision in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, violates the nondelegation doctrine. The Fifth Circuit's decision addressed a materially differ-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ent statutory scheme. In any event, any tension between that decision and this one would not be a basis for further review here because this Court has already granted further review of the Fifth Circuit's erroneous decision. See *FCC* v. *Consumers' Research*, No. 24-354, cert. granted (Nov. 22, 2024).