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 Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Respondents concede that the Tenth Circuit's decision below directly splits with the Ninth Circuit over the minimum-wage mandate, and that the decision below splits with the Sixth Circuit on whether § 121(a) empowers the President to "carry out" the Procurement Act's purpose statement at § 101. Resp. Br. 25, 28. The decision below also splits with the Eleventh Circuit's *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022), which is binding in that circuit. Respondents' speculation that the *en banc* Ninth Circuit may switch sides does nothing to resolve this four-circuit split. And because the reasoning of these circuits is irreconcilable, it is irrelevant that the Sixth and Eleventh Circuits addressed the COVID-19 vaccine mandate and not the minimum-wage mandate. Furthermore, the Tenth Circuit also splits with the Fifth Circuit on the application of the major questions doctrine. This Court should resolve these irreconcilable splits and decide whether the President may transform the internally focused Procurement Act into a powerful font of regulatory authority. And if the Court finds that the Procurement Act authorizes the minimum-wage mandate, it should grant the petition to review the President's unfettered, personal authority to direct federal contractors and permittees under the nondelegation doctrine.

This Court's intervention is all the more critical given the truly breathtaking authority asserted by the government under § 121(a). The government weakly suggests that FPASA does not have "limitless breadth" because it authorizes only those mandates that the President "'considers necessary to carry out this subtitle.'" Resp. Br. 19 (quoting 40 U.S.C. § 121(a)). On the government's view, however, the

President can micromanage every aspect of a permittee's internal operations—from the vaccination status of its workforce, to its parental-leave policies, down to the color of its office carpets—so long as he "considers" it necessary. That is no limit at all.

The entrenched circuit splits are producing ongoing turmoil on significant questions of economic and social policy. They cry out for this Court's resolution. The Court should grant the petition for a writ of certiorari.

ARGUMENT

I. The Circuit Courts Are Split Regarding the President's Procurement Act Authority

A. The Ninth Circuit, in direct conflict with the decision below, invalidated the minimum-wage rule at issue here. And the Sixth and Eleventh Circuits preliminarily enjoined a comparable rule requiring contractors to vaccinate their employees. All three circuits agree, contrary to the decision below, that 40 U.S.C. § 101 is not an "operative provision" and so cannot be coupled with § 121(a) to empower the President to issue any directives that he deems necessary to accomplish the purposes of the Procurement Act. *Nebraska v. Su*, 121 F.4th 1, 7–8 (9th Cir. 2024); *see Kentucky v. Biden*, 57 F.4th 545, 551–52 (6th Cir. 2023) (*Kentucky II*); *Georgia*, 46 F.4th at 1298–99. As the Ninth Circuit observed, Respondents justify the minimum-wage mandate by invoking an interpretation of the Act that gives the President "unfettered authority," extending even to forcing contractors and permittees to require employees to quit smoking or take birth control to reduce absenteeism. *Nebraska*, 121 F.4th at 10. Following *Kentucky II* and *Georgia*,

the Ninth Circuit rejected this "interpretive approach" and, as a result, held that the Procurement Act does not authorize the minimum-wage mandate. *Id.*

In contrast, the Tenth Circuit treated § 101 as an operative provision that the President may directly execute, echoing the Ninth Circuit's vacated *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023), *vacated as moot*, 89 F.4th 1186 (9th Cir. 2023). Pet. App. 30a. The Tenth Circuit thus held that the Act authorized the minimum-wage mandate.

1. Respondents agree that *Nebraska* and *Kentucky II* split with the Tenth Circuit's decision below. Resp. Br. 25, 28. Respondents attempt, however, to minimize the relevance of *Nebraska* and *Kentucky II*, as well as *Georgia*—cases with reasoning fatal to the minimum-wage mandate and Respondents' position in this case.

First, Respondents claim that the Ninth Circuit is in disarray on the issue because *Nebraska* created an intra-circuit conflict with *Mayes*. Resp. Br. 28. But *Mayes* has been vacated and cannot even be "instructive," *id.*, where it conflicts with *Nebraska*. *Mayes*, 89 F.4th 1186. Respondents thus suggest that the *en banc* Ninth Circuit may reverse *Nebraska* and validate *Mayes*. Resp. Br. 28. Respondents' suggestion is pure speculation, but even if their conjecture were borne out, the Ninth Circuit would simply join the Tenth Circuit's position, leaving the Sixth and Eleventh Circuits on the other side of the split. This would do nothing to resolve the split.

Second, Respondents attempt to dismiss *Kentucky II*. For instance, Respondents speculate that the *en banc* Sixth Circuit might someday overturn *Kentucky II*. Resp. Br. 26. But there is no basis for this

claim, and given that two panels of the Sixth Circuit concurred on the vaccine mandate using similar reasoning, the possibility is remote. *See Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022).

Respondents also claim that *Kentucky II* is distinguishable because it arose in the context of a vaccine mandate and not the minimum-wage mandate. Resp. Br. 26. But the relevant holdings in *Kentucky II* do not turn on the subject matter of the mandate at issue. *See* 57 F.4th at 551–552 (concluding that § 121(a) does not empower the President to effectuate § 101, which is "a powerless provision"). Indeed, Respondents recognize that the analyses of the President's Procurement Act power are fundamentally the same, whether as to a vaccine mandate or a minimum-wage mandate, when they invoke *Mayes*—a vaccine case—to support their position here. Resp. Br. 23, 28–29.

Respondents speculate that *Kentucky II* would not "necessarily compel a future panel of the Sixth Circuit to treat EO 14,026 as beyond the scope of the President's authority." Resp. Br. 27. But the Final Rule grounds its authority and that of the Executive Order in the President's power to execute § 101 through § 121(a). 86 Fed. Reg. 67,126, 67,129 (Nov. 24, 2021). This justification runs directly contrary to *Kentucky II*'s conclusion that § 101 is "a powerless provision" that cannot be combined with § 121(a) to "empower[] the President to issue directives necessary to effectuate the Property Act's . . . statement of purpose." 57 F.4th at 551–52.

Furthermore, *Kentucky II* recognized that the Procurement Act is "internally focused," allowing the President to regulate "government efficiency, not contractor efficiency." *Id.* at 553. The Executive's justification for the mandate here, however, invokes *only*

contractor efficiency and so would not pass muster under *Kentucky II*. 86 Fed. Reg. 22,835, 22,835 (Apr. 27, 2021) (determining that the mandate will "enhance[] worker productivity and generate[] higher quality work").

Given that, *Kentucky II* would certainly not permit the extension of the mandate to permittees like Petitioners, who are not even contractors. In contrast, the Tenth Circuit held that Petitioners, as federal permittees, are part of the government's "system for . . . supplying . . . nonpersonal services" to the public and so fall under the President's § 121(a) power. 40 U.S.C. § 101; Resp. Br. 18–19. By holding that permittees fall under the President's § 121(a) authority, the Tenth Circuit empowered him to regulate "entire industries," Pet. App. 60a (Eid, J., dissenting), and created a particularly stark split with *Kentucky II*.

Third, Respondents claim that the Eleventh Circuit's *Georgia* decision is irrelevant because it did not command a majority, instead prompting a judge to issue an unreasoned "concur[rence] in the result" and another to produce a dissent. Resp. Br. 27. But an appellate opinion may be binding even without a majority. *See Marks v. United States*, 430 U.S. 188 (1977); *Binderup v. Att'y Gen. of the United States*, 836 F.3d 336, 356 (3d Cir. 2016) (en banc) (applying *Marks* to determine "the law of [the] Circuit"). Indeed, three panels of the Eleventh Circuit have already treated *Georgia* as precedential, including a case in which both the majority and dissent considered *Georgia* to be binding. *See HM Florida-Orl, LLC v. Governor of Fla.*, No. 23-12160, 2023 WL 6785071, at *2 (11th Cir. Oct. 11, 2023) (quoting *Georgia*'s "majority opinion"); *id.*, at *5 (Brasher, J., dissenting) (arguing based on "our precedents" and principally relying on *Georgia*);

Alabama v. U.S. Sec'y of Educ., No. 24-12444, 2024 WL 3981994, at *6 (11th Cir. Aug. 22, 2024); *Garcia v. Exec. Dir., Fla. Comm'n on Ethics*, No. 23-12663, 2023 WL 11965005, at *1 (11th Cir. Nov. 30, 2023).

2. Respondents have no rebuttal to Petitioners' demonstration of the internal focus of the text and context of the Procurement Act. Pet. 6–7, 17. For example, it has nothing to say about language parallel to that in § 101(1) ("Procuring and supplying property and personal services") clearly showing that that phrase refers to the procurement of property and services *by the government* and *for the government*. 40 U.S.C. § 501(b)(1)(A) (directing GSA to "procure and supply personal property and nonpersonal services *for executive agencies*") (emphasis added).

Instead of grappling with Petitioners' arguments or those of the Ninth, Sixth, and Eleventh Circuits, Respondents baldly assert that the Procurement Act authorizes the President to use a minimum wage to determine who may "do[] business with the federal government." Resp. Br. 17. But even if that were true, permittees like Petitioners do not do business with the government. Rather, they merely seek permission to conduct their own business with outdoor enthusiasts on federal land. Contrary to Respondents' contention that Petitioners' permits are "arrangements in which the government contracts with a business to provide services to the public," Resp. Br. 19, the permits do not obligate Petitioners or other permitholders to provide any services at all, *see* Pet. App. 137a–50a. Like other permits, they simply authorize Petitioners to carry out activities otherwise forbidden. In a last-ditch attempt to tie permits to the Procurement Act, Respondents argue that § 121(a) extends to "contract-like instrument[s]" such as permits. Resp. Br. 18. But no

part of the statute—not even the inoperative § 101—references presidential control over "contract-like instruments," a nebulous concept invented by the minimum-wage mandate itself. 86 Fed. Reg. at 22,835.

As a result, Respondents only weakly support the Tenth Circuit's extension of the Procurement Act to permittees, stating reluctantly that it "can . . . be" the case that permittees are part of the government's system for supplying services under § 101. Resp. Br. 19. There is no support for Respondents' suggestion that the Procurement Act is meant to address the supply of recreational services by private companies to members of the public.

B. Certiorari is also necessary to resolve the Tenth Circuit's incorrect application of the major questions doctrine, which produced a circuit split with the Fifth Circuit. The Tenth Circuit held, and Respondents argue, Resp. Br. 20–21, that the major questions doctrine does not apply where the government action "invoke[s] the government's proprietary authority" instead of its "regulatory authority." Pet. App. 31a (cleaned up). The Fifth Circuit in *Louisiana v. Biden*, in contrast, explicitly rejected the Executive's argument that the vaccine mandate "is not subject to the major questions doctrine" simply because a directive under § 121(a) "is an exercise of the President's 'proprietary authority'" and "no[t] an exercise of 'regulatory authority.'" 55 F.4th 1017, 1029 (5th Cir. 2022).

1. Respondents argue that *Louisiana* and the decision below do not conflict because *Louisiana* concerned a vaccine mandate that implicated individual healthcare decisions. Resp. Br. 24. This argument, however, does not address the clear split of authority on whether the major questions doctrine applies where proprietary authority is implicated.

Respondents also imply that there is no split on the application of the major questions doctrine to exercises of proprietary authority, because the mandate in *Louisiana* was in fact an exercise of regulatory, not proprietary, authority. Resp. Br. 14–15. But the Fifth Circuit's point was that, given the "vast scope" of the vaccine mandate, "the distinction between regulatory and non-regulatory power . . . is here a distinction without a difference." *Louisiana*, 55 F.4th at 1032; *see* Texas Amicus Br. 21 ("[T]his 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.'") (quoting *Biden v. Nebraska*, 143 S. Ct. 2355, 2374–75 (2023)). That broad scope, which reached essentially all employees of federal contractors, defeated the government's attempt to exempt a pocket of Executive authority called "proprietary authority" from the major questions doctrine. *Louisiana*, 55 F.4th at 1032. The Tenth Circuit below split from the Fifth by allowing such an exemption despite the minimum-wage mandate's far broader scope, which extends even to permittees' employees. Pet. App. 31a–32a.

2. Respondents attempt to dilute the split by arguing that there is not a major question present at all because the minimum-wage mandate does not represent expansive authority grounded in modest, vague, or ancillary statutory provisions. Resp. Br. 20. Again, this does nothing to solve the circuits' disagreement over the application of the major question doctrine to a claimed exercise of proprietary power.

Regardless, the mandate is an exercise of expansive authority. It decides a sensitive political issue with unquestionable economic significance, displacing Congress's system for determining the minimum

wage for federal contractors. *See* 40 U.S.C. § 3142; 41 U.S.C. §§ 6502, 6704; Texas Amicus Br. 4. Worse, it extends, in unique fashion, beyond federal contractors to permittees. In contrast, prior Procurement Act orders simply ensured federal contractors will comply with federal law and would not run afoul of the major questions doctrine. The prior directives Respondents cite—forbidding discrimination in hiring, notifying employees of their right not to pay union dues, and requiring verification of employees' authorization to work in the United States—implicate neither political sensitivity nor economic significance but rather reinforce underlying legislation in near-ministerial fashion. *See* Resp. Br. 3 (discussing prior orders).

Furthermore, the power that the Executive claims to justify the mandate admits of no limiting principle. Pet. 33; Pet. App. 60a (Eid, J., dissenting); Texas Amicus Br. 17. Respondents, for their part, make no effort to identify such a limiting principle.

This enormous power, Respondents say, resides in the provisions of the Procurement Act. But § 121(a) is a modest and ancillary provision that simply authorizes the President to direct agencies how to use their powers under the Act. And even supposing the President could carry out the purpose provision at § 101, that provision is at best vague—as to whether "an economical and efficient system" may increase government costs as the Final Rule does, and whether the government's system of procurement and supply extends to the supply of services by private businesses to private clients.

It is no surprise that the Procurement Act is a poor fit for the minimum-wage mandate. The mandate, like President Obama's $10.10 minimum-wage mandate in 2014, Exec. Order 13,658, 79 Fed. Reg. 9851 (Feb.

12, 2014), was meant to bypass a Congress unwilling to enact a president's agenda. *See* The White House, *Statement by President Joe Biden on $15 Minimum Wage for Federal Workers and Contractors Going into Effect* (Jan. 28, 2022), https://tinyurl.com/3w979u66 (announcing the minimum-wage mandate as a "down payment on [a campaign] pledge" to increase the minimum wage to $15 per hour, and "continu[ing] to urge Congress to raise the federal minimum wage to $15 an hour"); Texas Amicus Br. 17. This echoes major questions doctrine cases like *Biden v. Nebraska*, 143 S. Ct. 2355, and *West Virginia v. EPA*, 597 U.S. 697 (2022), in which the Executive likewise stretched statutory authority to force through political priorities that Congress had rejected.

II. If the Procurement Act Authorizes the Minimum-Wage Mandate, the Court Should Resolve the Nondelegation Question

Respondents make no serious attempt to identify a limit on the President's authority under their interpretation of the Procurement Act, and simply repeat the Tenth Circuit's empty promise that § 121(a) "authorizes only those measures that 'the President considers *necessary*.'" Resp. Br. 30 (quoting Pet. App. 37a). But, as Judge Eid pointed out, the President need only *consider* a measure necessary, so under the Tenth Circuit's interpretation, the President may issue any directive that he subjectively believes will serve the purposes of the Act. Pet. App. 53a–60a. Today, the result is a minimum-wage mandate that will raise costs for the government being passed off as economical and efficient because it will allegedly result in happier workers. Tomorrow, it will be health mandates, the requirement that federal contractors use

electric vehicles, or anything else a president can imagine. *See Nebraska*, 121 F.4th at 10; Texas Amicus Br. 18. There is thus no avoiding the implications for the nondelegation doctrine of the Tenth Circuit's interpretation of the Act.

Respondents contend that this is a poor vehicle for reconsidering the intelligible principle test because it implicates the President's proprietary authority under Article II. But any distinction between proprietary and regulatory functions means little when the government seeks to leverage its permitting authority to dictate the internal decisions of private companies. In any event, articulating a coherent approach to the nondelegation doctrine will necessarily involve describing the limits of that doctrine—for example, when the executive enjoys broader discretion. *See Gundy v. United States*, 588 U.S. 128, 157–60 (2019) (Gorsuch, J., dissenting).

To be sure, the circuits are not divided on the application of the nondelegation doctrine to this or any other case, for the simple reason that the intelligible principle test is so lenient that it is virtually impossible to violate. *See id.* at 164–65. But five members of this Court have signaled their interest in revisiting that test in an appropriate case. *See id.* at 179; *id.* at 148–49 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari). This is such a case, for it allows the Court to address the nondelegation doctrine either directly or through the constitutional avoidance canon.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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