No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Property and Administrative Services Act, also known as the Procurement Act, exists to "provide the federal government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services." Toward that end, the Act created the General Services Administration to manage procurement and supply, and it allows the President to "prescribe policies and directives" he "considers necessary" to accomplish the Act's purposes. In 2021, President Biden invoked this power to require most federal contractors to pay their employees a $15-per-hour minimum wage. The resulting rule, issued by the Department of Labor, extends even to small businesses, like Petitioner Arkansas Valley Adventure, that merely hold permits to conduct guided expeditions on federal land, but that neither procure property or services for, nor supply them to or on behalf of, the federal government.

The questions presented are:

1. Whether the Procurement Act authorizes the President to require federal permittees to pay their employees a minimum wage.
2. Whether the Procurement Act delegates lawmaking power to the Executive Branch in violation of Article I of the Constitution.

PARTIES TO THE PROCEEDING

Petitioners (appellants in the court of appeals) are Duke Bradford and Arkansas Valley Adventures, LLC. A third appellant in the court of appeals is Colorado River Outfitters Association.

Respondents (appellees in the court of appeals) are the U.S. Department of Labor; the Department of Labor's Wage and Hour Division; Joseph R. Biden, in his official capacity as President of the United States; Julie A. Su, in her official capacity as U.S. Secretary of Labor; and Jessica Looma, in her official capacity as Administrator of the Wage and Hour Division.

CORPORATE DISCLOSURE STATEMENT

Petitioner Arkansas Valley Adventures, LLC, has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Bradford v. U.S. Department of Labor, No. 22-1023, U.S. Court of Appeals for the Tenth Circuit (Apr. 30, 2024).

Bradford v. U.S. Department of Labor, No. 21-CV-3283-NYW-STV, U.S. District Court for the District of Colorado (Jan. 24, 2022).

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JURISDICTION

The Tenth Circuit Court of Appeals issued its decision on April 30, 2024. On July 12, 2024, this Court granted an application for extension of time to file a petition for a writ of certiorari to and including August 28, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1, of the U.S. Constitution provides, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

40 U.S.C. § 101 provides in relevant part: "The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities: (1) Procuring and supplying property and nonpersonal services, and performing related functions . . . ."

40 U.S.C. § 121(a) provides, "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle."

INTRODUCTION

Petitioner Duke Bradford, through his small business, Arkansas Valley Adventures, LLC ("AVA"), has been conducting guided tours in the beautiful Mountain West for over 20 years. Many of AVA's tours take place on federal lands, such as the Colorado and Eagle Rivers, the White River National Forest, and Wolford Mountain Recreation Area. It does so pursuant to special recreation permits granted by the Forest Service and BLM. The permits operate similarly to those that allow other group activities on federal land. They authorize the use of specific areas for specific amounts of time. They require permittees to use trails and designated parking areas and not damage the land in any way. Permittees pay the government for the privilege of using federal lands. And permittees may not represent their activities as being conducted by the government. AVA could not operate its business without these permits.

In 2021, President Biden issued an executive order that threatens AVA's business and those of thousands of other outfitters that operate on federal land. Purporting to exercise his authority under the Federal Property and Administrative Services Act ("Procurement Act" or "Act") to issue directives to accomplish the Act's purposes, the President in Executive Order 14,026, and the Department of Labor ("Department") in a resulting rule, directed federal contractors to pay their employees a $15-per-hour minimum wage, plus overtime and annual increases. This mandate applies not only to traditional federal contractors—those with whom the government contracts to procure property or services for the government—but also to those who

operate under non-procurement "contract-like instruments," including AVA and more than 45,000 other businesses. *See* 86 Fed. Reg. at 67,196, 67,197.

The mandate creates practical problems for these small businesses and raises profound legal problems. As a practical matter, the mandate imposes a minimum-wage requirement on AVA and similar businesses whose guides typically negotiate flat "trip salaries" rather than getting paid on a strictly hourly basis. Because AVA's work is seasonal, guides prefer to work as much as possible during the season. Trip salaries enable guides and outfitting services to fit as many trips as possible into the season while maintaining an economical business model. Because trips last for several days, however, guides work far more than 40 hours in a typical week. If AVA were required to pay overtime based on a $15-per-hour minimum wage, its operating costs would skyrocket, forcing it to raise prices, limit or eliminate longer trips, or cut guides' hours. For this reason, the Trump administration exempted outfitters such as AVA from a previous federal-contractor minimum-wage rule. The Biden administration revoked the exemption, however, even while recognizing that outfitters are "[n]on-procurement," as they do not sell goods or services to the government, and they "cannot as directly pass costs along to the Federal Government" as traditional federal contractors. 86 Fed. Reg. at 67,206.

The legal problem the mandate creates is straightforward: the Procurement Act simply does not authorize the President to impose a minimum wage on federal contractors, let alone permittees like AVA who merely operate on federal land. The Tenth Circuit's decision to the contrary represents a massive expansion of the President's power under the Act. The Tenth

Circuit essentially read the President's authority—issuing directives *to carry out the Act's provisions*—as a freestanding power to regulate the operations of any business with whom the federal government deals. But the Procurement Act is fundamentally administrative, not regulatory. It provides a system by which the General Services Administration can efficiently and economically procure and supply goods and services for the various departments of the federal government. It speaks to "government efficiency, not contractor efficiency," *Kentucky v. Biden*, 57 F.4th 545, 553 (6th Cir. 2023), and was not "envisioned . . . as a latent well of authority" to regulate contractors, *Kentucky v. Biden*, 23 F.4th 585, 606 (6th Cir. 2022).

But under the Tenth Circuit's reading, the Act is just that—a latent and open-ended well of authority that allows the President to regulate not just federal contractors, but also any entity, such as AVA, that operates under a federal permit, license, or lease. This would include trucking companies and aviation companies, financial services, and broadcasting companies, to name just a few. *See also* App. 59a–60a (Eid, J., dissenting) (stating that, under the panel's reasoning, the President's authority would reach "a permit for cutting down a single Christmas tree in a national forest, a one-night stay on a federal campsite, or even a visit to the U.S. Capitol").

The Tenth Circuit's decision creates a split with the Sixth and Eleventh Circuits over the scope of the Procurement Act; it creates a split with the Fifth Circuit over the application of the major questions doctrine; and it runs headlong into the nondelegation doctrine because it interprets the Act to bless the President with "nearly unfettered power" to impose "any

conditions at any time" on federal permittees or contractors "as long as he considers the conditions necessary." App. 50a, 60a (Eid, J., dissenting).

This Court should grant the petition.

STATEMENT OF THE CASE

Statutory and Regulatory Background

1. In 1949, Congress enacted the Procurement Act to bring order to agencies' chaotic and duplicative procurement activities by centralizing procurement in a new agency that would supply other agencies with goods and services.

The Act was adopted in the wake of World War II, which had demonstrated that "the manner in which federal agencies [had been] entering into contracts to procure goods and services was not economical and efficient." *Kentucky*, 23 F.4th at 606. In 1947, Congress declared that it was the "policy of Congress to promote economy, efficiency, and improved service in the transaction of the public business" in the various Executive Branch agencies. Act of July 7, 1946, Pub. L. No. 80-162, § 1, 61 Stat. 246. This policy was to be achieved by, among other things, "limiting expenditures to the lowest amount consistent with the efficient performance of essential services, activities, and functions"; and by "eliminating duplication" and "consolidating services, activities, and functions." *Id*. Congress also established the Hoover Commission to study the executive branch's "organization and methods of operation" and recommend changes. *Id*. §§ 2, 10.

Consistent with its 1947 policy and "substantially" adopting the Hoover Commission's recommendations, James F. Nagle, *A History of Government Contracting* 127 (Gov't Training Inc. 3d ed. 2012), Congress en-

acted the Procurement Act to provide the federal government with an "economical and efficient system" to procure and supply the government with property and nonpersonal services, and to manage government property. Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, § 2, 63 Stat. 377, 378 (June 30, 1949); *see* 40 U.S.C. §§ 101, 102(8) & (9). The Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," but these "policies must be consistent with this subtitle." 40 U.S.C. § 121(a).[1]

A key recommendation of the Hoover Commission was the creation of a new central agency to "coordinate purchasing and other 'housekeeping' activities 'to avoid waste.'" *Georgia v. President of the U.S.*, 46 F.4th 1283, 1293 (11th Cir. 2022) (citation omitted). The Procurement Act thus consolidated procurement agencies into the newly established General Services Administration ("GSA"). 40 U.S.C. § 301. Among the agencies consolidated into GSA was the Treasury Department's Bureau of Federal Supply, an executive office that traces its history to Alexander Hamilton, who also favored "centralized management of the Federal Supply System." *See* Clifton Mack, *The Bureau of Federal Supply*, 25 Soc. Sci. 27, 27 (1950).

GSA is principally charged with "procur[ing] and supply[ing] personal property and nonpersonal services for executive agencies to use in the proper discharge of their responsibilities." 40 U.S.C. § 501(b)(1)(A). GSA procures personal property and nonpersonal services with money held in a specially

[1] For both § 101 and § 121(a), "this subtitle" refers to 40 U.S.C. §§ 101–1315 and 41 U.S.C. §§ 3101–4714 (except §§ 3302, 3501(b), 3509, 3906, 4710, and 4711). *See* 40 U.S.C. § 111(4).

created Treasury fund. *Id.* § 321(c). GSA then supplies that property and those services to requisitioning agencies, which reimburse GSA according to rates established by GSA's Administrator. *Id.* § 321(b)(3), (d). GSA must "determine[] that [each] action is advantageous to the Federal Government in terms of economy, efficiency, or service." *Id.* § 501(a)(1)(A); *see, e.g.*, *id.* §§ 602(a)(1), 603(a)(1) (authorizing GSA to "acquire motor vehicles" if it "determines . . . that doing so is advantageous to the Federal Government in terms of economy, efficiency, or service").

GSA also supplies services to agencies by representing them in negotiations with transportation carriers and public utilities and by operating agencies' warehouses and supply centers. *Id.* § 501(c), (d). Additionally, GSA manages property for executive agencies; deals with foreign excess property; manages agencies' urban land use, 40 U.S.C. Chs. 5, 7, 13; and regulates agencies' "purchases and contracts for property and services," 41 U.S.C. § 3101(a). *See* 40 U.S.C. § 111(4).

By centralizing procurement through GSA, which then supplies agencies, these provisions accomplish the Act's stated purpose of providing the government with "an economical and efficient system" for federal procurement and supply of property and services to agencies. 40 U.S.C. § 101. As such, the Act is "internally focused." *Kentucky*, 57 F.4th at 553.

2. Until 2014, the Act had never been used to impose a minimum wage on federal permittees. But that changed when President Obama issued Executive Order 13,658 to direct the Department of Labor to establish a minimum wage of $10.10 per hour, plus annual raises, for new federal "contracts, contract-like instruments, and solicitations." *Establishing a Minimum*

Wage for Contractors, 79 Fed. Reg. 9851, 9851 (Feb. 12, 2014). The Department's implementing regulation applied this minimum-wage requirement to permits issued by the Forest Service, National Park Service, and Bureau of Land Management. *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634, 60,655 (Oct. 7, 2014).

Second, President Trump issued Executive Order 13,838 to exempt outfitters and guides from the 2014 rule. *Exemption from Executive Order 13658 for Recreational Services on Federal Lands*, 83 Fed. Reg. 25,341 (May 25, 2018). This order noted that the 2014 rule harmed economy and efficiency by raising the cost of expeditions and reducing guides' hours. *Id.* at 25,341; *see Minimum Wage for Contractors; Updating Regulations To Reflect Executive Order 13838*, 83 Fed. Reg. 48,537 (Sept. 26, 2018).

Finally, in 2021, President Biden issued Executive Order 14,026, revoking President Trump's exemption for outfitters and guides and raising the minimum wage to $15 per hour, plus annual increases. *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 22,835 (Apr. 27, 2021). The Department adopted an implementing rule, effective January 30, 2022. *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126, 67,126, 67,167 (Nov. 24, 2021) ("Rule" and, collectively with Executive Order 14,026, "Minimum Wage Mandate" or "Mandate").

This Mandate requires minimum wages for "workers working on or in connection with" certain new federal government contracts, new "contract-like" instruments, new solicitations, and the extensions or renewals thereof. 86 Fed. Reg. 22,835, §§ 1, 8. Contracts are subject to the Mandate if (1) employee wages are within the scope of the Fair Labor Standard Act, the

Davis-Bacon Act, or Service Contract Act, and (2) the contracts are "for services covered by the Service Contract Act" or are "entered into with the Federal Government in connection with Federal property or lands and related to offering services for . . . the general public." 86 Fed. Reg. at 22,837; *see* App. 131a, 29 C.F.R. § 23.30(a). A "contract" is "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." App. 129a, 29 C.F.R. § 23.20. This unusually broad definition "include[s] . . . licenses, permits, or any other type of agreement," "regardless of whether the parties involved typically consider such arrangements to be 'contracts.'" 86 Fed. Reg. at 67,133, 67,135.

The Mandate thus covers Commercial Use Authorizations issued by the National Park Service, and permits issued by the Forest Service, BLM, and the U.S. Fish and Wildlife Service. 86 Fed. Reg. at 67,152. The Department acknowledged, however, that permits are "[n]on-procurement" in character. *Id*. at 67,206.

The Department's implementing rule claims authority under 40 U.S.C. §§ 101 and 121(a). *Id.* at 67,129.

Procedural Background

1. Duke Bradford is the founder and owner of Arkansas Valley Adventures, a small recreational outfitter in Colorado. App. 70a. AVA leads outdoor enthusiasts on guided expeditions to destinations in the Mountain West, primarily in the summer. App. 70a–71a. Many of these expeditions are held on federal lands, with appropriate use permits from the Forest Service and BLM. App. 71a–72a; *see* App. 137a (permit). AVA pays fees for these permits, which forbid AVA from damaging federal land or representing that

the government conducts AVA's excursions. *See, e.g.*, App. 139a, 143a, 148a. AVA's expeditions, which can last multiple days, are led by seasonally hired guides, who are typically paid a "trip salary." App. 72a. A trip salary is a flat fee for each expedition that usually works out to more than $15 per hour but less than $22.50 per hour. *Id.* As the Rule predicted, the annual raise and overtime requirements would significantly increase AVA's costs, particularly for multi-day expeditions. As a result, AVA would be forced to cut guide hours, raise prices beyond the reach of many Americans, and reduce or eliminate multi-day expeditions. App. 73a–74a.

On December 7, 2021, Bradford and AVA filed suit under the Administrative Procedure Act to challenge the Rule in the United States District Court for the District of Colorado. App. 70a. They brought three claims: (**a**) the Minimum Wage Mandate is *ultra vires* because it was not authorized by 40 U.S.C. § 121(a); (**b**) if § 121(a) does authorize the Mandate, the provision unconstitutionally delegates lawmaking power to the Executive; and (**c**) the Department's implementing Rule is arbitrary and capricious.

Petitioners moved for a preliminary injunction. They argued that the Mandate was not supported by the Procurement Act, which should be read narrowly to avoid serious doubts as to its constitutionality under the nondelegation doctrine. They also argued that the Rule was arbitrary and capricious. The district court denied the motion, concluding that Petitioners lacked a likelihood of success on the merits. App. 70a.[2]

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[2] Petitioners were joined below by the Colorado River Outfitters Association, but the district court held that it lacked standing. App. 74a, 82a. Petitioners do not challenge that ruling here.

2. On appeal, a motions panel of the Tenth Circuit enjoined the Rule pending appeal as to seasonal recreational services on federal land. App. 14a. The merits panel, over a dissent from Judge Eid, affirmed the district court's denial. App. 45a. The court agreed with the district court that Petitioners had not established a likelihood of success on the merits and did not address the other preliminary-injunction factors. App. 6a.

2.a.1. *Ultra Vires* Claim. The majority held that § 121(a) empowers the President to "issue 'policies and directives' that are consistent with the statute's purposes—including regulating the supply of nonpersonal services." App. 17a (citation omitted).

Contrary to the Procurement Act's internal focus on the supply of services and property to *agencies* by *GSA*, the majority held that the President could regulate the supply of services to *anyone* by *anyone* who holds a relevant federal permit or contract.

The majority pinned its analysis on the broad purpose statement in § 101(1), which declares that Congress adopted the Act "to provide the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services." The majority treated § 101(1) as an operative clause and reasoned that it "does not specify any particular entity that must receive the nonpersonal services to which it refers." App. 17a. The majority likewise reasoned that "there is no explicit requirement in § 101 that the government itself directly supply the property or services under [the Act]." App. 19a.

Thus, although Petitioners and not the government supply the outfitting services at issue, the majority reframed "the government's provision of federal permits to [Petitioners]" to be "part of 'an economical

and efficient' system for supplying those nonpersonal services to the public." App. 18a. It therefore held that Petitioners were subject to regulation under § 121(a).

The majority also made clear that presidential directives need not be necessary for economy and efficiency. Rather, a directive need have merely a "sufficiently close nexus to the values of economy and efficiency." App. 21a (cleaned up). And "courts have respected the President's judgment as to how a given executive order is likely to advance the statute's objectives." App. 22a (citation omitted). Thus, according to the majority, the Procurement Act is satisfied so long as "the President could consider" a directive to be necessary. *Id.* Because the government represented that the Mandate would increase worker productivity and work quality, this standard was met. *Id.*

2.a.2. Major Questions Doctrine. The panel concluded, for four reasons, that the major questions doctrine does not save Petitioners' *ultra vires* claim. First, the panel said, this is "not a case in which the executive branch seeks to locate expansive authority in 'modest words,' 'vague terms or ancillary provisions,'" App. 30a (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), because the Procurement Act uses "expansive language" to provide a "'relatively broad delegation'" in the Act. *Id.* (citation omitted). Second, the Procurement Act authorizes the President to exercise proprietary power—not the regulatory power with which the major questions doctrine is concerned. App. 31a–32a. Third, this case does not involve a newly discovered claim of power in a long-extant statute. App. 32a–33a (citing the orders issued by Presidents Obama and Trump). Finally, the panel

said, this is not a case in which the agency lacks expertise in the relevant policy area, that is, minimum-wage policy. App. 34a–35a.

2.b. Nondelegation Doctrine. The panel held that "[Petitioners]' nondelegation challenge is untenable." App. 37a. The panel recognized that a delegation is constitutional only if it includes an "intelligible principle" to guide the delegated authority. App. 36a. But it observed that this Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* (quoting *Whitman*, 531 U.S. at 474–75). According to the panel, key terms in the Procurement Act's authorization of "executive orders that 'the President considers *necessary*' to promote an '*economical*' and '*efficient*' system for procuring and supplying goods and services" sufficiently "channel executive discretion"—despite the panel's acknowledgement (for the second time) of the Act's relatively broad delegation of authority. App. 37a.

2.c. Arbitrary and Capricious. Finally, the panel rejected Petitioners' claim that the Rule arbitrarily and capriciously rescinded President Trump's exemption of recreational services from the minimum-wage rules. The panel acknowledged that agencies must "'provide a reasoned explanation'" and consider reliance interests before changing existing policies. App. 40a (citation omitted). But here, the panel held, the Department had "*no discretion* to act otherwise" because it was compelled by President Biden's executive order to revoke the exemption. App. 41a–42a.

3. Dissent. Judge Eid dissented from the panel's nondelegation ruling. She noted that this Court has

identified an intelligible principle as "falling into either of 'two buckets'" from *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): "'(1) whether the Congress has required any finding by the President in the exercise of the authority, and (2) whether the Congress has set up a standard for the President's action.'" App. 47a (Eid, J., dissenting) (citation omitted). And Judge Eid pointed to this Court's common-sense observation that "the more power a law delegates, the more the law must limit that delegation." App. 49a (citations omitted).

Concluding that the Procurement Act does not condition the President's § 121(a) power on any "situational or fact-finding requirement," Judge Eid turned to the second bucket, which requires a law to have "'a standard' limiting executive discretion." App. 47a (quoting *Panama Refining*, 293 U.S. at 415). In other words, the law must contain an intelligible principle.

But the Procurement Act, Judge Eid concluded, lacked any intelligible principle. Instead, the Act empowers the President to "do what he finds necessary to carry out the [Act] as long he thinks the federal government would have an economical or efficient system." App. 52a–53a. "That is it." App. 50a. As Judge Eid explained, the Act provides "no floor of what specific situations must arise, no ceiling on what the President may find economical or efficient to do." *Id.* Rather, he need consider only his "*subjective* opinion" of what is economical or efficient, App. 53a, without consulting statutory factors or any other "basis for determining what he may consider economical or efficient." App. 54a. As a result, the Act gives the President "unfettered power to regulate any nonpersonal service via

any contract-like instrument" and thereby "do whatever he finds necessary to regulate entire industries in the name of what he believes to be economical and efficient." *Id.* "Such a broad delegation without limits," Judge Eid concluded, "cannot stand under Article I." *Id.*

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Radical Expansion of the President's Power under the Procurement Act Is a Matter of National Importance and Creates Multiple Circuit Splits

The Procurement Act was enacted as an administrative statute with a simple purpose: avoiding wasteful "duplicative contracts" by "centraliz[ing] coordination of procurement efforts" and thereby rendering procurement rational and uniform. *Kentucky*, 23 F.4th at 606. Its provisions accomplish this purpose by establishing procedures to control the acquisition of property and services and directing GSA to administer those procedures. The Act was not "envisioned . . . as a latent well of authority" to regulate contractors or permittees. *Id.*

The Tenth Circuit nevertheless concluded that the statute supports the Mandate. The court's decision is flawed in two ways.

First, § 121(a) does not allow the President to regulate private parties at all; he may only improve the government's internal procurement system. The Tenth Circuit's contrary holding created a circuit split with the Sixth and Eleventh Circuits. Further, even if the Procurement Act allowed regulation of private parties, it would not reach Petitioners, from whom the government procures nothing and who supply nothing

on the government's behalf. The Tenth Circuit's decision, however, massively expanded the Procurement Act to allow direct presidential regulation of every industry holding a federal permit, license, or lease.

Second, even if he could regulate permittees, the President could not do so by imposing a $15-per-hour minimum wage, because by doing so, he settled a major question without clear statutory authority. To avoid this conclusion, the Tenth Circuit narrowed the major questions doctrine to the point of irrelevance, creating a circuit split with the Fifth Circuit.

The Tenth Circuit's errors empower the President to regulate "entire industries." App. 60a (Eid., J., dissenting). Yet in formulating his policies, the President need not consult any factors, find any facts, or accomplish any statutory goals. Rather, the President need only believe, in his "own *subjective* opinion," that his directive is necessary for economy and efficiency. App. 53a (Eid., J., dissenting).

The Court should grant certiorari to review the Tenth Circuit's extraordinary expansion of presidential power and to resolve the two circuit splits.

A. The Tenth Circuit interpreted the Procurement Act as a regulatory statute, creating a circuit split with the Sixth and Eleventh Circuits

The interpretation of the Procurement Act begins, of course, with the text. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 127 (2018). And to understand particular textual provisions, courts must read them "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), "not [as] iso-

lated provisions." *Graham Cnty. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010). "[S]tatements of purpose, . . . by their nature cannot override a statute's operative language." *Sturgeon v. Frost*, 587 U.S. 28, 57 (2019). Rather, operative language demonstrates the balance Congress struck in pursuing a purpose, for "no legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (citation omitted). Accordingly, authority is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). These principles prevent the Executive from treating enabling legislation as "an open book to which the agency [may] add pages and change the plot line." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (cleaned up).

Here, the Procurement Act's text and context reveal that it was enacted to establish a centralized procurement system, with GSA regulating the procurement, management, and supply of property and services for agencies to use. For example, the Act directs GSA to "procure and supply personal property and nonpersonal services for executive agencies," 40 U.S.C. § 501(b)(1)(A); establish a supply catalog system and purchase specifications, *id.* § 506; and "furnish motor vehicles and related services to executive agencies." *Id.* § 602(a)(3). This administrative statute thereby "provide[s] the Federal Government with an economical and efficient system for . . . procuring and supplying property and nonpersonal services." *Id.* § 101(1).

The President's power to "carry out" the Procurement Act allows him to "instruct [GSA and other agencies] on how to exercise their statutory authority" under the Act. *Georgia*, 46 F.4th at 1293. Thus, his power is "internally focused," allowing the President to regulate "government efficiency, not contractor efficiency." *Kentucky*, 57 F.4th at 553.

1. The Tenth Circuit diverged from the Sixth and Eleventh Circuits in holding that the President may regulate permittees and contractors under the Procurement Act

The Tenth Circuit disregarded the Procurement Act's internal focus and improperly empowered the President to regulate permittees and contractors. It reasoned that the President's power to "carry out" the Procurement Act, 40 U.S.C. § 121(a), included executing the non-operative policy statement in § 101(1). App. 30a (holding that § 121(a) empowers President to carry out "this subtitle," "which includes" the purpose statement); *see* App. 17a. And it held that § 101's reference to an "economical and efficient system" allows any measure that the President believes would result in "[e]nhanced worker productivity and higher quality work" for federal permittees and contractors. App. 22a.

This reasoning clashes with the Sixth and Eleventh Circuits' conclusions in three ways.

First, the Tenth Circuit erroneously treated § 101(1) as a substantive provision conferring powers on the President through § 121(a). This creates a split with the Sixth and Eleventh Circuits. As the Sixth Circuit correctly held, § 101 "provides no legal authority." *Kentucky*, 57 F.4th at 551. Even if used only to

illuminate § 121(a), § 101 "cannot . . . limit or expand the scope of the operative clause." *Id.* at 552 (cleaned up). And, as the Eleventh Circuit explained, § 121(a) "does not give the President the authority to 'carry out' the *purpose* of the statute," *Georgia*, 46 F.4th at 1298, but only "the power to instruct [GSA and other agencies] on how to exercise their statutory authority" under the Act. *Id.* at 1293.

Second, the Tenth Circuit incorrectly held that §§ 101(1) and 121(a) allowed the President to regulate the private business practices of permittees and contractors. *See* App. 18a. This conflicts with the Sixth Circuit, which explained that the Procurement Act is "internally focused," meaning §§ 101(1) and 121(a) allow the regulation of only "the government's system of entering into contracts for . . . goods and services." *Kentucky*, 57 F.4th at 553; *id.* at 552 (Congress's choice of "operative provisions" determined "the means by which to pursue the ends declared in § 101."). Thus, the President may "make contract*ing* more efficient" but cannot try to make, for example, "contract*ors* more efficient." *Id.* at 553.[3]

Third, the Tenth Circuit held that the Procurement Act authorizes any presidential directives that the President believes would result in "[e]nhanced

[3] The Sixth Circuit focused on the meaning of "system" in § 101. *See Kentucky*, 23 F.4th at 604 (considering dictionary definition and concluding that government's procurement "system" means its procurement "method"). Its resulting interpretation—that § 101 refers to the government's internal method of procurement—is consistent with Congress's usage in closely related provisions. For example, another procurement statute defines a "procurement system" as "the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function." 41 U.S.C. § 112.

worker productivity and higher quality work" for federal permittees and contractors. App. 22a. This diverges from the Sixth Circuit, which explained that such a justification "is a non-sequitur." *Kentucky*, 57 F.4th at 553. Even if a presidential directive "makes performance of a government contract 'more efficient and less costly,'" the fact "that goods and services are cheaper has no necessary relationship to whether the government's *system* of entering into contracts for those goods and services will be more efficient." *Id.* (quoting government brief) (emphasis added).

2. Even if the President could regulate contractors, the Tenth Circuit vastly expanded the Procurement Act in holding that the President may regulate federal permittees

Even if, contrary to the Sixth and Eleventh Circuits, § 101(1) empowers the President to regulate those from whom it procures goods and services, that power would not reach permittees.

It is undisputed that the government procures nothing from, and pays nothing to, permittees like Petitioners. Petitioners provide guide services to members of the public, and the government has no part in these transactions. Rather, the government simply authorizes Petitioners to conduct their business on federal land. *See* App. 139a–52a (example of Petitioners' permits). And though the permits forbid Petitioners from damaging federal land, *see, e.g.*, App. 147a–48a (forbidding spread of invasive species and noxious weeds), the permits do not substantively direct Petitioners' activities. They do not even require that Peti-

tioners provide services *at all*. The permits only *permit* Petitioners to conduct guided tours on federal land.

The Tenth Circuit tried to solve this problem by zeroing in on § 101(1)'s reference to providing the government with a system for "supplying . . . nonpersonal services." App. 18a. Because Petitioners supply outfitting services, the court held, Petitioners fall within § 101(1) and may be regulated by the President. *Id.*

This reasoning fails on two levels. First, as discussed above, the Procurement Act is concerned with the supply of services (and goods) *to government agencies*, not to outdoor enthusiasts or the public at large. Congress passed the Procurement Act to establish GSA and direct it to "supply personal property and nonpersonal services *for executive agencies* to use in the proper discharge of *their* responsibilities." 40 U.S.C. § 501(b)(1)(A) (emphasis added). Congress specified that GSA performs this centralizing function for "federal agencies, mixed-ownership Government corporations, the District of Columbia," *id.* § 502(a), and certain state and local agencies related to the blind and disabled. *Id.* § 502(b). Thus, for example, GSA "acquire[s] motor vehicles" and "furnish[es] motor vehicles and related services *to executive agencies*." *Id.* § 602(a)(1), (3) (emphasis added). When it supplies agencies with goods or services, agencies pay GSA, *id.* § 321(d), and GSA fixes the "rates to be charged *agencies* provided, or to be provided, *supply* of personal property and non-personal services through" GSA's Treasury fund. *Id.* § 321(b)(3) (emphasis added).

To hold that § 101 covers the supply of outfitting services to the public, the Tenth Circuit had to ignore this statutory context, construing § 101 as an "isolated provision[]." *Graham County*, 559 U.S. at 290 (citation

omitted). It also had to improperly treat § 101 as a substantive grant of power when it reasoned that "[c]rucially, . . . § 101 of [the Act] does not specify any particular entity that must receive the nonpersonal services to which it refers." App. 17a. By ignoring the textual limitations and statutory context of the Procurement Act, the Tenth Circuit erroneously expanded the Act's scope and application.

Second, even if § 101(1)'s reference to supply included the supply of outfitting services to the public, it would include only the supply of such services by "the Federal Government." 40 U.S.C. § 101; *see Kentucky*, 23 F.4th at 605 ("§ 101 refers to . . . function[s] performed by *the Federal Government*—not by the employees of federal contractors." (cleaned up)). Thus, the Procurement Act tasks GSA with supplying services and goods. *See id.* § 501(b)(1)(A) (requiring GSA to "supply personal property and nonpersonal services" to agencies); *id.* § 602(a)(3) (providing that GSA will "furnish motor vehicles and related services" to agencies); *id.* § 588 (providing for GSA's control over "supply of office furniture"). Section 101(1) does not encompass the supply of outfitting services by Petitioners.

Attempting to bridge the gap, the Tenth Circuit framed Petitioners as supplying outfitting services *on behalf of* the government. It held that, because Petitioners supply nonpersonal outfitting services, "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." App. 18a. That is, the court asserts, the government provides outfitting services through Petitioners by providing them with permits. And because Petitioners

are supposedly part of *the government's* supply of outfitting services, the President may regulate Petitioners through § 121(a).

This reasoning expands the Procurement Act far beyond contractors—and even beyond permittees. The Executive claims to be able to regulate those who hold federal "lease agreements," "licenses," "or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing." App. 129a, 29 C.F.R. § 23.20 (defining "contract").

Thus, the vision of the Procurement Act advanced by the Executive and validated by the Tenth Circuit extends to "entire industries"—"import and export, aviation, broadcasting, you name it." App. 60a (Eid, J., dissenting). For example, federal permits or leases are required for much of mining and drilling,[4] energy transportation[5] and production,[6] banking,[7] agriculture,[8] and the manufacture of plastics, chemicals,

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[4] *See, e.g.*, *Industrial Wastewater*, U.S. Env. Prot. Agency (Nov. 3, 2023), https://tinyurl.com/mr3kppdn; 30 U.S.C. Ch. 3A.

[5] *See, e.g.*, *Sierra Club v. FERC*, 68 F.4th 630, 635 (D.C. Cir. 2023), *vacated* (Aug. 23, 2023).

[6] *See, e.g.*, *Sierra Club, Inc. v. Granite Shore Power LLC*, _ F. Supp. 3d _, No. 19-cv-216-JL, 2023 WL 8455290, at *2 (D.N.H. Sept. 6, 2023); 16 U.S.C. § 797(e).

[7] *See, e.g.*, 12 C.F.R. § 5.20(b), (e)(3).

[8] *See, e.g.*, *Laws and Regulations that Apply to Your Agricultural Operation by Farm Activity*, U.S. Env. Prot. Agency (June 6, 2024), https://tinyurl.com/behc6tyh.

paper products,[9] and metals.[10] Under the Tenth Circuit's reasoning, then, all permit-holding firms in these industries are part of the *government's* system for supplying food, energy, financial services, and goods, and are therefore subject to the President's regulation under § 121(a).

This reasoning does not just sweep in this country's foundational industries; it also annexes into the President's personal control everyday Americans who seek "a permit for cutting down a single Christmas tree in a national forest, a one-night stay on a federal campsite, or even a visit to the U.S. Capitol." App. 59a–60a (Eid, J., dissenting).

But again, the Tenth Circuit's holding fails to read § 101 in light of the provision's context, which shows that Congress achieved its purpose through GSA's supply of services and goods and the Act's other operative provisions. The Tenth Circuit's conclusion to the contrary, again, relied on treating § 101(1) as a substantive provision. *See* App. 19a.

* * *

The Tenth Circuit's extension of the Procurement Act to permittees creates a circuit split with the Sixth and Eleventh Circuits and extends § 121(a) far beyond the statute's purpose and operative provisions. But § 121(a) is "a wafer-thin reed on which to rest such sweeping power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021). The Court should grant certiorari to review the scope of the President's power and resolve the circuit split.

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[9] *Water Releases by Industry*, U.S. Env. Prot. Agency (Mar. 20, 2024), https://tinyurl.com/t53xah8r.

[10] *See, e.g.*, *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 170 (3d Cir. 2004).

B. The opinion below significantly narrowed the major questions doctrine, creating a circuit split with the Fifth Circuit

This is a major questions case. *West Virginia*, 597 U.S. at 724. Therefore, the government must point to "'clear congressional authorization'" for the asserted power to establish minimum wages for Petitioners. *Id.* at 732 (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*). The Tenth Circuit, in concluding that the major questions doctrine does not apply, narrowed the doctrine to the point of irrelevance. The Court's attention is needed to prevent lower courts from expanding executive power unmoored from congressional policy.

1. A major question

President Biden claims to have discovered "in a long-extant statute"—the 1949 Procurement Act—"an unheralded power" of vast political and economic significance to regulate the affairs of private, non-procurement businesses that have permits to use federal land. *Id.* at 724. This is, therefore, "a major questions case." *Id.* Several "major questions" characteristics obtain here—both political and economic.

First, this claimed power "represent[s] a transformative expansion in [the government's] regulatory authority." *Id.* at 724 (quoting *UARG*, 573 U.S. at 324). Before the orders issued by President Obama in 2014 and President Biden in 2021, the only potentially comparable use of the Procurement Act had been the regulation of federal *contractors*, those who provided services to the government. And even as to contractors, the Fifth Circuit explained, "[i]t was not until [a] 2001 executive order . . . that it appears Presidents routinely and explicitly relied upon Procurement Act

authority to issue social-policy oriented procurement orders to contracting entities." *Louisiana v. Biden*, 55 F.4th 1017, 1030 (5th Cir. 2022) (citation omitted). No president had attempted to use the Procurement Act to regulate the private business relationships between federal-land permittees and their employees. *Cf. West Virginia*, 597 U.S. at 724 (noting EPA's use of a "gap filler" statute that had "rarely been used in the preceding decades").

Second, minimum-wage policy is an important topic within the legislature's sole domain. Congress has adopted minimum-wage laws for certain federal contractors[11] and for some but not all private employees.[12] But it has never adopted a law to regulate wage requirements for private, non-procurement permittees of federal land. *Cf. id.* at 724 (noting Congress's repeated failures to enact EPA's regulatory policy).

Third, the policy of minimum-wage laws remains a "subject of an earnest and profound debate across the country." *Id.* at 732 (citation omitted). In just the past few years, movements like the "Fight for Fifteen" have made national headlines,[13] and new federal and state

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[11] *See* 40 U.S.C. § 3142 (provision of Davis-Bacon Act setting minimum wages for mechanics and laborers working on certain public works); 41 U.S.C. § 6704 (provision of Service Contract Act setting minimum wages for service contractors); 41 U.S.C. § 6502 (provision of Walsh-Healey Public Contracts Act setting minimum wages for manufacturing contracts).

[12] *See* 29 U.S.C. §§ 206, 213.

[13] *See, e.g.*, Patrick McGeehan, *A $15 Minimum Wage Seemed Impossible. Now it's a Reality for a Million New York Workers,* New York Times (Dec. 31, 2018), https://tinyurl.com/3bmphb4c.

proposals spring up regularly.[14] The back-and-forth here—President Obama's adoption, President Trump's revocation, and President Biden's re-adoption—further reveals the political nature of this important question of *policy*. The Mandate thus goes far beyond a mere administrative act of "fill[ing] up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

Fourth, and relatedly, the Mandate "effected a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind." *West Virginia*, 597 U.S. at 728 (cleaned up). The Procurement Act authorizes the President to "prescribe policies and directives" to "carry out" the statute. 40 U.S.C. § 121(a). And the statute's purpose is "to provide the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services." *Id.* § 101(1). But the Mandate purports to regulate non-procurement businesses and impose additional costs. *See* App. 46a n.1 (Eid, J., dissenting) (noting difficulty imagining "any scenario where an agency rule exceeds the [Procurement Act's] vast grant of power after the President uses 'econom[y]' and 'efficien[cy]' as the justifications of executive action" here (citation omitted)).

Fifth, the Department has "no comparative expertise" in making policy judgments about federal procurement. *West Virginia*, 597 U.S. at 729 (citation omitted). While the Tenth Circuit held that the Department has expertise in minimum-wage issues, the

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[14] *See, e.g.*, Alec S. Blinder, *Washington Can Give America a Raise*, The Wall Street Journal (Aug. 20, 2024), https://tinyurl.com/yc89cu4r; Wage and Hour Division, *State Minimum Wage Laws*, U.S. Dep't of Labor (July 1, 2024), https://www.dol.gov/agencies/whd/minimum-wage/state.

relevant policy judgment under the Procurement Act involves the economy and efficiency of federal procurement and supply of property and services. The Department has no comparative expertise in the latter. *See id.* at 730 ("We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration.").

Finally, the Mandate has great economic significance. As the Department itself states, the resulting economic impact includes "transfers of income from employers to employees" of "$1.7 billion per year over 10 years," 86 Fed. Reg. at 67,194, in addition to a host of other costs. *Id.* at 67,204, 67,206, 67,208, 67,211.

2. The Tenth Circuit's war on the major questions doctrine

The Tenth Circuit concluded that the major questions doctrine doesn't apply for four reasons. The court's reasoning represents a dangerous evasion of this Court's precedent. "On issue after issue, the Court puts agency *ipse dixit* where reasoned analysis should be[.]" *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 405 (D.C. Cir. 2017) (Brown, J., dissenting from the denial of rehearing en banc).

First, the Tenth Circuit says that this isn't a case in which the executive seeks expansive power in modest words, vague terms, or ancillary provisions. App. 30a (citing *Whitman*, 531 U.S. at 468; *West Virginia*, 597 U.S. at 724). Why? Because, it claims, Congress used "expansive language" which effected a "'relatively broad delegation of authority.'" *Id.* (citation omitted). This is a non sequitur. Indeed, by relying on "expansive language," the court confirms that there is

no "clear congressional authorization" for the government's claimed power to regulate private, non-procurement businesses. *UARG*, 573 U.S. at 324; *see also NFIB v. Dep't of Labor*, 595 U.S. 109, 125 (2022) (Gorsuch, J., concurring) (explaining major questions doctrine "guards against" agency attempts to "exploit some gap, ambiguity, or doubtful expression" in "broadly worded statutes").

The Tenth Circuit next claims that the Mandate involves not the government's traditional regulatory authority, but rather, its "proprietary authority." App. 31a. The court admits that an "exercise of proprietary authority can amount to a regulation if it seeks to regulate conduct unrelated to the government's proprietary interests." *Id.* (citation omitted). But the court argues that the Mandate here merely reflects a "management decision" that the government "will do business with"—*i.e.*, issue permits to—"companies only on terms [the President] regards as promoting economy and efficiency." *Id.* This reasoning suffers from the same error as before—nowhere does the court identify "clear congressional authorization" to condition permitting on private businesses' wage structures. *Id.* Additionally, as alluded to above, a "management decision" promoting economy and efficiency would not increase costs. *Id.* And, finally, the Mandate does not involve a government-management decision; it purports to regulate the private conduct of third parties.

Third, the court claims that presidents have "over the decades" relied on the Procurement Act to regulate "federal contractors [and] to promote economy and efficiency in procurement and supply." App. 32a. But the court cites no presidential order purporting to regulate non-contractors. And, again, "[i]t was not until

[a] 2001 executive order . . . that it appears Presidents routinely and explicitly relied upon Procurement Act authority to issue social-policy oriented procurement orders to contracting entities." *Louisiana*, 55 F.4th at 1030 (citation omitted).

Finally, the court asserts that the Department has "expertise" in setting minimum wages for federal contractors. But, as just noted, Petitioners are not federal contractors, and the Department has no comparative expertise in evaluating the "economy and efficiency" of federal-procurement policy.

3. The Tenth Circuit's decision conflicts with a decision from the Fifth Circuit

The Tenth Circuit's decision and reasoning clash with the Fifth Circuit's decision in *Louisiana*. There, the court considered whether the Procurement Act allowed President Biden to require federal contractors to ensure, by adding a new clause to procurement contracts, that their entire workforce was fully vaccinated against COVID-19. *Id.* at 1019. The Fifth Circuit held that the major questions doctrine precluded the President's claimed authority. In doing so, the Fifth Circuit rejected the Tenth Circuit's flawed reasoning below.

The Fifth Circuit first rejected the argument that the government's exercise of its proprietary function is immune to the major questions doctrine. *Id.* at 1029. The government's argument would "carry more weight," the court said, if the vaccine mandate had applied "only to federal contractors on, for example, federal job sites." *Id.* at 1032. But the mandate covered all employees who work anywhere for any contractor. *Id.* The "vast scope" of that mandate belied the government's claim that it was acting merely as "the

manager of its internal affairs." *Id*. (quotation marks and citation omitted).

The Fifth Circuit also questioned whether the historical record supported the claim that these kinds of mandates represent long-standing practice under the Procurement Act. *Id*. at 1030. But, regardless, the vaccine mandate—purporting to regulate the conduct of contractor employees—was "dramatic[ally] differen[t]" than the other exercises of Procurement Act authority that focused on employers. *Id*. The Fifth Circuit's conclusion here underscores the Tenth Circuit's failure to distinguish between federal contractors—those involved in the government's procurement process—and non-procurement, private businesses.

The Tenth Circuit's opinion below cannot be squared with the Fifth Circuit's decision.

II. The Tenth Circuit's Impotent Version of the Intelligible Principle Test Conflicts with *Panama Refining* and *Schechter*—As Well as a Recent Fifth Circuit Opinion

Because the Procurement Act lacks an intelligible principle, it unlawfully delegates legislative power to the President. U.S. Const. art. I, § 1; *see* App. 46a (Eid., J., dissenting). Indeed, as Judge Eid explained, the Procurement Act "grants the President nearly unfettered power to create any policy he considers necessary to carry out nonpersonal services under the guise of economy and efficiency." *Id*. The majority acknowledges the Act's broad discretion. App. 17a, 30a. But it claims that the Act properly "channels" the President's discretion by allowing him to act "only" when he "'considers [it] necessary' to promote an 'economical' and 'efficient' system for procuring and supplying

goods and services." App. 37a (quoting §§ 101, 121(a)) (emphasis omitted).[15]

But, as Judge Eid observed, this language is "nearly identical" to language in the National Industrial Recovery Act ("NIRA"), which this Court twice held violated the nondelegation doctrine. App. 57a (Eid, J., dissenting); *see Panama Refining*, 293 U.S. at 407 (authorizing President to "'prescribe such rules and regulations as may be necessary to carry out the purposes'" of NIRA Title 1); *Schechter Poultry*, 295 U.S. at 523 & n.4 (authorizing President to act as he "in his discretion deems necessary to effectuate the policy herein declared").

A faithful application of *Panama Refining* and *Schechter* shows that the Procurement Act—like NIRA—violates the nondelegation doctrine because it delegates broad discretionary power without "requir[ing] the President to conduct any preliminary factfinding or to respond to a specified situation" or "provid[ing] the President a standard that sufficiently guides his broad discretion." App. 46a (Eid, J., dissenting).

In *Panama Refining*, the Court considered the President's authority under NIRA to prohibit the interstate or foreign transportation of hot oil produced or withdrawn in excess of state-set quotas. 293 U.S. at 406. NIRA stated that Congress wanted "to remove obstructions to the free flow of interstate and foreign commerce." *Id.* at 418. But the Court held that this

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[15] Yet elsewhere, the panel relied on the Act's broad delegation—even opining that "economy" and "efficiency" are "not narrow" terms—to hold that "enhanced worker productivity and higher quality work, standing alone, are sufficient justifications to invoke" the Procurement Act. App. 21a–22a.

"general outline of policy," *id.* at 417, was not a sufficient intelligible principle. To the contrary, the President was given "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." *Id.* at 415.

The same defect was found in *Schechter*, which held that no standard governed the President's authority under NIRA to enact "codes of fair competition" for certain industries. 295 U.S. at 529. The general policy stated in NIRA—instructing the President to adopt codes "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest," *id.* at 534—again did not sufficiently cabin the delegation. As this Court later explained, NIRA had failed to "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (citation omitted). In short, NIRA's vague statements failed to "articulate any policy or standard that would serve to confine the discretion of the [President]." *Id.* at 373 n.7.

The Tenth Circuit's decision below fails for the same reasons. As Judge Eid explained, what the panel claims is sufficient limitation in fact amounts to a blank check for the President to issue any order so long as he "considers" a directive to be "necessary" in his "*subjective* opinion." App. 57a (Eid, J., dissenting). The Procurement Act provides "no floor of what specific situations must arise[] [and] no ceiling on what the President may find economical or efficient to do." App. 50a (Eid J., dissenting); *compare with Panama Refining*, 293 U.S. at 415 (finding no intelligible principle given the absence of a requirement for fact-finding); *Schechter*, 295 U.S. at 538 (finding no intelligible

principle in requirement that President provide "a statement of an opinion" that an action "will tend to effectuate the policy" of the statute). Under the panel's holding, the Procurement Act empowers the President to "do whatever he finds necessary to regulate entire industries in the name of what he believes to be economical and efficient." App. 50a (Eid, J., dissenting). He could even promulgate the codes of fair competition that were disapproved in *Schechter*.

Accordingly, the Tenth Circuit's decision cannot be squared with *Panama Refining* or *Schechter*. And it stands in stark contrast to the Fifth Circuit's recent *en banc* opinion in *Consumers' Research v. FCC*, which involved the FCC's authority under the Telecommunications Act to impose taxes on telecommunications carriers and subsidize an undefined "universal service" program. 109 F.4th 743, 760 (5th Cir. 2024). The law, however, set out merely "'aspirational' principles rather than 'inexorable statutory command[s].'" *Id.* (citation omitted). And the "only real constraint on FCC's discretion to levy excise taxes on telecommunications carriers (and American consumers in turn) is that rates 'should' remain 'affordable.'" *Id.* at 761 (citing 47 U.S.C. § 254(b)(1)). As a result, the court held, the authority given to the FCC violated the nondelegation doctrine. The Fifth Circuit's approach conflicts with the Tenth Circuit's opinion by requiring—consistent with *Panama Refining* and *Schechter*—that an "intelligible principle" impose objective limits on delegated power. *Id.* at 761, 764 (emphasizing the Executive cannot be left to "roam at will" to make "policy judgments").

Nevertheless, the Tenth Circuit could point to cases from this Court that upheld broad delegations seemingly without the intelligible principle required

by *Panama Refining* and *Schechter*. *See, e.g.*, App. 36a (citing *NBC v. United States*, 319 U.S. 190, 216 (1943) (allowing FCC to regulate in the "public interest")). Perhaps for that reason, Members of this Court have indicated support to revisit the nondelegation doctrine. *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 149 (2019) (Alito, J., concurring); *id.* at 150 (Gorsuch, J., joined by Roberts, C.J., Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., dissenting from denial of certiorari).

In the absence of any example of a nondelegation violation since 1935, the Tenth Circuit followed the now conventional approach of the lower courts in uniformly upholding delegations, even when that requires inferring an intelligible principle from statutes that lack objective limitations.

The Court should grant this petition and resolve the tension between *Panama Refining* and *Schechter* and the virtually limitless scope of the "intelligible principle" in later decisions.

* * *

CONCLUSION

This Court should grant the petition.

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