No. 23-40671

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF MISSISSIPPI; STATE OF LOUISIANA,
Plaintiffs-Appellees,

v.

PRESIDENT JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; DEPARTMENT OF LABOR; JULIE A. SU, ACTING SECRETARY, U.S. DEPARTMENT OF LABOR, IN HER OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF LABOR; JESSICA LOOMAN, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES DEPARTMENT OF LABOR, WAGE & HOUR DIVISION,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

BRIEF FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE TEXAS ASSOCIATION OF BUSINESS SUPPORTING APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

No. 23-40671

State of Texas; State of Mississippi; State of Louisiana,
Plaintiffs-Appellees,
v.
President Joseph R. Biden, in his official capacity as President of the United States; Department of Labor; Julie A. Su, Acting Secretary, U.S. Department of Labor, in her official capacity as United States Secretary of Labor; Jessica Looman, in her official capacity as Administrator of the United States Department of Labor, Wage & Hour Division,
Defendants-Appellants.

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Plaintiffs-Appellees' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification.

Amici Curiae:

The Chamber of Commerce of the United States of America. The Chamber of Commerce of the United States of America has no parent corporation. No publicly held company has any ownership interest in the Chamber of Commerce of the United States of America.

The Texas Association of Business. The Texas Association of Business has no parent corporation. No publicly held company has any ownership interest in the Texas Association of Business.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Texas Association of Business ("TAB") is the state chamber of commerce, representing companies of every size and from various industries. TAB works in a bipartisan manner to protect Texas's pro-business climate, delivering solutions to the challenges affecting Texas employers. TAB's purpose is to champion the best business climate in the world, unleashing the power of free enterprise to enhance the lives of Texans for generations.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellants and Appellees consent to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

The minimum wage mandate at issue in this case imposes substantial costs and burdens on businesses that bid for or perform government contracts, including many of amici's members. Amici and their members likewise have an interest in opposing the Government's proposed interpretation of the Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. § 101 et seq., which has broad ramifications beyond this case for federal contracting and for businesses across many sectors that contract with the federal government.

The district court's permanent injunction correctly recognizes the limited scope of the Procurement Act. *Texas v. Biden*, --- F. Supp. 3d ----, 2023 WL 6281319 (S.D. Tex. Sept. 26, 2023). Executive Order 14,026 and its accompanying mandate would force federal contractors and subcontractors to increase the hourly minimum wage for their employees. This mandate exceeds the authority granted to the Executive Branch under the Procurement Act. Amici and their members have a substantial interest in ensuring that the Executive Branch regulation under the Procurement Act remains within the bounds of congressional authorization.

SUMMARY OF THE ARGUMENT

The wage mandate exceeds the President's authority under the Procurement Act by raising the minimum wage that all federal contractors and subcontractors—and ultimately the federal Government—must pay by $1.7

billion per year over ten years. The district court's permanent injunction against this wage mandate should be affirmed for multiple reasons.

First, the text of the Procurement Act does not support the exercise of authority contained in Executive Order 14,026. Second, even under the Government's theory, there is not a sufficient nexus between the wage mandate and improvement of economy and efficiency in federal contracting. Indeed, the wage mandate *decreases* economy and efficiency in federal contracting by significantly increasing costs. Third, the wage mandate goes beyond even previous extensions of presidential authority under the Procurement Act. Previous cases have read the President's authority broadly, but even those cases identified a more direct link between the order at issue and efficient procurement operations. Fourth, recent decisions by this Court and the Supreme Court regarding the major-questions doctrine cast further doubt upon the legality of the President's wage mandate.

BACKGROUND

During his presidential campaign, President Biden committed to raising the federal minimum wage to $15.00. *See* Meredith Newman & Karl Baker, *Joe Biden Calls for $15 Minimum Wage, Medicare Public Option at First 2020 Campaign Stop*, The News Journal (Apr. 29, 2019), https://bit.ly/3TLLrSI. And soon after he took office, congressional Democrats attempted to make good on that promise. *See* Andrea Hsu et al., *Senate Says No to $15 Minimum Wage for Now, But Democrats Vow to Push On*, NPR (Feb. 5, 2021),

https://n.pr/3TJz6P4; Alexander Bolton, *The Eight Democrats Who Voted 'No' on $15 Minimum Wage*, The Hill (Mar. 5, 2021), https://bit.ly/43voMNU.

After these legislative efforts proved unsuccessful, the President stepped in by issuing Executive Order No. 14,026, *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 22,835 (Apr. 27, 2021). Through this Order, the President directed the Secretary of Labor to implement regulations requiring all federal contractors and subcontractors to increase their minimum wage to $15.00 per hour. *Id*. at 22,835-36. This Order applies to any new contract or contract-like instruments with the federal Government. *Id.* at 22,837. And the Order extends broadly to "workers working on or *in connection with* a Federal Government contract." *Id*. at 22,835 (emphasis added). Moreover, the Order directs the Secretary of Labor to set annual increases for every year hereafter. *Id*. The Department of Labor conducted notice-and-comment rulemaking and issued the final rule per the Executive Order's instruction. *See Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 24, 2021).

Legal challenges to the wage mandate ensued, including this one, focusing on the President's claimed authority under the Procurement Act. *See, e.g.*, *Texas*, 2023 WL 6281319; *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023). Texas, Louisiana, and Mississippi sued to challenge the wage mandate and sought a permanent injunction on February 10, 2022. The Government filed a motion to dismiss, or in the alternative, a motion for summary judgment. The States responded to the Government's

motion and cross-moved for summary judgment. The district court concluded that the mandatory wage increase exceeded the President's authority under the Procurement Act, granted in part the States' cross-motion for summary judgment, and enjoined the Government from enforcing Executive Order 14,026 and the Final Rule on September 26, 2023. The Government appealed.

ARGUMENT

I. The Procurement Act's text and context do not support the exercise of authority contained in Executive Order 14,026.

The text of the Procurement Act does not support the far-reaching measures contained in Executive Order No. 14,026. The government's authority to purchase is not a power to unilaterally regulate.

The Government points to two provisions in the Procurement Act in attempting to justify the wage mandate. Gov't Br. 21-27. The first, 40 U.S.C. § 101, is the prefatory language of the Act. It reads, 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 including contracting . . . .
> (2) Using available property.
> (3) Disposing of surplus property.
> (4) Records management.

40 U.S.C. § 101. The second provision, 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." *Accord Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330-31 (D.C. Cir. 1996) ("The procurement power *must* be exercised consistently with the structure and purposes of the statute that delegates that power." (citation omitted)).

The Government's interpretation stitches these provisions together but reads out key language. The Government has taken these provisions together to mean that the Procurement Act authorizes essentially anything that the President "considers necessary" to make anything about federal contracting more "economical and efficient." Gov't Br. 24-25.

But that is not what the text says. Start with the first provision in 40 U.S.C. § 101. As the Sixth and Eleventh Circuits recently explained in enjoining President Biden's COVID-19 vaccine mandate for federal contractors and subcontractors, the Act's statement of purpose in 40 U.S.C. § 101 is just that—a statement of purpose, not a grant of authority.[2] *Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022); *Georgia v. President of the United States*, 46 F.4th 1283, 1298 (11th Cir. 2022). That is, although "[s]tatements of purpose may be

[2] This Court only lightly touched on this issue observing that the statute's statement of purpose may "act[] as a set of guidelines within which [the President's] policies must reside." *Louisiana v. Biden*, 55 F.4th 1017, 1023 n.17 (5th Cir. 2022).

useful in construing enumerated powers later found in a statute's operative provisions," the statements "are not *themselves* those operative provisions." *Kentucky*, 23 F.4th at 604. So "[a]n executive order cannot rest merely on the policy objectives of the Act." *Georgia*, 46 F.4th at 1298 (internal quotation marks and citation omitted); *see also Sturgeon v. Frost*, 139 S. Ct. 1066, 1086 (2019) ("[S]tatements of purpose . . . by their nature cannot override a statute's operative language." (cleaned up)). The statute's reference to "economical" and "efficient" contracting provides context for the scope of the President's authority, but it does not affirmatively grant authority on every question that touches upon either economy or efficiency.

A more natural reading conveys that the Act "permits [the President] to employ an 'economical and efficient *system*' to '*procur*[*e*]' those nonpersonal services." *Kentucky*, 23 F.4th at 604 (second alteration in original). The Act grants the President authority over the federal government's own *mechanisms* for achieving goals such as "[p]rocuring and supplying property and nonpersonal services," 40 U.S.C. § 101(1)—but not over every aspect of how contractors fulfill those demands. *See Texas*, 2023 WL 6281319, at *7 ("[T]he President's authority is limited to the supervisory role of buying and selling of goods."). Nor does this text grant the President the broad-reaching authority—covering all federal contractors, subcontractors, and any employee working "in connection with" a covered federal contract—to unilaterally impose an increased minimum wage at a staggering cost.

This more natural reading of the Act is confirmed by the context in which it came about. Arising after the imperative of World War II had ended, the Procurement Act was intended to "streamline[] and modernize[]" the federal government's "method of doing business." *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979). Congress intended to create "an efficient, business-like system of property management." *Reich*, 74 F.3d at 1333 (internal quotation marks and citation omitted). And the Act "was designed to centralize Government property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Kahn*, 618 F.2d at 787. As the Sixth Circuit explained, "the fear . . . was not that personnel executing duties under nonpersonal-services contracts were *themselves* performing in an uneconomical and inefficient manner, but instead that the manner in which federal agencies were entering into contracts to produce goods and services was not economical and efficient." *Kentucky*, 23 F.4th at 606. The Procurement Act was intended to centralize the federal government's procurement responsibility, not grant the Executive a "latent well" of regulatory authority over every individual employed by private federal contractors and subcontractors. *Id*.

This view accords with the larger statutory framework governing procurement. First, 41 U.S.C. § 1303(a) grants the Federal Acquisition Regulatory Council (with limited exceptions not applicable here), not the President, exclusive authority to "issue and maintain . . . a single Government-wide

procurement regulation." Second, the Procurement Act allows the President to issue "policies and directives," but not regulations. 40 U.S.C. § 121(a).

This context frames the core issue in this case. The President is attempting to achieve through the Procurement Act what he could not achieve legislatively, precisely what happened with the vaccine-mandate cases. There were many iterations of vaccine mandates and many cases challenging them. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. OSHA* ("*NFIB*"), 142 S. Ct. 661 (2022) (per curiam) (Occupational Safety and Health Administration standard requiring that employers with 100 employees or more mandate covid vaccines for their employees). In the Procurement Act vaccine mandate cases, the President attempted to regulate workplace health and safety of federal contractors and subcontractors under the guise of setting procurement policy. *See Kentucky*, 23 F.4th at 606-07. But courts correctly rejected that effort. As this Court recognized, "[t]o allow [the contractor] mandate to remain in place would be to ratify an 'enormous and transformative expansion in' the President's power under the Procurement Act." *Louisiana*, 55 F.4th at 1031 (quoting *Util. Air Regul. Grp. v. EPA*, 730 U.S. 302, 324 (2014)); *Georgia*, 46 F.4th at 1297 ("We cannot say that when Congress passed the Procurement Act, it meant to delegate authority to set baseline health and safety qualifications for contractors[.]").

These decisions confirm that Congress has circumscribed the President's power over procurement. The Procurement Act was intended to facilitate the federal Government's ability to contract for goods and services—*not*, as

the Government argues, to regulate anything and everything arguably connected to the realm of procurement. "[T]he statute does not offer the breadth of authority that the federal government asserts" and does not "grant[] the President complete authority to control the federal contracting process in a way he thinks is economical and efficient, subject only to certain statutory limitations." *Georgia*, 46 F.4th at 1298. No one contests the President's power to procure, or even the President's power to make policies and directives to govern the process of procurement.

But this power is not one to regulate generally, and not one to unilaterally impose a far-reaching minimum wage requirement that imposes billions of dollars of costs annually on the economy. *See* 86 Fed. Reg. at 67,194; *see also Georgia*, 46 F.4th at 1295.

The wage mandate is not unique among executive orders by Presidents—of both political parties—attempting to wield the federal government's procurement largesse as a regulatory cudgel. The Executive Branch has repeatedly used regulations over government contractors to impose policy changes that no private entity making a purchase would ever impose on a contractor or a subcontractor.

For instance, no private business purchasing goods or services would insist that a contractor or subcontractor must provide notice of *Beck* rights to its employees, or else it would not do business with that contractor (or sub). *Comms. Workers v. Beck*, 487 U.S. 735, 762-63 (1988) (recognizing a union worker's right to refuse to pay union fees for activities other than those

related to the union's collective bargaining). But the Executive Branch imposed those requirements on government contractors—and then rescinded them and reimposed them and rescinded them again in a fight over union policy, not procurement policy. *See, e.g.*, Exec. Order No. 12,800, *Notification of Employee Rights Concerning Payment of Union Dues or Fees*, 57 Fed. Reg. 12,985 (Apr. 13, 1992); revoked by Exec. Order No. 12,836, *Revocation of Certain Executive Orders Concerning Federal Contracting*, 58 Fed. Reg. 7,045 (Feb. 1, 1993); reimposed by Exec. Order. No. 13,201, *Notification of Employee Rights Concerning Payment of Union Dues or Fees*, 66 Fed. Reg. 11,221 (Feb. 17, 2001); revoked again by Exec. Order No. 13,496, *Notification of Employee Rights Under Federal Labor Laws*, 74 Fed. Reg. 6,107 (Jan. 30, 2009). Nor would a private purchaser require that a contractor or subcontractor provide its employees with a certain number of paid sick days annually. But the Executive Branch imposed just such a requirement, claiming to do so in the name of "increas[ing] efficiency and cost savings in the work performed by parties that contract with the Federal Government." Exec. Order No. 13,706, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54,697 (Sept. 7, 2015).

The Executive Branch insists these are "procurement" requirements, but they are nothing more than regulatory tools to engineer employment policy that the President could not achieve through legislation (such as the Fair Labor Standards Act or the National Labor Relations Act).

II. The wage mandate is not reasonably related to the Procurement Act's goals of an economic and efficient system of contracting.

With this context in mind, courts ask at a minimum whether challenged actions are "reasonably related to the Procurement Act's purpose of ensuring efficiency and economy in government procurement." *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981). Courts sometimes articulate this reasonable-relation standard to require a "sufficiently close nexus" between the challenged order and the "criteria" of "economy" and "efficiency." *Kahn*, 618 F.2d at 792; *see also* Gov't Br. 13 (conceding that the nexus must at least be "close"). Previous examinations of the Act have emphasized that this "nexus" requirement "does not write a blank check for the President to fill in at his will." *Kahn*, 618 F.2d at 793. Rather, the nexus must tangibly relate to the systems used for procurement.

The wage mandate fails to satisfy that requirement. The Government's stated nexus is that the wage mandate would "enhance[] worker productivity and generate[] higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover." 86 Fed. Reg. at 22,835; s*ee also* 86 Fed. Reg. at 67,127.[3] In other words, individuals employed by federal

[3] For the contractor vaccine mandate, the Government likewise pointed to "reducing absenteeism and decreasing labor costs" as "improv[ing] economy and efficiency" in federal contracting. Office of Management and Budget, Notice: Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14,042, 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021)

contractors and subcontractors will be happier and work harder, theoretically lowering the costs of federal contracts.

But the Procurement Act does not comport with this theory. If it did, the Procurement Act would essentially grant the President authority over any aspect of labor relations—or public health, or social policy—so long as it had some connection to employee morale at federal contractors and subcontractors. The scope of such authority would be virtually limitless. Yet the Government offers no limiting principle, and it does nothing to assuage fears that the reach of the Procurement Act would continue to grow. *See* Gov't Br. 24-25.

III. The wage mandate goes beyond previous extensions of presidential authority under the Procurement Act.

The Government's interpretation of the Procurement Act would elevate presidential authority to a new level, beyond the broadest understandings of the Act that courts have accepted in the past. This Court need not determine whether those prior interpretations are correct to decide this case. Even assuming that they are, they cannot justify the level of presidential power that the Government asserts here.

In *AFL-CIO v. Kahn*, for example, the President signed an executive order authorizing denial of government contracts to companies that failed or refused to comply with voluntary wage and price standards. 618 F.2d at 785. There, the court determined that the President's statutory authority to "prescribe" policies as he deems "necessary," though somewhat open-ended,

was not unlimited. *Id.* at 788. The court went on to note that this language was guided by the statute's purpose, which was to further the federal government's aim of having an "economical and efficient system for . . . procurement and supply." *Id.* The words "economy" and "efficiency," the court noted, "encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* at 789. In that case, the court upheld the use of the Procurement Act to implement the wage and price controls but "emphasize[d] the importance to [its] ruling . . . of the nexus between the wage and price standards and likely savings to the Government." *Id.* at 793. For example, the court found it noteworthy that the wage and price control at issue "will likely have the direct and immediate effect of *holding down* the Government's procurement costs." *Id.* at 792 (emphasis added). Here, by contrast, the wage mandate is premised on speculation that it will eventually lower costs by boosting morale. But the mandate imposes its own steep, direct, and immediate cost—$1.7 billion per year over 10 years, though even this "may . . . underestimate" the true cost. 86 Fed. Reg. at 67,194. The lack of a "direct and immediate effect" improvement in economy and efficiency demonstrates the lack of a sufficient nexus.

The Government points to *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), in support of its position that the standard under the Procurement Act is a "lenient" one, Gov't Br. 13, but that decision's conclusory treatment of the argument is not persuasive. There, the court upheld an executive order issued under the Procurement Act requiring

federal contractors to post notices at all facilities that federal labor laws protected employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities. *Chao*, 325 F.3d at 362-63. But in *Chao*, the primary question was whether the executive order was preempted by the *Garmon* preemption doctrine of the National Labor Relations Act (NLRA). *Id.* at 363; *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Under the *Garmon* preemption doctrine, the executive order would have been preempted if it involved regulation of an activity that was either protected or prohibited by the NLRA. *Chao*, 325 F.3d at 363. The court determined that the regulated activity was neither protected nor prohibited, and therefore the order was not preempted. *Id.* at 363-66.

The court's discussion of the Procurement Act in *Chao* came almost as an afterthought to its primary holding regarding preemption. The district court had not reached the Procurement Act question, but plaintiffs offered it as an "alternative ground for affirmance." *Id.* at 362, 366. The court spent about two paragraphs on the issue and failed to explain how a sufficient nexus existed. *Id.* at 366. The court merely gave a brief summary of *Kahn* and then restated the nexus offered by the President's executive order regarding the alleged connection to economy and efficiency. *Id.* The court even acknowledged that the "link" between the order and the Act's goals of economy and efficiency was "attenuated." *Id.* But the court dismissed its own (well-founded) skepticism and surmised that since a tenuous link had been permissible in *Kahn*, a tenuous link could be permissible there. *Id.* at 366-67.

Even if a sufficient nexus had existed in *Chao*, neither the result nor the court's reasoning could support the minimum wage requirement at issue here. The order in *Chao* bore a more direct relationship to labor management than the wage mandate. And the court's reliance on *Kahn* does not hold up where the wage mandate—unlike the orders in both *Kahn* and *Chao*—actually hinders economy and efficiency by significantly raising the cost of federal contracts.

As a final example, in *Chamber of Commerce v. Napolitano*, the Chamber challenged an executive order requiring federal contractors to use "E-Verify," an electronic system used to check immigration status for employment eligibility. 648 F. Supp. 2d 726, 729 (D. Md. 2009). The Chamber challenged the order under the Procurement Act, arguing that there was not a sufficiently close nexus between the order and the Procurement Act's "criteria of efficiency and economy." *Id.* at 737. The court upheld the order, requiring the President to provide only a "reasonable and rational" explanation of how the measure was "necessary" to promote "efficiency and economy." *Id.* at 738.

Even assuming that interpretation of the Procurement Act was correct, the wage mandate here has an even more tenuous connection to hiring procedures. In *Chamber of Commerce v. Napolitano*, the executive order was aimed at improving contractors' employment eligibility determinations to reduce immigration enforcement actions. *Id*.; *see also Louisiana*, 55 F.4th at 1030 n.39 (noting that the E-Verify executive order at least "track[ed] with a statutory

scheme—namely, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and related immigration and work authorization laws"). There, the order regulated a contractor's actual hiring operations to improve a contractor's efficiency. Here, the wage mandate indiscriminately requires a new minimum wage across industries in the hope that it will "enhance[] worker productivity" and "boost[] workers' health, morale, and effort"—and at a cost which may exceed the rule's estimates. 86 Fed. Reg. at 22,835; *see also* 86 Fed. Reg. at 67,194 (The Department of Labor's cost estimate "may be an underestimate because it does not capture workers already earning above $15.00 that may have their wages increased as well (i.e., spillover costs).").

In each of these cases, the courts took a deferential approach to the president's exercise of authority under the Procurement Act. Whether that overarching approach was correct is not at issue here. But in each of these cases, the challenged order was at least related to "the ordinary hiring, firing, and management of labor." *Kentucky*, 23 F.4th at 607. But the wage mandate moves beyond "the ordinary . . . management of labor" and into policymaking for a large portion of the American workforce. Assuming for present purposes that those previous orders were sufficiently connected to the grant of authority under the Act, they cannot support the Government's claim of authority here. The wage mandate does not improve the "economy and efficiency" of federal contracting.

IV. Recent Supreme Court decisions about the major-questions doctrine cast further doubt on the Government's assertion of authority here.

As the district court correctly concluded, the major-questions doctrine likewise bars the Government's assertion of authority here. *Texas*, 2023 WL 6281319, at *11. Under the major-questions doctrine, Congress must "speak clearly" to delegate regulatory "powers of vast economic and political significance" to the Executive Branch. *NFIB*, 142 S. Ct. at 665 (internal quotation marks omitted). And "[u]nder [the Supreme Court's] precedents, this is a major questions case." *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). Just two years ago, the Court explained that a vaccine mandate for millions of Americans implicated the major-questions doctrine because that mandate constituted "a significant encroachment into the lives . . . of a vast number of employees." *NFIB*, 142 S. Ct. at 665; *see also Louisiana*, 55 F.4th at 1028-30 (explaining that the contractor vaccine mandate implicated the major-questions doctrine because it impacted twenty percent of the workforce and moved beyond the Procurement Act's "past uses"). Likewise here, the wage mandate imposes billions of dollars in costs: there are the costs to employers from coming into compliance with the wage mandate; the costs of increasing pay to employees; and spillover costs affecting the whole economy from distorting wage payments for federal contracts and subcontracts compared to other state and private contracts. *See Texas*, 2023 WL 6281319, at *12; 86 Fed. Reg. at 67,194. Applying an unyielding mandate "across broad procurement

categories," with such far-reaching consequences, is precisely the type of regulatory change that "requires 'clear congressional authorization.'" *Georgia*, 46 F.4th at 1296 (quoting *West Virginia*, 142 S. Ct. at 2609).

The Government resists the conclusion that the major-questions doctrine applies, even as it concedes that the authority it claims here is "broad and flexible." *See* Gov't Br. 16. The Government argues that the wage mandate is "consistent with a longstanding statutory interpretation [of the Procurement Act] that does not impose 'vast' or 'transformative consequences." *Id.* at 28 (citing *Util. Air Regul. Grp.*, 730 U.S. at 324). And it posits that the "focused effect" of the wage mandate shows that it is "an exercise of procurement authority rather than regulatory power." *Id.* at 31.

Not so. There is no "procurement power" exception to the major-questions doctrine. The Supreme Court has stated that the doctrine applies in "all corners of the administrative state," *West Virginia*, 142 S. Ct. at 2608 (majority op.), regardless of whether the entity claiming congressional authority is subject to the direct control of the President, *see, e.g.*, *id.* at 2610 (applying the doctrine to review action by the Environmental Protection Agency, a quasi-independent agency); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (applying the doctrine to review action by the Attorney General, a cabinet appointee); *see also Louisiana*, 55 F.4th at 1031 n.40 (rejecting the Government's argument that the major-questions doctrine does not apply to the President and noting that "delegations to the President and delegations to an agency should be

treated the same under the major questions doctrine"). The major-questions doctrine applies here.

And the Congress has not clearly authorized the President's wage mandate. The Government locates its purportedly clear authorization in the aforementioned 40 U.S.C. §§ 101 and 121. The Government argues that those provisions are worded "broad[ly]." Gov't Br. 12-13. But as the Supreme Court's major-questions decisions establish, it is a mistake to conflate breadth with clarity. In *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021), for example, the Government relied on a similarly broad statute to claim the authority to halt evictions. There, the Government pointed to the Surgeon General's authority "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" between States. *Id.* at 2487 (quoting 42 U.S.C. § 264(a)). And in *NFIB*, the Government relied on the power to set "occupational safety and health standards" to support its workplace vaccine mandate. *NFIB*, 142 S. Ct. at 665 (quoting 29 U.S.C. § 655(b)). In both instances, the statutory language was arguably *broad* enough to authorize the power the Government claimed. *West Virginia*, 142 S. Ct. at 2609. But in neither instance was the statute *clear* enough. *See id.*; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *NFIB*, 142 S. Ct. at 665. So too here, the statutory text does not reflect clear Congressional authorization to unilaterally implement a wage policy for all federal contractors, subcontractors, and any employee working "in connection with" a covered federal contract.

There are still other "telling clues" that Congress did not authorize the sweeping power the Government asserts. *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring). "[T]he age and focus of the statute," for example, offer no indication that the Procurement Act permits the wage mandate. *Id.* at 2623. These considerations undermined the Government's position in *NFIB* because the statute at issue "was adopted 40 years before the pandemic and . . . focused on conditions specific to the workplace rather than a problem faced by society at large." *Id.* And they undermine the Government's position here. As already explained, the Procurement Act, passed in 1949, was enacted to improve the post-World War II efficiency of the government's procurement system, not to prescribe a national minimum wage standard. *Georgia*, 46 F.4th at 1293-94. The Government's "attempt to deploy an old statute focused on one problem to solve a new and different problem [is] a warning sign that it is acting without clear congressional authority." *West Virginia*, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

Furthermore, the "fundamental policy decisions" are the "hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment); *accord id.* at 645-46 (plurality op.); *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)). The wage mandate is just such a "fundamental policy decision." But rather than point to express congressional authorization, the President uses the

Procurement Act as a foot in the door to push through a sweeping policy objective that he could not achieve legislatively. The major-questions doctrine bars this kind of veiled acquisition of authority by the Executive.

CONCLUSION

The Court should affirm the district court's preliminary injunction.

Dated: March 29, 2024

Respectfully submitted.

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CERTIFICATE OF SERVICE

On March 29, 2024, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,211 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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