IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

DUKE BRADFORD, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF LABOR, *et al.*, Defendants.	CIVIL ACTION NO. 1:21-cv-03283

MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Duke Bradford and Arkansas Valley Adventure, LLC, d/b/a AVA Rafting and Zipline ("AVA") move for summary judgment against Defendants and an order setting aside the rule, *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 23, 2021) ("Rule").

The Rule sets a $15 hourly minimum wage, with annual increases and overtime, for recreational outfitters like Plaintiffs who serve private individuals in private transactions. The government purports to impose this minimum wage under the Procurement Act, a statute enacted to make government procurement more efficient, but Plaintiffs' only link to the government is the fact that their activities require federal permits. Plaintiffs do not supply the government with any goods or services; they are not federal contractors. Accordingly, the Rule exceeds the government's statutory authority, and if it does not, then the Procurement Act delegates lawmaking authority in violation of Article I of the Constitution. Furthermore, because the Department of Labor failed to consider alternatives in promulgating the Rule, its issuance of the Rule was arbitrary and capricious.

While the Tenth Circuit considered some related issues in affirming this Court's denial of a preliminary injunction, Plaintiffs only raised some of their arguments before the Tenth Circuit. Many of Plaintiffs' arguments are newly raised and are not bound by the Tenth Circuit's conclusion that Plaintiffs' preliminary-injunction arguments are not likely to succeed. Reviewing Plaintiffs' arguments anew, the Court should find the Rule to be unlawfully promulgated and set it aside.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Prior Agency Action

1. In 2014, President Obama issued Executive Order 13,658 under the Federal Property and Administrative Services Act ("Procurement Act" or "Act"), 40 U.S.C. § 101, *et seq.*, directing the Department of Labor ("DOL") to establish a minimum wage for "federal contractors and subcontractors." 79 Fed. Reg. 9851, 9852–53 (Feb. 12, 2014).

2. DOL implemented the Executive Order through a rule that required work performed on eligible federal contracts to be paid a $10.10 minimum hourly wage plus overtime and annual increases. 79 Fed. Reg. 60,634 (Oct. 7, 2014).

3. The rule defined contracts to include not just "contracts" but also "contract-like instruments," an "intentionally all-encompassing" definition that included "lease agreements," "licenses, permits," and "any other type of agreement." *Id.* at 60,639, 60,646, 60,652.

4. In 2018, President Trump issued Executive Order 13,838, exempting outfitters and guides from the rule. 83 Fed. Reg. 25,341 (May 25, 2018).

5. The President said that the rule's application "to outfitters and guides operating on Federal lands" would "not promote economy and efficiency" because of that sector's unusual work structures. *Id*.

6. DOL issued a rule implementing the order and included an analysis that agreed with the President. 83 Fed. Reg. 48,537, 48,540 (Sept. 26, 2018).

II. The New Rule

7. On April 27, 2021, President Biden reversed course, issuing Executive Order 14026, raising the previous hourly wage to $15 plus overtime and annual increases,

and revoking the exemption for recreational services on federal lands. 86 Fed. Reg. 22,835 (Apr. 27, 2021) (together with the Rule, the "Mandate").

8. On November 23, 2021, DOL implemented the order in a final rule effective January 30, 2022. 86 Fed. Reg. 67,126.

9. The Rule confirmed that the minimum wage applied to recipients of special use permits like those held by Plaintiffs. *Id.* at 67,147.

10. DOL estimated the Rule would affect more than 500,000 private firms, including 40,000 firms that provide services pursuant to special use permits on federal lands, and result in "transfers of income from employers to employees in the form of higher wage rates" of "$1.7 billion per year over 10 years," with "average annualized direct employer costs" of "$2.4 million" for each firm. *Id*. at 67,194–96.

11. The Rule is economically significant. *Id.*

12. The Rule recognized that these cost increases, as well as "regulatory familiarization costs and [] implementation costs," would likely be passed on to the government itself—at least as to procurement contracts—and thus "Government expenditures may rise." *Id.* at 67,204, 67,206.

13. Recreational firms holding permits to use federal lands are "[n]on-procurement," and thus "cannot as directly pass costs along to the Federal Government." *Id*.

14. As a result, the Rule "may result in reduced profits" for such firms, or outright losses, ameliorated only to the extent consumers are willing to pay "higher prices." *Id*.

15. DOL claimed "this final rule would result in negligible or no disemployment effects." *Id.* at 67,211.

16. DOL's supporting evidence suggests significant negative employment effects. *See id*.

17. DOL acknowledged that the Rule might place permittees at a competitive disadvantage with competitors not operating on federal lands. *Id*. at 67,208.

18. DOL said that the "purpose of this rulemaking is to implement Executive Order 14026," and thus it had no discretion to consider continuing the exemption for special use permits. *Id*. at 67,129, 67,216.

19. DOL said that whether statutory authority existed for the executive order and Rule was "not within the scope of this rulemaking action." *Id*. at 67,131.

20. DOL attempted to justify the Rule by pointing to economic research that it claimed proved that losses for special use permit holders would be "substantially offset" due to increased productivity and morale, which would improve services for the government and public. *Id.* at 67,153.

III. The Plaintiffs

21. Duke Bradford owns and operates Arkansas Valley Adventures, a licensed river outfitter in Colorado. ECF No. 56-1 ¶ 2 (Bradford declaration); ECF No. 31 at 5 ("MPI Order").

22. AVA's business includes leading members of the public on multi-day expeditions on federal lands. MPI Order at 6.

23. AVA leads these expeditions under federal permits that allow AVA to access the relevant federal lands. *Id.*

24. Members of the public pay AVA for its services.

25. The government pays nothing to AVA.

26. AVA employs guides to lead these expeditions. *Id.*

27. The Rule requires AVA to pay at least some of its guides a higher hourly wage than in the absence of the Rule and "incur other related costs." *Id.* at 12, 14.

28. This Court has determined that Bradford and AVA have standing. *Id.* at 12.

IV. Procedural History

29. Plaintiffs filed a complaint for injunctive and declaratory relief on December 7, 2021. ECF No. 1.

30. Plaintiffs then moved for a preliminary injunction on December 9, 2021, and after an evidentiary hearing, this Court denied the injunction in a written opinion. MPI Order.

31. Plaintiffs filed a notice of interlocutory appeal, and on April 30, 2022, the Tenth Circuit affirmed over a dissent from Judge Eid. *Bradford v. U.S. DOL*, 101 F.4th 707 (10th Cir. 2024).

32. The Tenth Circuit held its mandate until the Supreme Court denied Plaintiffs' petition for a writ of certiorari on January 13, 2025. ECF Nos. 83, 85.

33. While appeal was ongoing, the parties briefed cross-motions for summary judgment, ECF Nos. 56, 63, and the Court later administratively closed the case pending the outcome of the appeal, ECF No. 78.

34. After the Tenth Circuit issued its mandate, this Court reopened the case and, in response to the parties' request to renew their cross-motions for summary judgment, ordered a briefing schedule. ECF No. 87.

ARGUMENT

Typically, a movant must "show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" for summary judgment.

Fed. R. Civ. P. 56(a). But when assessing such a motion in an APA case, "the district judge sits as an appellate tribunal," *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001), and "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).

The Rule is unlawful for three independent reasons. First, the Procurement Act does not authorize the Rule. Second, if the Procurement Act authorizes the Rule, the Act delegates legislative power in violation of Article I of the Constitution. Third, the Rule is arbitrary and capricious because the Department of Labor failed to consider alternatives to the Rule.

I. The Procurement Act Does Not Authorize the Rule

The Executive Branch's authority "must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). A rule "in excess of statutory . . . authority" must be set aside. 5 U.S.C. § 706(2)(C). The Rule states that it is authorized as an implementation of Executive Order 14,026. 86 Fed. Reg. at 67,129. And the government claims that the Executive Order is authorized under a combination of 40 U.S.C. §§ 121(a) and 101. *Id.* It is not.

Sections 101 and 121(a) are part of the Procurement Act. Before the Act was passed, there was no central agency directing procurement, and federal procurement was diffuse, ad hoc, and wasteful as a result. *Georgia v. President of the U.S.*, 46 F.4th 1283, 1293 (11th Cir. 2022). Congress established the Hoover Commission to study the issue, and the Commission recommended centralizing procurement in a new agency, which became the General Services Administration ("GSA"). *Id.* In establishing the GSA,

the agency was principally directed to "procure and supply personal property and nonpersonal services for executive agencies." § 501(b)(1)(A). It does this by procuring personal property and nonpersonal services with money held in a specially created Treasury fund. § 321(c). GSA then supplies that property and those services to requisitioning agencies, which pay GSA according to rates established by the GSA Administrator. § 321(b)(3), (d). GSA must "determine[] that [each] action is advantageous to the Federal Government in terms of economy, efficiency, or service." § 501(a)(1)(A). GSA also supplies related services to agencies, such as managing agencies' motor vehicles, §§ 602(a)(1), 603(a)(1), and furniture, § 588.

> Section 101 is the Procurement Act's purpose statement, which states:
>
> 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, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.
>
> **(2)** Using available property.
>
> **(3)** Disposing of surplus property.
>
> **(4)** Records management.

Section 121(a) authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle" and specifies that "[t]he policies must be consistent with this subtitle."

The government's argument relies on two mistakes. Section 121(a) empowers the President to direct agencies how to carry out the Act's operative provisions, that is, those

provisions that vest powers and direct action to be taken. But, to support the Mandate, the government goes further, arguing that § 121(a) empowers the President to issue orders that directly implement the purpose statement itself, even if an order has no relation to the Act's operative provisions. Next, the government plucks from § 101 the words "supplying . . . nonpersonal services" and—ignoring the surrounding language and the rest of the Act—it interprets the phrase to reach *Plaintiffs'* supply of recreational services to *members of the public* under federal permits. Plaintiffs address these mistakes and the relevance of the Tenth Circuit's decision above in turn.

A. Section 121(a) does not authorize the President to directly carry out § 101

During the preliminary-injunction phase of this case, Plaintiffs focused on other issues and did not dispute that the President could directly carry out the Act's purpose statement, such that the statement operated as a substantive source of authority. *See* ECF No. 7 at 6 (motion for preliminary injunction); Tenth Cir. Doc. 10110656087 (Plaintiffs' opening brief). Accordingly, this Court and the Tenth Circuit likewise assumed, but did not decide, that the President may issue directives to establish an economical and efficient system of procurement and supply of property and nonpersonal services. *See Bradford*, 101 F.4th at 721.[1] Plaintiffs challenge this premise now, and two circuits that have considered this issue agree that the President cannot use § 121(a) to directly carry out § 101.

[1] *City of Albuquerque v. U.S. Department of Interior* did not hold that the President may issue whatever directive is consistent with § 101. 379 F.3d 901 (10th Cir. 2004). There, the Tenth Circuit acknowledged that § 101 (then § 471) provided an intelligible principle to limit the President's discretion in issuing directives, because any directive "should establish an economical and efficient system for the procurement and supply of property." *Id.* at 914. This was a limitation, not a grant of authority. That is, consistency with § 101 was necessary, *not sufficient*, for a valid directive. *See id.*

"A statutory statement of purpose provides no legal authority." *Kentucky v. Biden*, 57 F.4th 545, 551 (6th Cir. 2023) (*Kentucky II*). This is "hardly controversial," whether in examining the Constitution's preamble, statutory purpose statements, or congressional resolutions. *Id.* While "[s]tatements of purpose may be useful in construing enumerated powers later found in a statute's operative provisions," they "are not *themselves* those operative provisions." *Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022) (*Kentucky I*). Thus, § 101 "cannot . . . 'limit or expand the scope of the operative clause'" like § 121(a). *Kentucky II*, 57 F.4th at 552 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008)).

Section 121(a) authorizes the President to "carry out this subtitle." "The phrase 'carry out' requires a task to be done." *Kentucky II*, 57 F.4th at 552. Though § 101 is part of "this subtitle," the section "on its own, does nothing," and so it—like section titles and other nonoperative language—cannot be directly carried out. *Id.* Instead, § 121(a) empowers the President "to instruct [GSA, executive agencies, and other officials] on how to exercise their statutory authority" under the Act. *Georgia*, 46 F.4th at 1293. "While the government argues that the Executive Order "carr[ies] out this subtitle" by mandating a $15 minimum wage, "[t]he President 'cannot carry out this subtitle' . . . by exerting a power the subtitle never actually confers," and the Act confers no power regarding minimum wages and certainly none over permittees like Plaintiffs. *Kentucky I*, 23 F.4th at 606.

This view accords with the Supreme Court's discussion of an executive order eliminating employment discrimination in federal contracting. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 (1979), the Court discussed but did not decide the statutory authority

for the executive order. The Supreme Court, however, observed that "nowhere in the Act is there a specific reference to employment discrimination." *Id.* at 304 n.34.

Permitting the President to issue any directive that is consistent with § 101 would contradict the principle that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam). "[T]he very essence of legislative choice" consists of "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective." *Id.* at 526. And "[t]hrough dozens of operative provisions, Congress chose the means by which to pursue the ends declared in § 101." *Kentucky II*, 57 F.4th at 552. When a regulation extends beyond a statute's "substantive" provisions, it fails to "respect and give effect to [Congress's] compromises" and so "cannot be within the . . . power to issue regulations 'necessary to carry out' [an] Act." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94, 96 (2002).

Thus, even "general rulemaking 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." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006). Section 121(a) empowers the President only to carry out the Act's operative provisions, and none permits the President to order recreational permittees, along with federal contractors, to pay a $15 minimum wage plus overtime and annual increases. The government's interpretation of §§ 121(a) and 101 would permit *any* directive consistent with the statutory purpose, allowing the President to pursue the purpose at all costs and undermine the compromises embodied in the Act's substantive provisions.

B. Section 101 relates to government efficiency, not permittee minimum wages

Even if the Procurement Act empowered the President to directly carry out § 101, that does not help the government. First, § 101 is internally focused, concerning the government's internal efficiency in contracting. Second, even if the President could reach beyond the government's internal processes to regulate the efficiency of those from whom it procures goods or services, recreational outfitters like Plaintiffs are federal permittees from whom the government procures nothing.

Operative provisions of the Act containing the same language as in § 101(1) show that § 101(1) is meant to address the government's internal efficiency in contracting. To wit, Congress passed the Act to establish the GSA and directed it to procure property and nonpersonal services and then to supply those items to agencies. § 501(b)(1)(A); *see* § 321(b)–(d). GSA also provides "functions related to procurement and supply including contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting." § 501(b)(1)(A). The language of § 501(b)(1)(A), being duplicative of § 101(1), shows that § 101(1) concerns the government's internal systems for procurement and for supplying procured property and services to agencies.

Furthermore, GSA must "determine[] that [each] action is advantageous to the Federal Government in terms of economy, efficiency, or service." § 501(a)(1)(A). In this way, the Act "provide[s] the Federal Government with an economical and efficient system" for the activities under § 101(1), replacing the prior, chaotic system of ad hoc procurement.

This context, and the language of § 101(1) itself, shows that the provision "is internally focused, speaking to government efficiency, not contractor efficiency." *Kentucky II*, 57 F.4th at 553. Thus, even if the President could directly carry out § 101(1), it at most "authorizes the President to implement systems making the government's entry into contracts less duplicative and inefficient." *Id.* That is, the President could "implement an 'economical and efficient' method of contracting—a 'system,' in other words—to obtain nonpersonal services." *Kentucky I*, 23 F.4th at 604.[2] But he cannot impose whatever conditions "deemed 'necessary' on the relevant services personnel to make *them* more 'economical and efficient.'" *Id.*

The government proposes to ignore this context. Its position is that Plaintiffs supply nonpersonal services, and because § 101 contains the words "supply . . . nonpersonal services," the President has the authority to order Plaintiffs to pay a $15 minimum wage. This is not how statutes are read. A court's "duty . . . is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015). "The meaning . . . of certain words or phrases may only become evident when placed in context," so "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Rather, "[a] court must . . . interpret the statute as a symmetrical and coherent regulatory scheme . . . and fit, if possible, all parts into a harmonious whole." *Id.* at 133 (citation omitted). As shown by the statutory context, § 101(1) concerns the supply of services and goods *to government agencies*, not members of the public. And it concerns the supply of services and goods

[2] Like the argument above that § 101 is a nonoperative provision, this argument was not presented to the Tenth Circuit and so was not decided by it.

by GSA, not recreational outfitters like Plaintiffs.[3] Section 101(1) has no relation to the activities of recreational outfitters like Plaintiffs or what they pay their employees.

Under the government's interpretation, the President would be able to dictate the ins and outs of *any* business that sells ("supplies") goods or services to *anyone*—all because of "a purpose statement combined with a vague grant of rulemaking power in an esoteric internal-management statute." *Kentucky II*, 57 F.4th at 552. This does not "comport with 'common sense as to the manner in which Congress is likely to delegate' such power." *Id.* (quoting *Brown & Williamson*, 529 U.S. at 133).

Thus, even if the President could reach outside of the government to regulate those from whom the government "procur[es] . . . property and nonpersonal services," § 101(1), *i.e.*, federal contractors, that would not reach Plaintiffs. As the Rule recognizes, recreational outfitters are "non-procurement," 86 Fed. Reg. at 67,134, meaning the government *procures* nothing from, and pays nothing to, the outfitters. This underscores the simple fact that recreational outfitters like Plaintiffs are merely permittees. And of course, the government also does not *supply* recreational outfitters with any property or nonpersonal services. Thus, even if the President could directly regulate the

[3] Again, this argument was not considered by the Tenth Circuit, at which Plaintiffs argued "that 'supplying nonpersonal services' solely encompasses transactions in which a contractor provides services to the government." *Bradford*, 101 F.4th at 720. Here, Plaintiffs argue that "supply" refers to *GSA's* supply of property and services to agencies, as demonstrated by other statutory provisions. This interpretation does not make "procure" and "supply" in § 101(1) redundant, because GSA must have an efficient system for procuring goods, *see, e.g.*, § 501(b)(1)(A) (directing GSA to perform "contracting"), *and* an efficient system for supplying them to agencies, *see, e.g.*, *id.* (directing GSA to perform "storage"). *Compare* § 602(a)(1) (directing GSA to "acquire[] motor vehicles"), *with* § 602(a)(3) (directing it to "furnish motor vehicles and related services to executive agencies).

government's "procur[ement] and supply[] [of] property and nonpersonal services," § 101(1), that does not empower him to regulate recreational outfitters like Plaintiffs.

C. The major questions doctrine requires the Rule to be authorized by clear statutory authority, which is absent

The major questions doctrine requires "Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (cleaned up). Thus, "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up). No dollar amount triggers the doctrine. Rather, because the doctrine is based on the "presum[ption] that Congress intends to make major policy decisions itself," it applies when "a practical understanding of legislative intent" cautions that Congress may not have delegated the claimed power in "ambiguous statutory text." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (simplified). When the doctrine applies, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* (quoting *Utility Air*, 573 U.S. at 324).

Here, the Mandate is of vast economic and political significance, yet the requisite clear congressional authorization is missing, and the Rule is therefore ultra vires.

DOL rightly acknowledges that the Rule "is economically significant," since it would result in direct costs to employers of "$1.7 billion per year over 10 years." 86 Fed. Reg. at 67,194. This is in addition to "regulatory familiarization costs," "implementation costs,"

"compliance costs, increased consumer costs, and reduced profits," "disemployment," and even increased "Government expenditures." *Id.* at 67,204, 67,206, 67,208, 67,211.

Furthermore, the minimum wage is a major political issue, with significant clashes over the issue in Congress, electoral races, and the public. It is thus an issue for which Congress is presumed to retain for itself. *See West Virginia*, 597 U.S. at 723. For example, Congress has enacted three statutes that set wage standards for federal contractors: the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Service Contract Act. 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(2).

The Mandate represents an exercise of economically significant power over an issue of high political sensitivity. Accordingly, clear congressional authorization is necessary. However, as discussed above, the government relies only on "a purpose statement combined with a vague grant of rulemaking power in an esoteric internal-management statute." *Kentucky II*, 57 F.4th at 552. No clear authorization exists, and the Mandate is therefore ultra vires.

D. The statute must be read to avoid unconstitutionality under the nondelegation doctrine

The canon of constitutional avoidance instructs that a court must "construe [a] statute to avoid [serious constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The canon is triggered even if the broader construction would not actually result in an unconstitutionality. The point of the canon is "not to needlessly reach constitutional issues" at all, so the canon applies simply when an interpretation would "raise significant constitutional questions" the answer to which "is not clear." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*,

531 U.S. 159, 172–73 (2001). Furthermore, the need to apply the canon "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," *id.* at 173, such as labor regulations. If the President's view of his own power is correct, then the Procurement Act would "raise a nondelegation problem," *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021), as detailed next. And it would do so with respect to federal regulation in an area of traditional state power. Accordingly, the Court should avoid the government's position and hold that the Act does not support the Mandate.

II. If the Procurement Act Authorizes the Rule, It Unconstitutionally Delegates Lawmaking Authority

If the government is correct that the Procurement Act permits the President to impose a minimum wage mandate on federal contractors from whom the government "procur[es] . . . property and nonpersonal services," 40 U.S.C. § 101(1), and on permittees and non-procurement businesses like Plaintiffs, the Act violates the nondelegation doctrine.

The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I. Accordingly, "Congress may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Gundy v. United States*, 588 U.S. 128, 135 (2019) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). In distinguishing between a proper delegation and an unlawful transfer of legislative power, a court considers whether Congress has provided "an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The broader the power Congress delegates, the more Congress must limit the exercise of that power. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001)

("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."). Congress's direction must be sufficiently specific for courts to "ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 425 (1944).

The Supreme Court has invalidated statutory provisions under the nondelegation doctrine twice. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), it considered the National Industrial Recovery Act's ("NIRA") delegation of authority to the President to prohibit the transportation of hot oil in commerce. The Court ultimately found this delegation impermissible because it granted the President "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. Indeed, the statute contained no policy on the transportation of oil and no standard to guide the president's discretion in prohibiting it. *Id.* at 415, 418. Nor did it condition the President's actions on any initial finding by the President. *Id.*

In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court struck down a second provision of NIRA that granted the President discretion to approve and prescribe industry "codes of fair competition" as he saw fit. There, the Court held that this delegation conferred "virtually unfettered" discretion to "enact[] laws for the government of trade and industry throughout the country," and thus found it unconstitutional. *Id.* at 542.

Here, the government's reading of the Procurement Act grants the President discretion to regulate parties that "procur[e] and supply[] property and nonpersonal services" to the government, § 101(1), as well as parties that do not. The government's interpretation of the Act also does not limit the requirements the President may impose

so long as he subjectively considers his directive to be necessary for economy and efficiency. Even under the government's view, then, the Act confers broad and significant authority to determine both the scope of regulated parties and the substance of their obligations under federal law. This delegation violates the nondelegation doctrine because there is no intelligible principle to guide such action.

There are only two candidates in the statute for where the President could find guidance in setting a minimum wage for federal contractors (and others): Sections 101 and 121(a). Neither of these provisions—even when combined—go as far as would be required to permit the agency's action here.

To start, § 101 is the Procurement Act's purpose provision, which cannot serve as an intelligible principle. As the Supreme Court has stated, this general policy statement "is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections." *Panama Ref.*, 293 U.S. at 418. Intelligible principles live in those "subsequent sections"—not in the government's self-serving interpretations of a statute's purpose.

Were it otherwise, Congress could simply pass various purposes and direct agencies to effectuate the policies they describe. But this we know Congress may not do. *See Schechter Poultry*, 295 U.S. at 531 (invalidating President's authority under NIRA to set "wise and beneficient [sic] provisions for the government of the trade or industry in order to accomplish the broad purposes of [the Act]"); *see also Kentucky I*, 23 F.4th at 607 n.14 ("If the government's interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more 'economical and efficient'—then that *certainly* would present non-

delegation concerns."); *Gundy*, 588 U.S. at 175 (Gorsuch, J., dissenting) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993)) ("[S]urely we must all agree that broad and sweeping statements like these about 'a statute's "basic purpose" are . . . inadequate to overcome the words of its text regarding the specific issue under consideration.'").

Regardless, the text of § 101 as interpreted by the government would fail to set forth an intelligible principle even if it resided elsewhere in the statute. It calls for an "economical and efficient system" for a number of activities, but offers no guidance for what counts as "economical" or "efficient." One might reasonably conclude that "economical" means cost-effective. But, according to the government, the President acts within his authority to create an "economical" system even when he imposes costs on federal contractors knowing they will be passed along to the government in the form of higher contract prices. *See* 86 Fed. Reg. at 67,194. Apparently, it even allows for imposing costs on federal permittees that result in higher costs to consumers. *See id.* at 67,207. Relevant here, § 101(1) provides that the principles of economy and efficiency govern the system for "procuring and supplying property and nonpersonal services." But the government understands this language to also authorize action over those not in the business of supplying property and nonpersonal services to the government, like Plaintiffs.

This expansive reading of § 101—an already broad provision—does not direct executive action in a way that informs an inquiry into whether such action is consistent with the will of Congress. *See Yakus*, 321 U.S. at 425. It includes no reference to a

minimum wage at all,[4] much less one for recreational outfitters. Consequently, it fails to indicate whether there should be a minimum wage mandate, what its floor or ceiling might be, or whether it should bind federal permittees like Plaintiffs. It does not suggest whether the President should promote a minimum wage via mandate, incentivization, or mere encouragement. It offers no assistance in identifying the circumstances under which these avenues may be beneficial (or not). It does not limit the President through factfinding. Rather, "[t]his general outline of policy contains nothing as to the circumstances or conditions in which" a minimum wage mandate for federal contractors (or permittees) should apply or the policy overriding the imposition of one. *See Panama Ref.*, 293 U.S. at 417–18. "Such a broad delegation without limits cannot stand under Article I." *Bradford*, 101 F.4th at 735 (Eid, J., dissenting).

Section 121(a) is the other provision that purportedly cabins or directs the President's action here. That language tells the President that he "may prescribe policies and directives that [he] considers necessary to carry out" the Procurement Act. 40 U.S.C. § 121(a). It adds that any policies and directives "must be consistent with this subtitle." *Id.* Far from constituting a standard directing executive action, this provision resembles the statute the *Panama Refining* Court considered standardless. As discussed, the provision at issue in *Panama Refining* provided that "[t]he President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof

[4] The absence of any reference to a minimum wage for recreational outfitters in the Procurement Act is perhaps the biggest difference between the authority the government urges here and the authority claimed in *Panama Refining*. In conferring powers to the President, NIRA at least referenced the general subject matter over which he had authority (the transportation of hot oil in commerce). In contrast, the government urges a reading of the Procurement Act that would confer power over substantial issue areas not even referenced. *See also supra* Section I.C.

produced . . . ." *Panama Ref.*, 293 U.S. at 406. In interpreting that language, the Court observed that it furnished "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. In short, "[i]t establishe[d] no creterion [sic] to govern the President's course." *Id.* at 416.

So too here. Section 121, according to the government, authorizes the President to determine the policy for a federal minimum wage mandate and to impose one—or not—as he deems fit. If that reading is correct, the Procurement Act gives the President "unfettered discretion to make whatever laws he thinks may be needed or advisable" to further the broad purposes of the Procurement Act. *Schechter Poultry*, 295 U.S. at 537–38. Today, that means permittees must pay a certain minimum wage. Tomorrow, it might mean 12-month paternity leave or uncapped vacation days. And since the Procurement Act apparently applies to federal contractors as well as entities that operate under a federal permit, license, or lease, no industry is safe from regulations promulgated under the government's understanding of the Procurement Act's scope. To name just a few examples, the Act so understood would allow the President to regulate trucking companies, aviation companies, financial services, and broadcasting companies. Mining and drilling,[5] energy transportation[6] and production,[7] banking,[8] agriculture,[9] and the

[5] *See, e.g.*, *Industrial Wastewater,* U.S. Env't Prot. Agency, https://tinyurl.com/mr3kppdn (last visited Feb. 21, 2025); 30 U.S.C. Ch. 3A.
[6] *See, e.g.*, *Sierra Club v. Fed. Energy Regul. Comm'n*, 68 F.4th 630, 635 (D.C. Cir. 2023), *vacated* (Aug. 25, 2023).
[7] *See, e.g.*, *Sierra Club, Inc. v. Granite Shore Power LLC*, 706 F.Supp.3d 257, 263–64 (D.N.H. Sept. 6, 2023); 16 U.S.C. § 797(e).
[8] *See, e.g.*, 12 C.F.R. § 5.20(b).
[9] *See, e.g.*, *Laws and Regulations that Apply to Your Agricultural Operation by Farm Activity*, U.S. Env't Prot. Agency (June 6, 2024), https://tinyurl.com/behc6tyh (last visited Feb. 21, 2025).

manufacture of metals[10] also require federal permits or leases. The President's reach would extend to an individual's activities as well, such as "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." *Bradford,* 101 F.4th at 740 (Eid, J., dissenting). It would cover commercial filming, still photography, and sound recordings,[11] weddings,[12] organized games and sports,[13] scattering ashes,[14] and assembling for First Amendment activities in federal parks.[15] *See also* 86 Fed. Reg. at 67,151 (stating that the "category of covered contracts pertains to a much broader array of service contracts and industries than the outdoor recreational industry"). That the President has the power to act so broadly emphasizes the size and breadth of the discretion the government insists Congress delegated to the President through the Procurement Act.

To the extent the government finds § 121's requirement that the President not act inconsistently with the statute a criterion governing his course, or a limitation on his action, it is neither. For one, it does not relate to the subject of a minimum wage, so cannot offer guidance or limit the President's purported authority to impose one. *See Panama Ref.*, 293 U.S. at 416 (observing that the restrictive covenants in the NIRA did not relate to the authority to prohibit the transportation of hot oil in commerce and so did not constitute a

[10] *See, e.g.*, *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 170 (3d Cir. 2004).
[11] *See* 36 C.F.R. § 5.5.
[12] *See, e.g.*, *Wedding Permits*, National Park Service, https://www.nps.gov/nama/planyourvisit/weddings.htm (last visited Feb. 21, 2025).
[13] *See, e.g.*, National Park Service, *Permit Planning Resources*, https://tinyurl.com/4wc7hmyb (last visited Feb. 19, 2025).
[14] *See, e.g.*, *Permits*, National Park Service, https://tinyurl.com/347p8cz6 (last visited Feb. 19, 2025).
[15] *See supra* n.13.

limitation on that broad authority). In any event, this requirement is no limitation at all, since any action contrary to the statute would be unlawful.

City of Albuquerque does not decide Plaintiffs' nondelegation claim. It simply states that delegations require an intelligible principle and notes that "Congress did instruct the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property." 379 F.3d at 914. The case never actually holds that this limitation satisfies the intelligible-principle requirement. *Id.* And no wonder: neither party in that case contended that the statute violated the nondelegation doctrine. Nor had the district court included discussion of it in its decision. *See City of Albuquerque v. U.S. Dep't of Interior*, 217 F.Supp.2d 1194 (D.N.M. 2002), *rev'd*, 379 F.3d 901. The constitutionality of the Procurement Act was therefore not before the court, and the court brushed past the issue in three sentences of dicta. *See Bradford*, 101 F.4th at 741 (Eid, J., dissenting) (citing *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009)) (referencing the Tenth Circuit's practice of "not afford[ing] precedential weight to an opinion's discussion that alludes to a constitutional doctrine (that was *not* before the Court) in the mix of determining another issue (that *was*)"); *see also Pell v. Azar Nut Co., Inc.*, 711 F.2d 949, 950 (10th Cir. 1983) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)) ("'It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.'"). *City of Albuquerque* does not resolve the nondelegation question.

If the Procurement Act permits the action at issue here, it violates the nondelegation doctrine.

III. The Rule Is Arbitrary and Capricious

DOL's Rule is arbitrary and capricious because it rescinded the exemption for non-procurement businesses like Plaintiffs without engaging in reasoned decisionmaking or considering potential alternatives.

A. This Rule is subject to arbitrary and capricious review

In implementing President Biden's Executive Order, DOL disclaimed any discretionary authority over what it was doing because it was acting pursuant to an executive order. *See, e.g.*, 86 Fed. Reg. at 67,216. The agency now contends that, given this lack of discretion, it is insulated from judicial review under the APA. *See, e.g.*, ECF No. 21 at 15 (Defendants' opposition to motion for preliminary injunction). It is wrong.

At the outset, the agency's contention that it lacked all discretion here because it was implementing an executive order is incorrect. For example, the agency provided its own analysis—separate and apart from the President—in defense of the policy and in response to comments about the Rule. In addition, the Executive Order included explicit discretionary directives to the agency. For example, it ordered the Secretary to issue regulations that "include . . . as appropriate . . . exclusions from [its] requirements." 86 Fed. Reg. at 22,836. And the agency did create certain exclusions. *See id.* at 67,162, 67,216–17. The Executive Order also tasked the agency with defining terms used in the Order. *Id.*

In defining the Executive Order's various terms, DOL could have chosen definitions that would not have included recreational outfitters serving the general public and holding federal permits. "Contract or contract-like instrument," a term that affects the scope of the entire Mandate, could have been defined to exclude permits. "[C]oncessions contract[s]"

subject to the Mandate, *id.* at 22,837, could have been limited to those for which goods are supplied, rather than services, or they could have been limited to contracts that supply to agency employees, rather than the general public. In defining a "contract or contract-like instrument" "entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public," "the Department *interpreted* th[e] [relevant] provision in the NPRM as generally including" licenses to use federal property to offer services to the public, but nothing required that conclusion. *Id.* at 67,150. Likewise, in defining exclusions, DOL could have excluded instruments like permits. DOL's definitions and exclusions were not forced by the Executive Order; DOL exercised its discretion to *choose* a definition that included Plaintiffs.[16]

In any event, this notion is foreign to the text of the APA. That statute requires a court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Nowhere in this language is there an exception for agency action that implements an executive order. *See, e.g.*, *Nebraska v. Su*, 121 F.4th 1, 15 (9th Cir. 2024) ("No language in the APA prevents or excepts review of an agency action that implements a presidential action."); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("[T]hat the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA . . . .").

[16] Plaintiffs did not argue to the Tenth Circuit that DOL failed to consider alternatives to its definitions and exclusions, and so the court did not decide this issue, which is therefore open to this Court's judgment.

And that makes sense. Were it otherwise, the president could circumvent judicial review by keeping his executive orders broad. As illustrated in this case, implementing executive orders into final rules always requires agencies to exercise some level of decisionmaking. But while the decisionmaking given to the agency here is significant, it is not difficult to imagine an executive order that is even broader. It could, for example, set forth a general policy to promote economy and efficiency in government and direct agencies to carry out that policy however they see fit. An exception to the APA that would remove the agency's subsequent action from judicial review just because it implements a presidential directive would swallow the APA's "'presumption favoring judicial review of administrative action.'" *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

This Court may review the Rule at issue in this case, notwithstanding its relationship to an executive order.

B. This Rule is arbitrary and capricious

DOL acted arbitrarily and capriciously in promulgating this Rule when it neglected to engage in reasoned decisionmaking and to consider alternatives. When an agency, in the course of changing policy, "disregard[s] facts and circumstances that underlay or were engendered by the prior policy," it must provide a "reasoned explanation" for the change. *FCC v. Fox Television, Inc.*, 556 U.S. 502, 515–16 (2009). An agency's "reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Calif.*, 591 U.S. 1, 30 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). "Brushing aside such matters would be arbitrary and capricious," and thus

requires "some additional justification." *Qwest Corp. v. FCC*, 689 F.3d 1214, 1225 (10th Cir. 2012).

In 2018, DOL implemented President Trump's Executive Order 13838, which found that applying President Obama's minimum wage mandate to outfitters and guides "does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands." 83 Fed. Reg. at 25,341.[17] In support, the President referenced seasonal recreational workers' "irregular work schedules, [] high incidence of overtime pay, and [] unusually high turnover rate" and determined that, based on these unique factors, forcing a minimum wage on them "threaten[ed] to raise significantly the cost of guided hikes and tours on Federal lands . . . ." *Id.* The implementing rule echoed these considerations. 83 Fed. Reg. at 48,537.

The Rule at issue here ultimately disregarded these facts and circumstances in reversing the exception for recreational services (among others) on grounds that it "[did] not have the authority to unilaterally exempt" them from the minimum wage requirement. 86 Fed. Reg. at 67,154. That reasoning alone amounts to an admission that DOL did not engage in reasoned decisionmaking—in its view, decisionmaking is unnecessary if the decision has already been made.

Of course, the agency did reference these facts and circumstances because commenters did. And in doing so, it recognized, for example, that "[p]rice increases and impacts may be more pronounced" for those President Trump exempted, "including seasonal recreational businesses . . . ." *Id.* at 67,207. It even admitted that "those working

[17] Notably, President Obama's Executive Order imposing this mandate did not reference recreational services. *See generally* 79 Fed. Reg. 9851 (Feb. 20, 2014).

on multi-day trips in remote areas do pose a unique situation" for purposes of DOL's transfer estimates for overtime. *Id.* at 67,210. And it conceded that permittees like Plaintiffs may face a competitive disadvantage in relation to those not using federal lands. *Id.* at 67,207.

But it nowhere explained why these facts and circumstances, which prompted President Trump's exemption, now counseled against one. True enough, DOL explained why it thought the mandate would not be as harmful as commenters suggested. *See, e.g.*, *id.* at 67,126, 67,152–53. But this reasoning in defense of the policy does not explain why the policy change is warranted in the first place—which is what matters for purposes of the APA. At most, the agency posited that there were potential benefits to the Rule. *See id.*[18] This is not reasoned decisionmaking.

Nor did DOL consider alternatives to the revocation of its waiver for recreational services.[19] It explicitly admitted this fact in the final rule, again noting that "due to the prescriptive nature of Executive Order 14026, the Department does not have the discretion to implement alternatives that would violate the text of the Executive order, such as the adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses." *Id.* at 67,216.

[18] The agency undermined even the purported benefits of the policy reversal when it suggested that these employers try to get exemptions potentially available *under other statutes*. 86 Fed. Reg. at 67,210. If revoking the minimum wage exemption from recreational services was truly to promote economy and efficiency in federal contracting, and if DOL really thought the Rule would benefit outfits like Plaintiffs, it is curious that it would advise that they seek exemptions elsewhere.

[19] As discussed, DOL exercised its discretionary authority under the Order to craft exclusions. But none of these exclusions are alternatives to the minimum wage rate for federal contractors.

Finally, even if DOL's revocation of its waiver for recreational services were lawful, DOL did not consider alternatives to its definitions and exclusions. The Executive Order empowered DOL to "include both definitions of relevant terms and, as appropriate, exclusions from the requirements of this order." 86 Fed. Reg. at 22,836. Those definitions and exclusions could have excluded, as non-contractors, recreational outfitters who offer services to the public without compensation from the government and who therefore cannot easily offset the costs created by the Mandate. The definitions and exclusions could still include within the Mandate's ambit those recreational outfitters who offer services to the public *with* compensation from the government (and who therefore can be considered contractors and can offset the increased wage costs), thereby giving effect to the waiver's revocation.[20] DOL did not consider this alternative. *Cf.* 86 Fed. Reg. at 67,216–17 ("Regulatory Alternatives").

By failing to engage in reasoned decisionmaking and consider alternatives, DOL acted arbitrarily and capriciously.

CONCLUSION

The Rule far exceeds the Procurement Act's limited scope, and an interpretation of the Act that supports the Rule would have no limits. And DOL swept recreational outfitters like Plaintiffs into the Rule's ambit and imposed the wage mandate on them without considering alternatives. This Court should set aside the Rule.

[20] Again, the Tenth Circuit did not decide this issue, because it was not presented to the court by Plaintiffs.

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Respectfully submitted,

/s/ Michael Poon
MICHAEL POON
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
916-419-7111
MPoon@pacificlegal.org

STEVEN M. SIMPSON
KERRY HUNT
Pacific Legal Foundation
3100 Clarendon Blvd, Suite 610
Arlington, VA 22201
202-888-6881
SSimpson@pacificlegal.org
KerryHunt@pacificlegal.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record:

BRETT A. SHUMATE
Acting Assistant Attorney General
JULIE STRAUS HARRIS
Assistant Branch Director

TAISA M. GOODNATURE
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20530
Taisa.M.Goodnature@usdoj.gov

Respectfully,

/s/ Michael Poon
MICHAEL POON
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
916-419-7111
MPoon@pacificlegal.org

STEVEN M. SIMPSON
KERRY HUNT
Pacific Legal Foundation
3100 Clarendon Blvd, Suite 610
Arlington, VA 22201
202-888-6881
SSimpson@pacificlegal.org
KerryHunt@pacificlegal.org

Counsel for Plaintiffs