No. 23-40671

In the
United States Court of Appeals
for the Fifth Circuit

State of Texas, *et al.*,
Plaintiff-Appellees,

v.

President Joseph R. Biden, in his official capacity as President of the United States, *et al.*,
Defendant-Appellants.

On Appeal from the United States District Court for the Southern District of Texas
No. 6:22-cv-4 — Drew B. Tipton, *Judge*

BRIEF OF AMICI CURIAE GEORGIA AND 16 OTHER STATES SUPPORTING APPELLEE STATES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Amici Curiae are governmental parties. Under Fifth Circuit Rule 28.2.1, a certificate of interested persons is not required.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUMMARY OF ARGUMENT AND INTEREST OF AMICI STATES

Amici are the states of Georgia, Alabama, Alaska, Arkansas, Idaho, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, and West Virginia. *See* Fed. R. App. P. 29(a)(2). Like many private businesses, many state entities have significantly invested in federal contracting. The question here is whether, when businesses and States decide to enter federal-government procurement contracts, they tumble out of the free market and into a $700 billion, centrally planned economy, subject to the President's unfettered decision-making. The question answers itself.

The federal defendants' interpretation of the Federal Property and Administrative Services Act is stunningly broad. Here the President tried to unilaterally set the minimum wage for a fifth of the American workforce. And the defendants assert that the President can demand *anything* of federal contractors as long as he deems it "economical" or "efficient," a virtually unlimited authority that is unmoored from the text of the statute and how federal contracting works. The Act restructures *internal* government operations; it does not regulate the internal affairs of

non-federal entities. Congress requires agencies to parcel out contracts based on competition, not the policy preferences of the President.

I.A. Competition between federal contractors has always been the crux of federal procurement law. Congress requires federal agencies to release procurement contracts to the free market, relying on competition to drive down prices, improve quality, and encourage innovation. Of course, because this process is less convenient, agencies have consistently exploited loopholes to award overpriced contracts to preferred contractors—often by imposing unnecessary, burdensome specifications. But in response Congress has repeatedly overhauled the system to make it harder for agencies to award contracts noncompetitively or impose requirements outside the demands of competition.

B. The federal defendants claim that the Federal Property Act empowers the President to upend this carefully designed procurement system by imposing pure policy preferences on federal contractors, but it does no such thing. The Act restructures *internal* government operations to eliminate wasteful uses of property. In particular, it created the General Services Administration to streamline federal operations. The Act grants concomitant authority to various executive actors to support this

internal streamlining. 40 U.S.C. § 121. The text and context of the Act make clear that the President may oversee this process and resolve disputes between agencies. But nothing in the Act empowers the President to make demands of private contractors' own internal operations. Simply put, the President has the authority to manage the federal government's process for purchasing and handling goods and services, *not* the authority to demand that private parties change their own policies.

C. The federal defendants' contrary theory is riddled with flaws. At the most basic level, they do not grapple with the statute's text. Instead, they rely on the Act's *purpose* statement to override its operative provision. That is the wrong way to interpret a statute. A purpose statement is just that: a statement of purpose. It doesn't grant authority beyond the operative provisions of the statute. And even if *this* purpose statement did somehow grant authority, the President's policies must still be "consistent with" the Act—and regulating private parties (federal contractors) is about as far from managing internal operations as one can get.

D. Even if all that were wrong, the President *still* lacks authority to impose a new federal-contractor minimum wage. Congress already enacted multiple minimum wage laws

specifically for federal contractors. It borders on nonsensical to conclude that Congress delegated authority to the President to undo the choices it already (and repeatedly) made.

II. There is another problem with the federal defendants' expansive theory. Congress does not bury conditions on procurement spending in obscure purpose statements. Congress itself openly imposes regulations on federal contractors, and it would go against that practice to indirectly impose unpredictable conditions by delegating policymaking power to the President—especially in a statute that does not impose even one condition on federal contractors. And if Congress did so, that would create constitutional problems, violating the requirement that statutes imposing conditions on federal spending give "clear notice." So, at minimum, the federal defendants' interpretation of § 121(a) should be rejected because it would manufacture unnecessary constitutional conflict.

ARGUMENT

I. The Federal Property Act does not delegate to the President the power to regulate federal contractors.

A. Federal contracting is based on competition, not the President's policy preferences.

Competition has been the guiding star of federal government contracting and procurement for centuries. Congress passed a law in 1809 which provided that "contracts for supplies or services . . . shall be made either by open purchase or by previously advertising for proposals respecting the same." *Myerle v. United States*, 1857 WL 4192, at *2 (Ct. Cl. 1857) (quoting 2 Stat. 536); *see also* 12 Stat. 220 (1861); 23 Stat. 109 (1884); 31 Stat. 905 (1901). Advertising led to competition, and these early laws "reflect[ed] a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

Procurement spending exploded during World War II, and to help catalyze domestic wartime production, Congress passed the War Powers Act, which eliminated many of the longstanding competition requirements and allowed the military to negotiate freely with manufacturers. *See* Pub. L. No. 77-354, § 201, 55 Stat. 838, 839 (1941). But reduced accountability led to rampant abuse,

including "profiteering and favoritism in the awarding of defense contracts."[1] That abuse led Congress to pass the Armed Services Procurement Act, which was the first "comprehensive revision and restatement of the laws governing the procurement of supplies and services by the [Department of Defense]." S. Rep. No. 80-571, at 2 (1947). The new regime restored the old competition requirements and limited noncompetitive negotiations to a few exceptions—like national emergencies, experimental research, or markets where national security demanded that the government maintain a broad industrial base. Pub. L. No. 80-413, § 2(c), 62 Stat. 21, 21–22 (1948). Congress extended these requirements to civilian agencies a year later in the Federal Property Act. Pub. L. No. 81-152, §§ 301–310, 63 Stat. 377, 393–97 (1949). Congress's clear mandate for agencies was to return to competitive bidding and negotiation wherever possible. *See Paul v. United States*, 371 U.S. 245, 252 (1963).

But federal agencies quickly took the easy way out, favoring the exceptions and entering noncompetitive contracts. By 1960, 85% of federal contracts were awarded noncompetitively. S. Rep.

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[1] *Special Committee to Investigate the National Defense Program*, U.S. Senate, https://www.senate.gov/about/powers-procedures/investigations/truman.htm (last visited Mar. 25, 2024).

No. 98-50, at 5 (1983). And with reduced competition came irrational spending. In one case, the Navy awarded a scaffolding-coupler contract to a contractor producing a less safe, more expensive product where the lower-priced product *exceeded* the minimum safety requirements. *Id.* at 14. Agencies would avoid competitive bidding for ordinary items by combining them with highly specialized equipment—which drove up their price. For example, in 1981 the government included in a non-competitive contract for a specialized flight-instruments trainer the 400 other parts and tools needed to service it; as a result, the government overpaid hundreds of thousands of dollars for basic, commercially available items. Airon A. Mothershed, *The $435 Hammer and $600 Toilet Seat Scandals: Does Media Coverage of Procurement Scandals Lead to Procurement Reform?*, 41 Pub. Cont. L.J. 855, 860–61 (2012).

So once again Congress overhauled the procurement system. To improve accountability, it created the Office of Federal Procurement Policy and vested it with the authority to coordinate and oversee all federal procurement. *See* Pub. L. No. 93-400, §§ 5, 6(a), 88 Stat. 796, 797 (1974); 41 U.S.C. § 1121(a). The office's primary responsibility was to establish and maintain a "system" of uniform procurement regulations for the entire government. 41

U.S.C. § 1122(a)(2). By standardizing process, the Act helped reduce both "the Federal Government's cost of procuring property and services and the private sector's cost of doing business with the Federal Government." *Id.* § 1122(a)(8).

Congress also made it easier for agencies to use competitive negotiation where competitive bidding was infeasible and made it harder to award the noncompetitive sole-source contracts that had led to overspending. Competition in Contracting Act, Pub. L. No. 98-369, § 303(a)(2)(B), (c), 98 Stat. 1175, 1175–76 (1984). To prevent agencies from including unnecessarily restrictive specifications, Congress required agencies to undertake market research before soliciting bids. 41 U.S.C. § 3306(a)(1)(B); *see, e.g.*, *Piedmont Propulsion Sys., LLC v. United States*, 167 Fed. Cl. 72, 78–79 (2023). And it created a formal "procurement protest system," 31 U.S.C. § 3551, to replace the informally developed process by which losing bidders would protest contract awards that violated competition requirements. William E. Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 Admin. L.J. Am. U. 461, 470–71 (1995). As a whole, these changes forced agencies to stop excluding businesses that could meet the government's procurement needs in more cost-effective ways.

But the proliferation of statutes, regulations, and policies had its own problems. Rather than make the process more competitive, adding rules sometimes made things worse, and contracting sometimes devolved into "a complex and unwieldy system" that was impossible to navigate—for agencies or contractors. *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 20 (D.D.C. 2001) (quotation omitted). So Congress passed the Federal Acquisition Streamlining Act, which, among other things, fast-tracked buying of commercially available items and made it easier for agencies to use "simplified acquisition procedures" for smaller contracts. Pub. L. No. 103-355, §§ 4201, 8003, 108 Stat. 3243, 3343–44, 3388 (1994); *see* 3 L. Purchasing § 51:3–4 (2d ed. 2024).

The governing principle for federal procurement is, and always has been, "full and open competition." 41 U.S.C. § 3306(a). Even as the executive branch has repeatedly resisted this mandate by channeling procurement to preferred contractors, Congress has, over and over, revised the statutes to prevent these abuses.

B. The Federal Property Act empowers the President to organize government agencies, not to interfere with competition in federal contracting.

Despite this robust body of procurement law, the federal defendants argue that the Federal Property Act empowers the President to freely impose policies that exclude otherwise qualified federal contractors. Fed. Defs. Br. at 12–13. In this dispute, for example, the President demands that agencies work with only contractors that pay above a $17 hourly minimum wage. *Id.* at 7. So even if another potential contractor provides a lower-cost, higher-quality bid, that firm will lose if it pays some of its relevant workers less than $17/hour.

The federal defendants' view of the Act should strike the Court as exceedingly unlikely. It makes no sense that Congress would focus all federal contracting on competition only to give the President the unilateral authority to pick winners and losers as long as, in his view, it is more "efficient" or "economical" to do so. *Id.* at 12. Were that the case, the President could all but preclude *any* challenges to contract awards by simply *declaring* that the chosen winner was, in his view, a more "efficient" choice. *Cf., e.g.*, *IAP Worldwide Servs., Inc. v. United States*, 159 Fed. Cl. 265, 274 (2022) (dispute over "a billion dollar procurement" contract).

The text of the Federal Property Act confirms that this unintuitive view is nowhere to be found in federal law. The Act gives the President authority to "prescribe policies and directives that [he] considers necessary to carry out [the Act]." 40 U.S.C. § 121(a). The federal defendants argue that because the "purpose" of the Act is to provide an "economical and efficient system" for managing and procuring government property, *id.* § 101, the President can impose any policy he chooses on federal contractors as long as it theoretically promotes "economy and efficiency"—even if it directly inhibits competition and increases the government's immediate costs. Fed. Defs. Br. at 13–14 (quotation omitted).

But § 121(a) provides the President the authority to carry out *the Act*, not do whatever he happens to think might help its vaguely worded purposes. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and *with a view to their place in the overall statutory scheme*." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (emphasis added; quotation omitted). The text of this statute expressly incorporates this rule, requiring the President to act "consistent[ly] with" the rest of the Act. 40 U.S.C. § 121(a).

Here, "[r]eading the [Act] as a whole, as well as in conjunction with Congress' [prior and] subsequent [minimum-wage and procurement-contract] legislation, it is plain that Congress has not given the [President] the authority that [he] seeks to exercise here." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The Act is full of the anodyne, bureaucratic details you would expect from a statute that does what this one does: centralize property management for a behemoth organization like the federal government. The Act aims to eliminate government waste, and nothing in it suggests that it empowers the President to broadly regulate the internal operations of federal contractors.

To start, Title I of the Act creates the centralized General Services Administration, replacing entities such as the Treasury Department's Bureau of Federal Supply and the War Assets Administration. 63 Stat. at 379–83. Title II lays out the GSA's responsibilities, authorizing it to manage, allocate, and dispose of property with an eye toward "minimiz[ing] expenditures for property," *id.* at 384, and it also delineates the GSA's organizational chart, setting roles for the President, the Comptroller General, the GSA Administrator, and the heads of each executive agency, *id.* at 383–93. Title III improves efficiency in procurement by requiring agencies to advertise needs and

eliminate unnecessary specifications to ensure "full and free competition" between potential suppliers, including by ensuring that the process remains open to small businesses. *Id.* at 393–95. Any deviation from that pro-competition framework is enumerated in narrow exceptions, such as permitting security-sensitive purchases to be negotiated directly. *Id.* at 394. Title IV structures the disposal of "foreign excess property," *id.* at 397, and Title V identifies the policies and statutes the Act supplanted and those that survived, *id.* at 399–403.[2]

"These details are dry. But they [are] what the [Federal Property] Act is all about." *Georgia v. President of the United States*, 46 F.4th 1283, 1296 (11th Cir. 2022) (Grant, J.); *see id.* at 1308 (Edmondson, J.) (concurring in judgment because plaintiffs proved likely success on merits). The restructuring was to eliminate "shocking instances of wasteful practices and poor business management in the government's supply operations" by imposing "executive accountability and centralized authority" through the GSA and, ultimately, the President. *Id.* at 1293 (quotation omitted). The Act is about reorganizing and reducing

[2] This framework remains even after the Act was codified in two parts of the U.S. Code. Everything except Title III was codified in subtitle I of Title 40, and Title III was moved over to subtitle I of Title 41. *See* 40 U.S.C. § 111.

waste, not about how best to leverage government procurement spending to advance executive policy goals.

This context defines the scope of the President's policymaking authority under § 121(a). For a policy to be "necessary to carry out" and "consistent with" the Federal Property Act, *id.*, it must effectuate some actual statutory element of the Act. And the statute provides ways for the federal government to consolidate property management and eliminate wasteful uses of property—it says *nothing* about regulating the operations of federal contractors. The President's "policies," then, must be internal facing, modifying the rules for government agencies, not for the private businesses that serve as federal contractors. His authority does not extend beyond managing federal agencies.

Indeed, if the President's authority extended beyond internal federal operations, so would the near-identical authority of the Comptroller General and GSA Administrator, which makes no sense at all. The President's authority parallels policymaking authority given to the Comptroller General, 40 U.S.C. § 121(b) ("shall prescribe principles and standards of accounting for property"), the GSA Administrator, § 121(c)(1) ("may prescribe regulations to carry out this subtitle"), and the heads of executive agencies, § 121(c)(2) ("shall issue orders and directives that the

agency head considers necessary"). "It is a basic canon of statutory construction that phrases within a single statutory section be accorded a consistent meaning." *First City Bank v. Nat'l Credit Union Admin. Bd.*, 111 F.3d 433, 438 (6th Cir. 1997); *see Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005). So because the President, GSA Administrator, and heads of executive agencies may all prescribe policies, regulations, and directives "to carry out this subtitle," the scope of these parallel authorities should be interpreted consistently, to apply only to government operations. It would make no sense to say that the GSA Administrator has regulatory authority over all federal contractors.

The Federal Property Act's other, more specific grants of authority to the President are likewise internally focused. He appoints the GSA Administrator, § 101(b), 63 Stat. at 379, decides when to exempt the military from GSA oversight, § 201(a), 63 Stat. at 383–84, and allocates property management authority between agencies, *id.* §§ 205(e), 401, 502(d)(19), 63 Stat. at 390, 397–98, 403. Section 121(a) rounds out these other grants of authority by serving as a stopgap measure, ensuring that, when the dust settles, the President gets the final say on which agencies have what responsibilities.

Perhaps even more telling is the nearly verbatim grant of presidential authority in Title IV, which deals with foreign excess property: "The President may prescribe policies that the President considers necessary to carry out [Title IV]. The policies must be consistent with [Title IV]." 40 U.S.C. § 701. Under the federal defendants' reading, this section serves no purpose, because § 121(a) gives him complete policymaking authority over every aspect of government property management and procurement. But it is "a cardinal principle of statutory construction that a statute ought [to be read so that] no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation omitted). The better reading is that each statute mirrors one of the President's unique responsibilities—one as the manager of the executive branch, the other as the point person for U.S. foreign policy.

It is a bit misleading, then, to call the Federal Property Act the "Procurement Act," a name coined by the D.C. Circuit in *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (en banc). Calling it the "Procurement Act" suggests that it addresses the relationship between federal contractors and federal agencies, but it has nothing to do with regulating federal contractors. The Act deals with the management of federal property and administrative

services. No surprise, then, that the very title of the Act reflects that reality.

Nor does the one short section of the Act that deals with procurement, Title III, suggest anything different. Congress essentially copied and pasted Title III from the competition requirements it had imposed on the military a year earlier in the Armed Services Procurement Act, an Act which gave no policymaking authority to the President. *See* 62 Stat. at 21–26. On top of that, as explained above, *supra* I.A., Congress repeatedly redesigned federal procurement law after the Federal Property Act was passed, and each new law was meant to better encourage competition. The competition requirements are not optional, and the Act does not empower agencies to add specifications that merely advance the agencies' own policy goals.

In sum, § 121(a) grants the President authority to manage federal agencies, not federal contractors. The text and context—§ 121, Title II, and the overall Act—reveals that his authority extends only to the internal operations of the government.

C. The federal defendants' theory violates basic interpretive principles, the Federal Property Act, and federal procurement law.

The federal defendants' "offer[] virtually no textual analysis, which is unsurprising given that the text undermines [their] position." *Kentucky v. Biden*, 23 F.4th 585, 604 (6th Cir. 2022). Instead, they assert that § 121(a) incorporates the Act's purpose statement (§ 101) and thus grants the President unfettered authority to regulate federal contractors in any way that might make them more "efficient." Fed. Defs. Br. at 12–13. In their view, the President may *indirectly* improve the government's efficiency by *directly* managing federal contractors in any way that has a "nexus" to potential improved efficiency in the economy, which will somehow trickle back to the government. *Id.* at 13 (a theory emanating from *Kahn*, 618 F.2d at 792). While they feign to concede that "[t]he district court was correct that § 101 [the Act's purpose statement] 'is not a substantive grant of authority,'" *id.* at 26, they argue the exact opposite. Asserting that a purpose statement is the meat of a grant of authority is the same thing as asserting that the purpose statement grants that authority. And § 101 simply cannot support their claims here.

1. A purpose statement cannot define the scope of operative text. A purpose statement in an act or a prefatory clause in a

statute performs a narrow role: it "may . . . resolve an ambiguity in the operative clause," but it "[can]not limit or expand the scope of the operative clause." *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008) (citing multiple treatises on statutory and constitutional interpretation); *see also Apter v. Dep't of Health & Hum. Servs.*, 80 F.4th 579, 589 (5th Cir. 2023). Statements of purpose "by their nature 'cannot override a statute's operative language.'" *Sturgeon v. Frost*, 587 U.S. 28, 57 (2019) (alteration accepted) (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 220 (2012)). In other words, the meaning of the operative provisions of a statute must first be analyzed *on their own*—apart from the purpose statement. *Id.* And only if applying the rules of textual interpretation to that text produces competing answers can the purpose statement factor in to break the tie.

Take *Heller* as an example. The District of Columbia argued that the Second Amendment's prefatory clause, which discusses a citizen militia, *curtailed* the Amendment's broad operative provision, which enshrines an individual right to bear arms. 554 U.S. at 577. The Court expressly rejected the argument that the prefatory clause limited the operative text. "It is nothing unusual in acts . . . for the enacting part to go beyond the preamble." *Id.* at

578 (quotation omitted). The Court interpreted the operative clause on its own, found its broad meaning clear, and rejected counterarguments that the purpose statement changed the amendment's scope. *Id.* at 578, 599.

Here, the federal defendants would have the purpose clause *expand* the operative provisions of the Act, which is just as textually taboo. The federal defendants want to integrate § 121(a) and the purpose statement into a single operative clause, arguing that the Act "authorizes the President to 'prescribe policies and directives that [he] considers necessary to carry out' the statutory objective of 'provid[ing] the Federal Government with an economical and efficient system.'" Fed. Defs. Br. at 12. They would leverage the purpose statement to "expand the scope of the operative clause." *Heller*, 554 U.S. at 578. But that is wrong. *Georgia*, 46 F.4th at 1299. The purpose statement cannot override the operative text—whether it would restrict it, as in *Heller*, or expand it, as in the federal defendants' view here. *Heller*, 554 U.S. at 578. No statute pursues its purposes "at *all* costs." Scalia & Garner, *supra*, at 219.

Because the Federal Property Act is so clear, there is not even a tie-breaking role for § 101. And even if there were some ambiguity somewhere in the Act that the President tried to

leverage to regulate federal contractors, the purpose statement would cut against the federal defendants. The "system" contemplated by § 101 is the federal government's internal system, not some centrally planned economy controlled by the President. *Kentucky*, 23 F.4th at 604. The federal defendants' argument thus fails twice over, contradicting both the substantive provisions and the purpose statement.

2. Even if § 101 and § 121(a) could be fused together as a grant of authority, that power would still be limited by the scope of the Federal Property Act. At minimum, the President may not replace Congress's competition-driven system for contracting with a centrally managed system where he decides who can be a federal contractor and what they must do to stay qualified.

To start, § 121(a) requires any policy to be "consistent with" the Federal Property Act. To be "consistent with" means that these policies must be in "harmony" and aligned with the rest of the Act. *Consistent*, Merriam-Webster's Collegiate Dictionary 266 (11th ed. 2003). The Act creates the GSA, imposes a competitive bidding process for contracting (prohibiting unnecessary specifications), and develops processes for shifting or disposing of government property. *See supra* I.B. Requiring federal contractors to pay a higher minimum wage is not even in the same

ballpark as, say, preventing agencies from entering duplicative contracts,[3] so it is not "consistent" with the Act.

The other problem with the federal defendants' theory is that it defies Congress's express design for the procurement system. Imposing additional requirements on federal contractors "necessar[ily] works against [federal procurement law's] oft-repeated priority of achieving 'full and open competition' in the procurement process." *Georgia*, 46 F.4th at 1297 (quoting 41 U.S.C. § 3301). The President may not impose "restrictive provisions or conditions" in procurement requests that are not "necessary to satisfy the needs of the executive agency." 41 U.S.C. § 3306(a)(2)(B). And the Supreme Court has repeatedly "warn[ed] against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996).

But that is exactly what the federal defendants claim the President can do here. One need only look at the past executive orders the federal defendants reference to see that they assert the power to eliminate competition and funnel federal procurement

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[3] *See, e.g.*, U.S. Gov't Accountability Off., Rep. No. 20-567, *Information Technology: Selected Federal Agencies Need to Take Additional Actions to Reduce Contract Duplication* (2020).

business to companies willing to adopt executive-preferred policies. Fed. Defs. Br. at 3–4, 14–16. Their theory has no limits. In their view, the President can force businesses to:

- adopt affirmative action programs[4]
- comply with wage and price controls during high inflation[5]
- inform employees about labor laws[6]
- adopt e-verify programs that facilitate compliance with immigration law[7]
- provide paid sick leave[8]
- force their employees to get the COVID-19 vaccine[9]
- pay a $17 minimum wage that exceeds any state minimum wage[10]

There is no limiting principle to this approach. Attempts to do so simply devolve into competing theories of law-office economics—about what sorts of policies would really be "efficient." *See, e.g.*, Ill. Amicus Br. at 16–23; AFL-CIO Amicus Br. at 24–30. Worse yet, the courts that have adopted this framework (mainly the D.C. Circuit) quickly abandoned even pseudo-economic

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[4] *Contractors Ass'n of E. Pa. v. Sec'y of Labor*, 442 F.2d 159, 170 (3d. Cir. 1971).

[5] *Kahn*, 618 F.2d at 793.

[6] Exec. Order No. 13,201, 66 Fed. Reg. 11,221 (Feb. 17, 2001).

[7] Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 6, 2008).

[8] Exec. Order No. 13,706, 80 Fed. Reg. 54,697 (Sept. 7, 2015).

[9] *Georgia*, 46 F.4th at 1289.

[10] Fed. Defs. Br. at 7.

analysis, resorting to a sort of *Chevron*-step-two deference where they accept whatever the agency says as long as it is not totally irrational. *See, e.g.*, *Kahn*, 618 F.2d at 793 (adopting agency's theory that directly increased costs for the government might be offset in the end by "slowing inflation in the economy").

The federal defendants' theory flouts Congress's mandate that the executive refrain from imposing hurdles that prevent otherwise-qualified businesses from becoming (or remaining) federal contractors. Their interpretation of § 121(a) would permit the President to handpick federal contractors for almost any reason—because they employ members of a particular union, support an important charitable cause, or are owned by members of a certain race. Under some theory these rules might promote "efficiency," but under any theory they reduce competition. Congress has not permitted that result.

D. At minimum, the President cannot supplant existing federal-contractor minimum-wage laws.

Even if all the above were tossed aside, the President cannot impose a higher minimum wage on federal contractors. A grant of executive authority will not include "implicit power to create an alternative to the explicit and detailed remedial scheme that [Congress actually] prescribes." *New Mexico v. Dep't of Interior*,

854 F.3d 1207, 1226 (10th Cir. 2017). Not only did Congress already create a procurement system, it already set the federal-contractor minimum wage.

The Fair Labor Standards Act imposes the standard federal minimum wage for "[e]mployees of employers providing contract services to [the] United States"—federal contractors. 29 U.S.C. § 206(e). Congress made an especially strong point enacting this statute, because most if not all federal contractors were already captured by the rule covering businesses engaged in interstate commerce. *See id.* § 206(a)(1). These statutes—especially 29 U.S.C. § 206(e)—show that the federal defendants' $17-minimum-wage policy is a direct replacement for a federal law. If there is *any* limit on the President's power under § 121(a), it is that the President cannot enact policies that supplant duly enacted statutes. So the FLSA alone should resolve this case.

But there is more. Congress recognized that certain categories of federal contractors may need to earn higher wages, so it passed three laws covering industries where higher wages may be appropriate. The Davis-Bacon Act recognizes that "mechanics or laborers" working on "public buildings and public works" need to be guaranteed a higher minimum wage that matches the "prevailing [wage] for the corresponding classes of

laborers and mechanics" in the area. 40 U.S.C. § 3142(a)–(b). The Walsh-Healey Public Contracts Act sets the same standard for workers in "the manufacture or furnishing of materials, supplies, articles, or equipment." 41 U.S.C. § 6502(1). And the McNamara-O'Hara Service Contract Act does the same for services contracts. 41 U.S.C. § 6703.

Congress did *not* delegate to the President the power to set the federal-contractor minimum wage. *Congress* set the minimum wage and did so through a detailed scheme that differentiates between classes of workers. And it even voted down the President's preferred legislation that would have increased the minimum wage—the measure crumbled in the Senate under bipartisan opposition.[11] The federal defendants have simply chosen to "ignore the plain implication of Congress' [federal-contractor-minimum-wage]-specific legislation." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160.

And it is no answer to say that an executive policy demanding a higher minimum wage does not necessarily *conflict* with these statutes. The question is not whether the President's minimum

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[11] *See* Emily Cochrane & Catie Edmondson, *Minimum wage increase fails as 7 democrats vote against the measure*, N.Y. Times (Mar. 5, 2021) https://www.nytimes.com/2021/03/05/us/minimum-wage-senate.html.

wage rule would be preempted or precluded by Congress's minimum wage law. The question is whether it is logical to conclude that Congress delegated wage-setting authority to the President after addressing the question—repeatedly—itself. It is unlike the question whether, for example, a *state's* minimum-wage law would be preempted by these federal statutes. *See Arizona v. United States*, 567 U.S. 387, 399 (2012). The nature of minimum wage laws is that there can be multiple compatible laws if multiple sovereigns set them. But here, the President and Department of Labor have attempted to supplant the federal-contractor minimum wage laws that cover exactly the same footprint as their rule. It makes little sense to conclude that Congress directly addressed the question but also delegated authority to the President to replace its decision with his own.

II. The President usurps Congress's Spending Clause power when he unilaterally imposes conditions on federal spending.

The President is not the first person to realize that procurement spending is a powerful tool to impose national policy. Congress uses it all the time. The Spending Clause empowers Congress "to grant federal funds to the States [and private persons and] condition such a grant upon [them] taking certain

actions that Congress could not require them to take" otherwise. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012) (Roberts, C.J.) (quotation omitted). Here, the federal defendants argue that in the $700 billion contracting space, Congress delegated unfettered policy authority to the President. But the fact that Congress regularly imposes *express* conditions on federal contracts cuts against their theory that Congress *implicitly* handed the President power to freely regulate federal contractors. And no one reading § 121(a) would see that coming, so their theory also violates the Spending Clause's clear-statement requirement. The Court should not read § 121(a) expansively to create an unnecessary "constitutional collision." *United States v. Hansen*, 599 U.S. 762, 781 (2023) (quotation omitted).

Congress has exercised its Spending Clause power in many contexts, from setting standards for public and private nursing homes, *see* 42 U.S.C. § 1396r, to prohibiting disability and sex discrimination at public and private universities under Title VI of the Civil Rights Act, *see Barnes v. Gorman*, 536 U.S. 181, 185 (2002). Congress also uses offers of federal funding to persuade States to enact regulations that bind private individuals in areas where it itself could not legislate, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), although that power is carefully circumscribed,

NFIB, 567 U.S. at 576–77 (cautioning that such legislation must be "scrutinize[d] . . . to ensure that Congress is not using financial inducements to exert a power akin to undue influence" (quotation omitted)).

And, most relevant here, Congress has repeatedly leveraged this power in procurement spending. "[T]he procurement contract [has long been] employed . . . as a sophisticated technique for public administration as well as procurement." Judge Harold Leventhal, *Public Contracts and Administrative Law*, 52 A.B.A. J. 35, 36 (1966). Congress has incorporated restrictions on government procurement into diverse legislation:

- The SECURE Technology Act (2018), which directs the government to mitigate supply chain security risks in procurement by excluding firms that fail cybersecurity standards. 41 U.S.C. § 4713.
- The Clean Air Amendments (1970), which prohibit the government from contracting with any company that has criminally violated air pollution standards. 42 U.S.C. § 7606.
- The Fair Labor Standards Amendments (1966), which imposes the federal minimum wage on federal contractors. 29 U.S.C. § 206(e).
- The McNamara-O'Hara Service Contract Act (1965), which sets a locality-driven minimum wage and requires safe working conditions for federal services contracts. 41 U.S.C. § 6703.
- The Walsh-Healey Public Contracts Act (1936), which sets a locality-driven minimum wage, sets maximum hours,

restricts child labor, and requires safe working conditions for federal materials contracts. 41 U.S.C. § 6502.

- The Buy American Act (1933) and progeny, which require the government to prioritize domestic over imported products in procurement. 41 U.S.C. § 8302; *see also* 10 U.S.C. § 4862 (Department of Defense must purchase certain items domestically).
- The Davis-Bacon Act (1931), which set a locality-driven minimum wage for laborers on public buildings and public works. 40 U.S.C. § 3142.
- The Eight Hour Law (1892), which required federal contractors to adopt an 8-hour workday. *Penn Dairies v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 273 (1943).
- The Act of February 23, 1887, which banned federal contractors from hiring federal prisoners. *Kahn*, 618 F.2d at 790 n.31.

This frequent integration of procurement into substantive regulation across a wide range of legislation is direct evidence that Congress considers its control over the procurement power as inexorably intertwined with its authority to legislate national policy. This is not the sort of power one accidentally gives away by failing to comprehend the implications of a purpose statement.

To the contrary, requirements imposed in the Spending Clause context must be upfront and candid. The government may not impose "obligations" through spending without giving "clear . . . notice." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219, 220 (2022) (quotations omitted). No doubt, the Federal Property Act itself is not Spending Clause legislation.

The statute restructures internal government operations. But that only exacerbates the problem here. When the purported requirements come from Spending Clause legislation, that at least puts the parties on notice that there might be additional conditions they need to consider before accepting the funding. But the federal defendants here would infer expansive conditions attached to federal contracting from the purpose statement of an unrelated statute—one which in no way suggests, much less clearly notifies, federal contractors of the broad power the President claims here. In fact, § 121(a) is about as far as one can get from providing "clear notice" to businesses that the President has nearly unlimited power to regulate them in the federal contracting space.

These constitutional problems mean that even if the narrower reading of § 121(a) "were not the best one," because it "is at least [a] fairly possible" reading, "the canon of constitutional avoidance would still counsel [the Court] to adopt it." *Hansen*, 599 U.S. at 781 (quotation omitted). "When legislation and the Constitution brush up against each other, [a court's] task is to seek harmony, not to manufacture conflict." *Id.* The far better reading of § 121(a) is that it concerns the government's own operations, but even if that were not true, the federal defendants' reading runs

headlong into constitutional problems, and that is reason enough to scuttle it.

The federal defendants try to downplay the significance of their argument here, claiming that the new minimum wage rule is not that big a deal. Fed. Defs. Br. at 29. That is not true, but even if it were, the *power* at issue—the power to condition all federal procurement spending on the President's unilateral policy preferences—is enormous. It would make no sense for Congress to give away significant power over federal procurement through a vestigial provision of the Federal Property Act. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "alter . . . fundamental details [through] ancillary provisions"); *Env't Integrity Project v. EPA*, 969 F.3d 529, 542 (5th Cir. 2020). Congress has always imposed these kinds of conditions itself, and it blinks reality to argue that Congress delegated *all* of this authority to the President, implicitly, in a statute that does not itself impose *any* policy on federal contractors.

CONCLUSION

For the reasons set out above, this Court should affirm the judgment of the district court.

Respectfully submitted.

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I hereby certify that on March 28, 2024, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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