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Supreme Court Declines to Hear Tenth Circuit Case Challenging President's Procurement Act Authority



The Biden-era effort to raise the minimum wage for employees of federal contractors will not, for now, get a final say by the Supreme Court of the United States.

Rather, legal challenges will continue to muddy the issue of whether long-standing procurement law supplies the authority for Biden's executive action and regulatory activity.

On January 13, 2025, the Supreme Court denied a *certiorari* petition by Arkansas Valley Adventure LLC, an outdoor adventure company, and its owner, Duke Bradford. *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707 (10th Cir. 2024), *cert. denied*. In the petition, Bradford and the company asked the Court to undo the U.S. District Court of Appeals for the Tenth Circuit's ruling that the government had authority to govern wages under the Federal Property and Administrative Services Act (FPASA), also known as the Procurement Act. The justices did not give a reason for denial.

This case is one of many that sought to invalidate the Executive Order on Increasing the Minimum Wage for Federal Contractors (EO 14026) and the U.S. Department of Labor (DOL) rule that implemented the order. EO 14026 was issued by President Biden on April 27, 2021, pursuant to his authority under FPASA, 40 U.S.C. §§ 101–1315, which authorizes the president to “prescribe policies and directives that the President considers necessary to carry out” FPASA and that are “consistent with” FPASA, 40 U.S.C. § 121(a). One purpose of FPASA is to “provide the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services.” 40 U.S.C. § 101(1). Accordingly, EO 14026 raised the minimum wage for federal contract workers, and those who work for outfitters on federal lands, to \$15 per hour starting on January 30, 2022. The rate is currently \$17.75 per hour. EO 14026 also rescinded the Executive Order on Exemption From Executive Order 13658 for Recreational Services on Federal Lands (EO 13838), issued by President Trump in 2018, that provided an exemption from the minimum wage requirements for seasonal recreational service permittees.

On December 7, 2021, Bradford sued to invalidate the DOL rule in the U.S. District Court for the District of Colorado by challenging a specific provision of EO 14026 that rescinded EO 13838. On January 24, 2022, the District of Colorado refused to preliminarily enjoin the DOL rule or EO 14026. *Bradford v. U.S. Dep't of Labor*, 582 F. Supp. 3d (D. Colo. 2022).

On April 30, 2024, the Tenth Circuit upheld the district court's decision denying injunctive relief. In addition, the panel found that outfitters and recreation companies ("recreational services permittees"), like Bradford's, were not likely to show that the DOL lacked statutory authority to issue regulations implementing EO 14026. The court also rejected arguments that the DOL's rule actions and rule were arbitrary and capricious, that the Procurement Act violated the non-delegation doctrine, and that the Procurement Act violated the major questions doctrine.

In denying *certiorari*, the justices declined to address the president's authority under the Procurement Act. However, it is likely that the Supreme Court is waiting to see how other circuits will decide this question before stepping in. Currently, there is a case on appeal before the U.S. District Court of Appeals for the Ninth Circuit in which the U.S. District Court for the District of Arizona rejected a lawsuit brought by a coalition of states challenging the executive order. *Arizona v. Walsh*, No. 3:22-CV-00213 (D. Ariz. Jan. 6, 2023) (filed by Arizona, Idaho, Indiana, Nebraska, and South Carolina). In the U.S. District Court of Appeals for the Fifth Circuit, the Biden administration filed an appeal in a case brought by Louisiana, Mississippi, and Texas where the U.S. District Court for the Southern District of Texas held the president exceeded his authority under the Procurement Act and that EO 14026 violated the major questions doctrine. Until the Ninth and Fifth Circuits decide, however, the Supreme Court is likely biding its time to see whether a circuit split will occur that requires its attention. In addition, at this time it is also unclear whether the new administration will move forward with the Fifth Circuit appeal or will repeal EO 14026 and moot the issue entirely. All told, the Supreme Court's denial is most likely a signal that this question may have been brought too soon.

It is uncertain whether the new administration will seek to override Biden's attempt to raise the minimum wage for employees of federal contractors or otherwise reinstate the exemption previously provided under EO 13838 for seasonal recreational service permittees. Employers affected by EO 14026 should stay informed of the new administration's actions and seek advice from experienced employment counsel.

Authors

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