



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW, Rm. 7511
Washington, DC 20530

Tel: (202) 514-1673

September 1, 2022

VIA CM/ECF

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
Office Of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130

RE: *Louisiana v. Biden*, No. 22-30019 (oral argument scheduled for Oct. 3, 2022)

Dear Mr. Cayce:

Pursuant to Rule 28(j), we write to inform the Court that, on August 26, 2022, a divided panel of the Eleventh Circuit issued a decision in *Georgia v. President of the United States*, 2022 WL 3703822 (11th Cir. Aug. 26, 2022), a case analogous to the one brought by plaintiffs here. The panel upheld a preliminary injunction enjoining enforcement of Executive Order 14042, but narrowed the injunction's scope to the plaintiffs in that case.

The principal opinion in *Georgia*—the relevant portion of which did not command a majority, *see Georgia*, 2022 WL 3703822, at *17 (Edmondson, J., concurring in the result), and which thus lacks precedential force even in the Eleventh Circuit—should not persuade this Court for several reasons. *First*, although the lead opinion rejects what it describes as the D.C. Circuit's "purpose-based approach" to the Procurement Act, *id.* at *10, the opinion focuses less on the statutory text than on what it conceives to be congressional purpose, *see id.* at *5-*8. As Judge Anderson's dissenting opinion explains (*id.* at *18), the Act broadly authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," 40 U.S.C. § 121(a). That is the grant of authority. Section 101's articulation of the Act's purpose simply constrains what "policies and directives" may

be “consider[ed] necessary to carry out,” the Act, *id.* § 121(a). *Second*, the opinion erred in concluding that inapposite dicta in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), limits the President’s Procurement Act authority to issuing orders that advance specific statutory directives; to the contrary, the *Chrysler* Court made clear that a “grant of legislative authority” need not be “specific before [policies] promulgated pursuant to it can be binding,” *id.* at 308. *Third*, the principal opinion was mistaken to invoke major-questions principles; those principles lack application where, for the reasons explained in our briefs, the President exercises a delegation of proprietary authority. And *fourth*, the opinion gave short shrift to decades of Executive Branch and Congressional action endorsing the understanding of Presidential authority challenged here.

Sincerely,

s/ David L. Peters

David L. Peters

U.S. Department of Justice

Appellate Staff, Civil Division

cc (via CM/ECF): Counsel of Record