No. 22-1023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRADFORD, *ET AL.*,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF LABOR, *ET AL.*,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Colorado
Case No. 1:21-cv-03283 (Chief Judge Philip A. Brimmer)

BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT, COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, AND ECONOMIC POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENTS

The National Employment Law Project is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the NELP.

The Communications Workers of America is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the CWA.

The Service Employees International Union is a non-profit labor organization and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the SEIU.

The National Women's Law Center is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the NWLC.

The Economic Policy Institute is a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of the EPI.

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INTEREST OF *AMICI CURIAE*[1]

Amici are non-profit organizations and unions that advocate for workers' rights, including increased wages and benefits and closing racial and gender wage gaps. These wage gaps particularly harm people of color and women—and in compounding ways harm women of color, who are at the intersection of these identities. *Amici* accordingly have a strong interest in improved employment standards for workers employed by businesses who benefit from contracts with the federal government:

The National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include minimum wages, workplace health and safety, and worker mobility. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in Tenth Circuit states, and has litigated and participated as *amicus curiae* in numerous cases addressing workers'

[1] Counsel for all parties have consented to the filing of this brief. *Amici* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money intended to fund this brief.

wage and hour and health and safety rights under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on the importance of the economic security that accompanies living minimum wages, and on workplace health and safety.

The Communications Workers of America, AFL-CIO ("CWA") is a union of hundreds of thousands of public and private sector workers in communities across the United States, Canada, Puerto Rico, and other U.S. territories. Its members work in telecommunications and IT, the airline industry, manufacturing, news media, broadcast and cable television, education, health care, public service, and other fields. CWA organizes and represents thousands of federal contract employees covered by Executive Order 14,026. CWA and its industrial division, IUE-CWA, represent federal service contract workers who fix military fighter jets and other aircraft, support satellite operations, provide ID badge services, among other occupations. CWA Local 7781, the United Professional Ski Patrols of America, represents Ski Patrollers at Crested Butte, Park City, Steamboat, Telluride, and Stevens Pass, and is committed to improving the working conditions of Ski Patrollers whether

they work on or off federal lands. For years, CWA members have fought to improve workplaces by bargaining to improve pay and benefits, and for equal treatment, while advocating for labor standards that protect the safety and economic wellbeing of all workers.

The Service Employees International Union ("SEIU") is a labor union representing two million working people, including essential workers in property services, healthcare, and public service. Thousands of these workers provide services to the federal government on contracts to clean federal buildings, secure important facilities, provide food services, and render essential assistance to our nation's veterans. SEIU is an anti-racist organization. Federal contract workers are disproportionately people of color, and SEIU views raising wages on federal contracts as not only a smart procurement policy, but also an economic and racial justice imperative.

The National Women's Law Center ("NWLC") fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that

harm all of us—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NLWC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or *amicus curiae* in a range of cases. NWLC is committed to advocating for workers' rights and has a strong interest in supporting increased minimum wage requirements for workers whose employers benefit from contracting with the federal government.

The Economic Policy Institute ("EPI") is a non-profit organization with over thirty-five years of experience analyzing the effects of economic policy on the lives of working people in the United States. EPI has studied and produced extensive research examining how the minimum wage affects workers and the economy, who benefits from the minimum wage, and how the declining value of the federal minimum wage over time has contributed to the growth in U.S. income inequality. This research includes the impact of increasing the minimum wage for federal contractors to $15 per hour. EPI has participated as *amicus curiae* in numerous cases impacting workers' rights under federal and state wage

and hour laws. EPI strives to protect and improve the economic conditions of working people. EPI is concerned that all working people in the United States have good jobs with fair pay.

SUMMARY OF THE ARGUMENT

For decades, courts have recognized that the Federal Property and Administrative Services Act of 1949 (widely known as the "Procurement Act") provides the President "particularly direct and broad-ranging authority" to set standards "the President considers necessary" to promote economy and efficiency for those who choose to contract with the federal government.[2]

Acting pursuant to this authority in 1978, President Carter issued Executive Order 12,092, conditioning federal contracts on contractors' compliance with the Administration's otherwise voluntary wage-and-price controls.[3] Those controls limited workers' wage increases to "no more than a seven percent annual rise."[4] The D.C. Circuit upheld the order as a valid exercise of the President's Procurement Act authority,

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[2] *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979); 40 U.S.C. § 121(a).

[3] *Kahn*, 618 F.2d at 785-86; Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (Nov. 3, 1978).

[4] *Kahn*, 618 F.2d at 786.

even while acknowledging that "there may be occasional instances where a low bidder will not be awarded a contract."[5]

Using the same authority in 2014, President Obama issued Executive Order 13,658, establishing a federal minimum wage for federal contractors; that minimum wage applied to outdoor recreational outfitters and guides operating on federal lands.[6] In 2018, acting pursuant to the same authority, President Trump issued Executive Order 13,838, which decided, as a matter of policy, to exempt from these requirements certain outdoor recreational service employers operating on federal lands, but kept in place the minimum wage rules for other contract workers.[7]

Just like his predecessors, President Biden exercised his Procurement Act authority in issuing Executive Order 14,026 ("E.O. 14,026"), addressing wage rules for companies that choose to contract

[5] *Id.* at 792-93.

[6] Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014); *see id.* § 7(D) (applying to certain contracts or contract-like instruments "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.").

[7] Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018).

with the federal government.[8] In order to "promote[] economy and efficiency," he determined it was necessary to increase the federal contractor minimum wage to $15/hour and to revoke Executive Order 13,838's exemption of outdoor recreational service employers operating on federal lands from this requirement.[9]

The Department of Labor ("Department") reasonably concluded in its Rule implementing E.O. 14,026[10] that increasing the federal contractor minimum wage will increase employee productivity and decrease employee turnover and absenteeism. In doing so, it relied on studies across various industries and academic literature demonstrating that higher wages incentivize workers to stay in their jobs, thereby reducing employee turnover and absenteeism and the costs associated with such activities, and increase employee morale and productivity. Thus, ample evidence supports the Department's conclusion that increasing the minimum wage will increase the value of the government's investments, and even more to the point, "there is no evidence to suggest

[8] Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021).

[9] *Id*.

[10] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021) (codified at 29 C.F.R. pts. 10, 23).

that these benefits would not apply to the outfitters and guide industry as well."[11] Critically, the Department estimates that increasing wages will impact more than 327,000 contract workers—including in industries largely comprised of women, and disproportionately Black and Latinx, workers—helping to rectify the racial and gender wage gaps in federal contractor workforces.[12]

Finally, despite Appellants' efforts to argue otherwise, E.O. 14,026 does not conflict with other federal laws addressing wage standards in federal contracting, such as the Davis-Bacon Act, the Walsh-Healey Public Contracts Act, and the Service Contract Act. While these laws operate to set baseline minimum prevailing wages, they do not preclude application of other wage standards made pursuant to other federal authorities, as E.O. 14,026 does here and as Executive Orders issued by Presidents Carter, Obama and Trump did in the past.

Because Appellants have failed to show a likelihood of success on the merits of their claims—and because of the greater income and workplace equality that is at stake for impacted workers—the Court

[11] *Id.* at 67,212.
[12] *Id.* at 67,194, 67,214-5.

should affirm the decision of the district court denying Appellants' request for a preliminary injunction.

ARGUMENT

I. E.O. 14,026 is within the President's Procurement Act authority.

The district court properly concluded that Appellants are not likely to succeed on the merits of their claim that the Rule exceeds the President's authority under the Procurement Act. That conclusion flows directly from prior precedent and was amply supported by the record developed before the Department.

A. The President's Procurement Act authority extends to setting minimum wage requirements for those who choose to contract with the federal government.

Appellants contend that E.O. 14,026 does not support economy and efficiency. They argue that the President's Procurement Act authority is limited to actions that result in cost savings to the federal government.[13] Appellants' Br. at 22-24. They are incorrect.

[13] Appellants also contend that the language of the Procurement Act vesting the President with authority over the "supply[]" of "nonpersonal services" does not extend to permittees on federal lands. 40 U.S.C. § 101(1); Appellants' Br. at 17-21. Amici agree with the United States' position on the proper reading of this language and will not repeat its arguments.

The Procurement Act vests in the President "broad-ranging authority" with "necessary flexibility."[14] The Act's stated purpose is to provide the government "with an economical and efficient system" for activities including "[p]rocuring and supplying property and nonpersonal services."[15] The Act grants the President wide discretion to "prescribe policies and directives that *the President* considers necessary to carry out" the Act's goals.[16] Courts will sustain a President's action made under the Act so long as it has a "sufficiently close nexus" to "the values of 'economy' and 'efficiency.'"[17] The terms "efficiency" and "economy" encompass "factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions."[18] Courts have further recognized these concepts as "reaching beyond any narrow" construction, and includes "secondary policy views that deal with government contractors' employment practices—policy views that are

[14] *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003); *see also* City *of Albuquerque v. DOI*, 379 F.3d 901, 914 (10th Cir. 2004).

[15] 40 U.S.C. § 101.

[16] *Id.* § 121(a) (emphasis added).

[17] *See, e.g., Kahn*, 618 F.2d at 792.

[18] *Id.* at 789.

directed beyond the immediate quality and price of goods and services purchased."[19]

Applying these established principles, the Department's Rule does not exceed the President's authority. President Biden concluded that "[r]aising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs."[20] He reasoned that "ensuring that Federal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in Federal procurement."[21] Thus, E.O. 14,026 addresses wage standards for federal contractors, something that multiple circuits have expressly recognized is within the President's Procurement Act authority.[22]

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[19] *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996). Courts have upheld the use of Procurement Act authority for a number of these secondary purposes; perhaps the "most prominent" involve "a series of anti-discrimination requirements for Government contractors." *Kahn*, 618 F.2d at 790.

[20] 86 Fed. Reg. at 22,835.

[21] *Id.*

[22] *Kahn*, 618 F.2d at 792-93; *Kentucky v. Biden*, 23 F.4th 585, 607 (6th Cir. 2022) (noting that use of the Procurement Act authority to require federal contractors "to abide by wage and price controls" "has a 'close nexus' to the ordinary hiring, firing, and management of labor.")

The Department determined that in the event that "Government expenditures may rise," the benefits "expected to accompany any such increase in expenditures" will result in "greater value to the Government."[23] Further, the Department concluded, "[e]ven without accounting for increased productivity and cost-savings"—which it also concluded were likely to result from the Rule—"direct costs to employers and transfers are relatively small compared to Federal covered contract expenditures (about 0.4 percent of contracting revenue . . .)," and thus "any potential increase in contract prices or decrease in profits will be negligible."[24] For companies unable to pass costs to the government, the Department noted that increased payroll costs are likely to be small and may be mitigated through the Rule's stated benefits, passing along costs to the public, and "negotiating a lower percentage of sales paid as rent or royalty to the Federal government in new contracts."[25]

The Department reasonably determined the Rule's benefits apply to all "contracts" and "contract-like instruments," defined as "an agreement between two or more parties creating obligations that are

[23] 86 Fed. Reg. at 67,206
[24] *Id.*
[25] *Id.* at 67,206-07.

enforceable or otherwise recognizable at law."[26] The government has a direct interest in the efficiency of the contracts in connection with federal lands, as, depending on the permit type and issuing federal agency, permittees must meet certain requirements to operate on federal lands, including potentially being subject to competitive bidding processes[27] and paying fees up to 3% of their adjusted-gross revenue from permitted activities.[28]

B. The Department properly relied on evidence that increasing the federal contractor minimum wage increases employee morale and productivity and reduces turnover, absenteeism, and income inequality.

The record before the Department amply supports its conclusion that an increased minimum wage supports " efficiency and economy … in government procurement."[29] Studies and literature cited in the Rule show the link between increased wages and efficiencies, including morale and productivity increases and decreases in employee turnover and

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[26] *Id*. at 67,225.

[27] Mark K. DeSantis, Cong. Rsch. Serv., R46380, *Guides and Outfitters on Federal Lands: Background and Permitting Process* 20 (2020), https://bit.ly/3gNglWA.

[28] *Id*. at 11.

[29] 86 Fed. Reg. at 67,212.

absenteeism, and the larger social benefits of reducing poverty and income inequality by increasing wages for workers.[30] Thus, evidence supports the Department's position that, "by increasing the quality and efficiency of services" provided to the government, E.O. 14,026 will improve the value of the government's investments.[31] And contrary to Appellants' statement that the Department "conceded" that these benefits would not apply to the outfitters and guides, Appellants' Br. at 43, the Rule in fact concluded the opposite. The Department stated that its findings related to increased morale and productivity and decreased turnover "tend to be general rather than industry-specific, and *there is no evidence to suggest that these benefits would not apply to the outfitters and guide industry as well*."[32]

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[30] *Id*. The Department also considered disemployment, i.e. when employers employ fewer higher-wage workers for work previously performed by more low-wage workers, and concluded the Rule "would result in negligible or no disemployment." *Id*. at 67,211. It recognized that, even under conservative estimates, with which the Department did not agree, for permittees on federal lands required to increase wages from $7.50 to $15/hour, disemployment would still be small, "a reduction of 0.9 percent employment." *Id*. at 67,212.

[31] *Id*. at 67,131.

[32] *Id*. at 67,212 (emphasis added).

To support its conclusion regarding increased worker morale and productivity, the Department reviewed studies on the efficiency wage theory, an established economic principle[33] that provides that employers paying a premium in wages give "the worker[s] an incentive to try to keep their job, to lower recruiting and turnover costs, or to increase morale and effort."[34] This is because employees "with better pay, training, and job security satisfy both the internal and external needs of employees and, therefore, enhance employee satisfaction."[35]

One study cited in the Rule looked at the effects of "higher pay on productivity for warehouse workers and customer service representatives, using objective productivity metrics" and estimated that "the increase in productivity caused by raising wages fully pays for itself."[36] For warehouse workers, the study found that a $1 increase in

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[33] George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J. Econ, 543, 543 (1982); Jeff Chapman & Jeff Thompson, Econ. Pol'y Inst., Briefing Paper No. 170, *The Economic Impact of Local Living Wages* (2006), https://bit.ly/3GOwLZA.

[34] Natalia Emanuel & Emma Harrington, *The Payoffs of Higher Pay: Elasticities of Productivity and Labor Supply with Respect to Wages*, 3, note 3 (2020), https://bit.ly/34YuRIi.

[35] Hong Soon Kim & SooCheong Jang, *Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry*, 71 Tourism Mgmt. 378, 380 (2019).

[36] Emanuel, *supra* note 34, at 3.

pay resulted in increased productivity that "represents an hourly savings of $1.10 for the retailer."[37] Similar productivity gains were found for customer service representatives.[38] Another cited study concluded that "increasing the federal minimum wage immediately enhances restaurant productivity for up to two years."[39]

The Department also considered indirect productivity increases that could result from the Rule. In particular, in a study of cashiers in a grocery store, which the study recognized as an industry "particularly prone to" reduced employee productivity, found "strong peer effects associated with the introduction of high-productivity workers into work groups," meaning that in addition to a "high-productivity worker" raising "total output directly because the worker has higher productivity," the worker also boosts productivity in others.[40]

Evidence also supports the Department's conclusion that increased wages reduce employee turnover and absenteeism. Reduced turnover

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[37] *Id*. at 13.

[38] *Id*. at 14 ("We find that each $1/hr increase in relative pay is associated with a 7.5% increase in call volume, 1.9 additional calls per day off of a based of 26.").

[39] Kim, *supra* note 35, at 1.

[40] Alexandre Mas & Enrico Moretti, *Peers at Work*, 99 Am. Econ. Rev. 112, 143, (2009), https://bit.ly/3GR7pdm.

represents "both potential productivity gains and cost savings for the employer."[41] When employees remain in their jobs, it means "more experienced employees, who need less supervision and are more skilled at their jobs" and "decreased spending on recruitment, hiring, and supervisor time spent training new employees."[42]

In considering employee turnover, the Department cited to studies assessing local living wage ordinances.[43] These laws "set wage and benefit standards for companies that do business with the government" in order "to improve the quality of contracted jobs and increase the standard of living for low-income workers."[44] More than 140 cities and the State of Maryland have adopted such laws.[45] Such ordinances often

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[41] David Fairris et al., *Examining the Evidence, The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses* 107 (2015), https://bit.ly/3LCPqey.

[42] *Id.*

[43] *See id.;* Michael Reich et al., U.C. Berkley Inst. of Indus. Rel., *Living Wages and Economic Performance, the San Francisco Airport Model* (2003); Chapman & Thompson, *supra* note 33; Paul Sonn & Tsedeye Gebreselassie, Nat'l Emp. L. Project, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring the Federal Contracting Delivers Good Jobs and Quality Services* (2009), https://bit.ly/3GOxvhk; Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44 Indus. Rel. 139 (2005), https://bit.ly/34Ty63R.

[44] Fairris, *supra* note 41, at 1.

[45] Sonn, *supra* note 43, at 13.

cover not only employers that contract directly to supply services to the governments, but also concession businesses that, similar to Appellants, "contract with the city to operate a business on city property, and typically agree to pay the city a percentage of the revenue generated by that business."[46]

For example, the San Francisco Airport ("SFO") adopted two ordinances in 1999, one "establishing compensation, recruitment and training standards" for airport safety and security employees and another setting living wage requirements for airport leases and service contracts.[47] A study of implementation of these requirements found that after wages increased, employee turnover fell by an average of 34% for all contractors surveyed and 60% for contractors that "experienced average wage increases of 10 percent or more."[48] For airport screeners, the turnover fell from 94.7% to 18.7% in fifteen months—a nearly 80% decrease.[49]

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[46] Fairris, *supra* note 41, at 15; *Bradford v. DOL*, No. 21-CV-3288, 2022 WL 204600 (D. Colo. Jan. 24, 2022), at *3 (Noting one Appellant is required to pay "the greater of either $100 per year or 3% of AVA's gross revenue from the activities listed on the permit.").

[47] Reich, *supra* note 43, at 7.

[48] *Id*. at 10.

[49] *Id*.

Other cited studies reach similar conclusions. One study assessing the impacts of an ordinance nearly doubling wages for in-home health care workers found a 31% reduction in turnover for all workers and 57% reduction for new workers.[50] Similarly, a study concluded that employers subject to Los Angeles's living wage ordinance had less turnover than those that were not.[51]

The Department also considered the cost savings associated with reduced employee turnover. According to the SFO study, the cost to replace an employee was on average $4,275, and the new wage requirements saved $6.6 million per year from reduced turnover.[52] The findings at SFO are not an outlier—a review of thirty studies estimated that employee turnover costs employers "about one-fifth of a worker's salary to replace that worker."[53]

As to absenteeism, one study found a statistically significant decrease in employee absenteeism for contractor employers required to

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[50] Howes, *supra* note 43, at 161.
[51] Fairris, *supra* note 41, at 105-06.
[52] Reich, *supra* note 43, at 10.
[53] Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There are Significant Business Costs to Replacing Employees* 1 (2012), https://ampr.gs/3gMouL6.

pay higher wages per Los Angeles's living wage ordinance, when compared to those that were not.[54] And the SFO study found that one-third of employers reported higher job performance among covered employees, including measures like higher morale (reported by 47% of these employers), fewer employee grievances (45%), decreases in disciplinary issues (44%), and a decrease in absenteeism (29%).[55] And while the Department noted that one study "attributes a decrease in absenteeism to mechanisms of the firm other than an increase in worker pay,"[56] it reasonably concluded that the "other evidence is strong enough to suggest a relationship between increased wages and reduced absenteeism."[57]

The Department further explained that increasing the minimum wage could lead to decreased poverty and inequality based on race and gender among workers on federal contracts. The Department noted that for a full-time worker making $10.95/hour—the minimum wage rate

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[54] Fairris, *supra* note 41, at 109, 116.

[55] Reich, *supra* note 42, at 10.

[56] 86 Fed. Reg. at 67,214 (citing to Georges Dionne & Benoit Dostie, *New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data*, 61 Indus. Lab. Rel. Rev. 108 (2007), https://bit.ly/3oNkC0S).

[57] 86 Fed. Reg. at 67,214.

immediately preceding the Rule—the worker's "annual salary would be $22,776, which is below the 2020 Census Poverty Threshold for a family of four," of $27,949.[58] Increasing the minimum wage to $15/hour increases full-time annual earnings for a family of four above the poverty threshold.

Relying on public comments, studies, and statistics, the Department recognized that increasing the minimum wage will aid in reducing income inequality and racial and gender wage gaps, given the disproportionate number of people of color and women who are paid low wages and are represented in federal contractor workforces.[59] Data from the Current Population Survey Annual Social and Economic Supplement from the U.S. Census Bureau provided in literature relied on by the Department shows that as of 2019, while the Black population

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[58] *Id*. *See Poverty Thresholds*, U.S. Census Bureau, https://bit.ly/3BtACKw (last visited Apr. 27, 2022).

[59] 86 Fed. Reg. at 67,215. *See also* Jesse Wursten & Michael Reich, Inst. for Rsch. On Lab. and Emp., *Racial Inequality and Minimum Wages in Frictional Labor Markets* (2021), https://bit.ly/3w5bF5V (finding minimum wage increases between 1990 and 2019 reduced the Black–white "wage gap by 12 percent overall and by 60 percent among workers with a high school degree or less" and while "minimum wages increase earnings for all race/age/gender groups," they "increase more for black workers and women in general.").

"represented 13.2% of the total population in the United States," it accounted for "23.8% of the poverty population."[60] Similarly, for the Latinx population, while it comprises "18.7% of the total population," it accounted for "28.1% of the population in poverty."[61] The Department also cited to analysis and data provided by commenters, including from *Amici* EPI and NELP, as well as U.S. Bureau of Labor Statistics data, showing that many of the industries affected by the Rule are disproportionately comprised of people of color and/or women.[62] As courts

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[60] John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019: Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept. 15, 2020), https://bit.ly/3xZzpL4.

[61] *Id*. Further, data demonstrate that women experience a wage gap at all education levels and in nearly every occupation and are overrepresented in low-paid jobs. Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why, and What to Do* 1 (2021), https://bit.ly/36Oo712 (Also noting that "[w]omen in the U.S. who work full-time, year-round are typically paid only 83 cents for every dollar paid to their male counterparts.").

[62] 86 Fed. Reg. at 67,215 ("Federal agencies contract billions of dollars each year to businesses in industries like building services (13% Black, 41% Latinx, 56% female), administrative services (12% Black, 45% female), warehousing (22% Black, 20% Latinx), food service (14% Black, 27% Latinx, 52% female), security services (26% Black, 18% Latinx, 23% female), waste management and remediation (15% Black, 22% Latinx), and construction (30% Latinx).").

have long recognized, workplace racial inequities undermine efficiency in government contracting.[63]

II. E.O. 14,026 does not conflict with other federal laws addressing minimum wages.

Appellants incorrectly assert that the minimum wage established by E.O. 14,026 conflicts with other federal statutes applicable to federal contractors. Pointing to the Fair Labor Standards Act ("FLSA"),[64] which sets the nationwide federal minimum wage for all employers that have an annual dollar volume of sales or business of at least $500,000 and/or engage in interstate commerce, and the Davis-Bacon Act ("DBA"),[65] the Walsh-Healey Public Contracts Act ("PCA"),[66] and the Service Contract Act ("SCA"),[67] which contain wage standard provisions for specified sets of federal contractors, Appellants suggest that Congress has constrained

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[63] *See, e.g., Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971) (recognizing that orders barring race discrimination in federal contracting were apparently "authorized by the broad grant of procurement authority" in the Act because "it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority work[ers].").

[64] 29 U.S.C. § 201 *et seq*.

[65] 40 U.S.C. § 3142 *et seq*.

[66] 41 U.S.C. § 6501 *et seq*.

[67] 41 U.S.C. § 6701 *et seq*.

the President's authority under the Procurement Act to set higher minimum wage standards for federal contractors. Appellants' Br. at 27-32. However, the statutes they cite provide no support for Appellants' assertions. As such, the district court as well as the Department in the Rule properly concluded that the minimum wage standards set in E.O. 14,026 do not conflict with these statutes.[68]

Each of the applicable provisions of the FLSA, DBA, PCA, and the SCA demonstrate that they were intended to be floors—not ceilings—under federal law for minimum wage requirements. The FLSA, which sets the federal minimum wage broadly applicable to public and private employers nationwide, explicitly states that the provisions of the FLSA do not "excuse noncompliance with any *Federal* or State *law* or municipal ordinance *establishing a minimum wage higher than the minimum wage established*" by the Act.[69]

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[68] *See Bradford*, 2022 WL 204600, at *13 ("The Biden Rule does not conflict with the statutes to which plaintiffs cite and, therefore, it is not clear how the Biden Rule displaces any of them."); 86 Fed. Reg. at 67, 129 ("[T]he DBA, FLSA, and SCA establish 'minimum' wage rates; it is therefore not inconsistent with these wage floors to establish a higher minimum wage rate.")

[69] 29 U.S.C. § 218(a) (emphasis added).

And the DBA, which applies to contracts for construction and repairs for public buildings and works in excess of $2,000, sets a prevailing wage standard as determined by the Secretary of Labor and explicitly provides for the possibility of different wage rates established by other federal laws: "This subchapter *does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates*."[70] Similarly, the minimum wage provisions of the PCA, applicable to contracts over $10,000 relating to the manufacture and furnishing of supplies and equipment, and the SCA, which generally governs service contracts in excess of $2,500, do not impose limitations on higher wage requirements established by other applicable federal authorities.[71]

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[70] 40 U.S.C. § 3146 (emphasis added).

[71] 41 U.S.C. § 6502(1) (requiring that employees of the contractors to be paid "not less than the prevailing minimum wages, as determined by the Secretary."); 41 U.S.C. § 6703(1) (requiring that covered contracts contain a minimum wage provision "in accordance with prevailing rates in the locality" as determined by the Secretary.) Additionally, the Rule cites to the SCA's legislative history demonstrating that Congress intended this provision to create a minimum wage floor. *See* 86. Fed. Reg. at 67,130; *see, e.g.,* H.R. Rep. No. 89–948, at 3 (1965) ("Provisions regarding wages and working conditions must be included in these contracts and bid specifications. Service employees must be paid *no less than* the rate determined by the Secretary of Labor to be prevailing in

Appellants fail to explain how their restrictive interpretation of the Procurement Act is mandated by any of the statutory language cited above, nor can they. The text of the FLSA, DBA, PCA, and SCA establishes that none of the statutes were intended to tie the hands of the President in establishing higher minimum wage standards for federal contracts where other applicable federal law provides such authority. Further, Appellants' attempt to manufacture a conflict between these laws and Congress' decision to provide the President with broad government-wide management and administrative authorities within the Procurement Act goes against general principles of statutory construction. "It is a cardinal principle of construction that ... [w]hen there are two acts upon the same subject, the rule is to give effect to both if possible."[72] And "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-

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the locality.") (emphasis added); S. Rep. No. 89–798, at 2 (1965) ("Persons covered by the bill must be paid *no less than* the prevailing rate in the locality as determined by the Secretary, including fringe benefits as an element of the wages.") (emphasis added).

[72] *United States v. Borden Co.,* 308 U.S. 188, 198 (1939).

existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[73]

The cited statutes thus easily co-exist with the authorities vested in the President by the Procurement Act and E.O. 14,026 setting a higher minimum wage standard. And in fact, as Appellants recognize, Appellants' Br. at 31, in order for permittees on federal land to come within the scope of E.O. 14,026, their employees' wages must be governed by the FLSA, SCA, or DBA.[74] The Court should reject Appellants' attempts to read a conflict between these statutes and the broad authority provided by the Procurement Act, when none exists.[75]

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[73] *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[74] 86 Fed. Reg. at 22,837.

[75] Further, State Amici argue that E.O. 14,026 "directly conflicts" with the locality-specific prevailing wage provisions of the DBA, PCA, and SCA. State Amici Br. at 9-10. In doing so the State Amici fail to recognize that the Order simply establishes a minimum wage for all contracts that are governed by the DBA, FLSA, or SCA, which as explained above, the wage provisions of those statutes permit. But the E.O. does not otherwise affect the Secretary's ability to set prevailing wages for an industry, based on the locality, at or above the $15.00 minimum. *See SAM.gov Search Page*, https://bit.ly/3vBKsXU (last accessed Apr. 27, 2022) (indexing prevailing wage determinations under the DBA and SCA). As such, E.O. 14,026 does not undermine the "prevailing wage" provisions of the DBA, PCA, and SCA.

CONCLUSION

For the reasons above and in Defendants-Appellees' filings, *Amici* respectfully urge this Court to affirm the district court's denial of a preliminary injunction.

Respectfully submitted,

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/s/ Sean A. Lev

Date: April 27, 2022

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2022, a true and accurate copy of the foregoing filing was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Sean A. Lev

Date: April 27, 2022