IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

STATE OF TEXAS, *et al.*, *Plaintiffs*, v. **JOSEPH R. BIDEN** in his official capacity as President of the United States, *et al.*, *Defendants*.	Civil Case No. 6:22-CV-00004

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF TEXAS AFL-CIO, EVERY TEXAN, SOUTHWEST LABORERS' DISTRICT COUNCIL, NATIONAL EMPLOYMENT LAW PROJECT, COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, ECONOMIC POLICY INSTITUTE, AND INDIANA COMMUNITY ACTION POVERTY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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Texas AFL-CIO, Every Texan, Southwest Laborers' District Council, National Employment Law Project, Communications Workers of America, Service Employees International Union, National Women's Law Center, Economic Policy Institute, and Indiana Community Action Poverty Institute (collectively, *Amici*) move for leave to file the attached brief as *amici curiae* in support of Defendants' motion to dismiss, or in the alternative, motion for summary judgment. Counsel for proposed *Amici* have consulted with the parties' counsel, who have indicated their consent or non-opposition to the filing of this motion.

"The extent to which the court permits amicus briefing lies solely within the court's discretion." *United States v. Olis*, Case No. CIV.A. H-07-3295, 2008 WL 620520, at *7 (S.D. Tex. Mar. 3, 2008) (citing *Waste Management of Pennsylvania v. City of York*, 162 F.R.D. 34, 36-37 (M.D. Pa. 1995)). "Factors relevant to the determination include whether the proffered information is 'timely and useful' or otherwise necessary to the administration of justice." *Olis*, 2008 WL 620520, at *7; *see also Neonatology Assoc., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (granting leave to file amicus brief where "amici have a sufficient 'interest' in the case and that their brief is 'desirable' and discusses matters that are 'relevant to the disposition of the case' (quoting Fed. R. App. P. 29(b))); *Lefebure v. D'Aquilla*, 15 F.4th 670, 676 (5th Cir. 2021) (Ho, J.) ("[W]e would be 'well advised to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted.'" (quoting *Neonatology*

Assoc., 293 F.3d at 133)). "Federal Rule of Appellate Procedure 29 sets forth standards for filing an amicus brief in the United States Courts of Appeals, and in the absence of controlling authority, district courts commonly refer to Rule 29 for guidance." *Id.* Rule 29 permits a party to seek leave to file an amicus brief within seven days "after the principal brief of the party being supported is filed." Fed. R. App. P. 29(a)(6).

Here, the proposed *amicus curiae* brief is timely, as it is filed within seven days of Defendants' motion that the proposed brief supports. Further, the proposed brief will assist the Court as it considers Defendants' motion to dismiss, or in the alternative, motion for summary judgment. As organizations that advocate for workers' rights, proposed *Amici* have a strong and unique interest in improved employment standards for workers who are employed by businesses who benefit from contracts with the federal government. The attached brief reflects *Amici*'s position that the regulations are lawful and advance economy and efficiency for the federal government. In particular, proposed *Amici* have undertaken a close review of the literature and studies cited by the Department of Labor in its regulations[1] implementing the federal contactor minimum wage requirements established by Executive Order 14,026.[2] That review shows that the Department 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

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[1] Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126, 67,206 (Nov. 24, 2021).

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

absenteeism and therefore the costs associated with such activities and increasing employee morale and productivity.

INTERESTS OF AMICI CURIAE

Proposed *Amici* include nine organizations who advocate for the rights of workers and who are dedicated to ensuring the needs of workers are considered in economic policy decision-making:

The Texas AFL-CIO is a state federation of labor unions representing 240,000 members in Texas. The Texas AFL-CIO has affiliated unions across the state in all of the major economic sectors, including unions whose members are working on federal contracts. A low minimum wage has condemned hundreds of thousands of working people to poverty in Texas, cost taxpayers, and shut out business customers. The Texas AFL-CIO works, as one of its core purposes, to raise wages for workers, so individuals working for a living have family-supporting wages and benefits, the restoration of the minimum wage to a living wage, and pay equity for women and people of color.

Every Texan advocates for policies that will measurably improve equity in and access to health care, food security, education, and financial security. We expose unfair barriers faced by people of color, low-income Texans, immigrants, women, children, and other disenfranchised populations. We work alongside community leaders to advance equitable policy solutions. Every Texan 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 Southwest Laborers' District Council ("SWLDC"), an affiliate of the Laborers' International Union of North America ("LiUNA") serves construction, service, and federal sector workers in Arkansas, Oklahoma, and Texas. Our diverse membership constructs buildings roads, bridges, pipeline, and includes employees working under the Service Contract Act and in the Federal Sector. LiUNA members are highly skilled and focused on advancement and new opportunities for themselves and all workers. We promote economic and workplace justice in public policy across the issues that are critical to providing safe and secure workplaces with good pay and benefits. The SWLDC includes thousands of workers in the federal sector working under the Service Contract Act, on multiple military bases or other federal enclaves. Literally hundreds of employees have already enjoyed the benefit of receiving the much-needed increases in their perspective wages, thanks to President Biden's Executive Order Increasing the Minimum Wage for Federal Contractors. SWLDC has a direct interest in supporting the increased minimum wage requirements for workers whose employers benefit from contracting 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, and has litigated and participated as amicus curiae in numerous cases addressing workers' 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 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 the Executive Order. 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 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.

The Indiana Community Action Poverty Institute, a program of the Indiana Community Action Association, doing business as the Indiana Community Action Poverty Institute, promotes public policies to help Hoosier families achieve financial well-being. We value, gather, and translate quantitative and qualitative data to communicate the opportunities and challenges that Hoosiers experience. We advance well-being by promoting evidence-based solutions and building coalitions to engage in direct and strategic conversations with policymakers and the public. For nearly two decades, the Institute has researched the causes and conditions of financial vulnerability, the economic conditions of Hoosier families who earn low to moderate wages and the hardships that wage inadequacy cause for individuals, families, and Indiana's economic well-being as a whole. From this research, we know that in no county in Indiana can even a single adult be economically self-sufficient on the current federal minimum wage; and that the hourly wage at 200% of the federal poverty level (a common metric for self-sufficiency) is more than $22 an hour. The Institute is committed to helping to dismantle inequities and to build families'

economic well-being. We believe when families are financially stable, they can achieve their full potential and better contribute to their communities.

Proposed *Amici* state that no counsel for any party authored the proposed brief in whole or in part, and no person or entity, other than proposed *Amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

For the reasons state above, the Court should grant proposed *Amici* leave to file the attached brief as *amici curiae*.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I certify that the total number of words in this motion, less portions excluded under Court Procedure 16(c), is 1,873, as counted by Microsoft Word.

/s/ Sean A. Lev

CERTIFICATE OF CONFERENCE

I certify that counsel for proposed *Amici* have timely and in good faith conferred with the parties' counsel on this motion. Defendants have consented to this motion and to the filing of the attached *amicus curiae* brief. Counsel for Plaintiffs have indicated that Plaintiffs do not oppose the filing of this motion.

/s/ Sean A. Lev

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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: May 6, 2022

IN THE UNITED STATES DISTRICT COURT
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STATE OF TEXAS, *et al.*, *Plaintiffs*, v. **JOSEPH R. BIDEN** in his official capacity as President of the United States, *et al.*, *Defendants*.	Civil Case No. 6:22-CV-00004

[PROPSOED] BRIEF OF TEXAS AFL-CIO, EVERY TEXAN, SOUTHWEST LABORERS' DISTRICT COUNCIL, NATIONAL EMPLOYMENT LAW PROJECT, COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, ECONOMIC POLICY INSTITUTE, AND INDIANA COMMUNITY ACTION POVERTY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

The Texas AFL-CIO, Every Texan, Southwest Laborers' District Council, National Employment Law Project, Communications Workers of America, Service Employees International Union, National Women's Law Center, Economic Policy Institute, and Indiana Community Action Poverty Institute are each a non-profit entity and has no parent corporation. No publicly owned corporation owns 10% or more of the stocks of any entity.

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INTEREST OF *AMICI CURIAE*[1]

As provided in the accompanying motion for leave, *Amici* are non-profit organizations and unions that advocate for workers' rights, including increased wages and benefits and closing racial and gender wage gaps. *Amici* accordingly have a strong interest in improved employment standards for employees of businesses who benefit from contracts with the federal government.

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

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[1] *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.

[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.

D.C. Circuit upheld the order as a valid exercise of the President's Procurement Act authority, 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 minimum wage for federal contractors; that minimum wage applied to outdoor recreational outfitters and guides operating on federal lands.[6] Executive Order 13,658 also contained provisions applicable to federal contractors who employ tipped workers and established a process by which the minimum hourly wage for tipped workers would incrementally increase until the hourly cash wage equals 70% of the wage for non-tipped covered employees.[7] 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.[8]

Just like his predecessors, President Biden exercised his Procurement Act authority in issuing Executive Order 14,026 ("E.O. 14,026"), which addresses wage rules for companies that choose to contract with the federal government.[9] In order to "promote[] economy and efficiency," he determined it was necessary to increase the

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[5] *Id.* at 792-93.
[6] Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014).
[7] *Id.* at 9,851–52.
[8] Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018).
[9] Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021).

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.[10] Like Executive Order 13,658, E.O. 14,026 also incrementally increased tipped workers' minimum hourly wage so that beginning January 1, 2024, federal contractors are required to pay tipped workers 100% of the wage set for non-tipped workers.[11]

Notwithstanding that E.O. 14,026 aligns with decades of executive action taken pursuant to the Procurement Act addressing wage standards, Plaintiffs—the States of Texas, Mississippi, and Louisiana—assert that the President lacks authority to set wage standards to which those who choose to contract with the government must adhere. Even more stunning is that to the extent Plaintiffs have chosen to enter into contracts with the federal government covered by Executive Order 13,658, those contracts have been subject to minimum wage requirements established by the President pursuant to the Procurement Act for *more than seven years*. Yet, Plaintiffs did not challenge Executive Order 13,658 or its application to them. Plaintiffs may disagree with the *policy* choices reflected in E.O. 14,026, i.e., setting a higher minimum wage that will improve efficiency for both federal contract employers and the federal government, while also improving the lives of many employees of federal contractors by providing them a decent wage. But their

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[10] *Id.*
[11] *Id.* at 22,836.

allegations that E.O. 14,026 is *ultra vires*, Count I, Compl. at 21, ECF No. 1, and that the Rule exceeds the Procurement Act authority, Count II, Compl. at 24, are legally and factually unsupported.[12]

The Department of Labor ("Department") reasonably concluded in its Rule implementing E.O. 14,026[13] 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 therefore the costs associated with such activities and increasing 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.[14] Critically, moreover, the Department estimates that increasing wages will impact more than 327,000 contract workers—including in industries largely comprised of women, and

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[12] Plaintiffs' Complaint takes issue with E.O. 14,026's recission of the exemption from the minimum wage requirement for outdoor recreational services operating on federal lands, Compl. ¶ 22, as well as requirements related to tipped workers, *id*. However, Plaintiffs do not allege any proprietary interests injured by these provisions; in other words, they do not claim they have covered contracts that are impacted by them. To the extent they are purporting to bring claims on behalf of citizens or entities within their States as *parens patriae*, they cannot assert such claims against the federal government. *See Massachusetts v. Mellon*, 262 U.S. 447, 485–486 (1923).

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

[14] *Id*. at 67,212.

disproportionately Black and Latinx, workers—helping to rectify the racial and gender wage gaps in federal contractor workforces.[15]

Finally, despite Plaintiffs' 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 Plaintiffs' claims are meritless—and because greater income and workplace equality will create more economy and efficiency for the government—the Court should grant Defendants' motion to dismiss, or alternatively, enter summary judgment in favor of Defendants.

ARGUMENT

I. E.O. 14,026 IS WITHIN THE PRESIDENT'S PROCUREMENT ACT AUTHORITY.

The Rule does not exceed the President's authority under the Procurement Act. E.O. 14,026 and the Rule align with prior precedent and advance economy and efficiency in government contracting. Further, the Rule's stated benefits were amply supported by the record developed before the Department. Plaintiffs' claims should thus be rejected.

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[15] *Id.* at 67,194, 67,214–5.

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

Plaintiffs allege that the Procurement Act "does not give the President authority to regulate the minimum compensation of employees of contractors," Compl. ¶ 101. They further assert that E.O. 14,026 does not support economy and efficiency. Compl. ¶ 100. They are wrong on both counts—the text of the Procurement Act and decades of precedent interpreting the President's authority under the Act contradict Plaintiffs' assertions.

The Procurement Act vests in the President "broad-ranging authority" with "necessary flexibility."[16] 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."[17] The Act grants the President wide discretion to "prescribe policies and directives that *the President* considers necessary to carry out" the Act's goals.[18] 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.'"[19] The terms "efficiency" and "economy" encompass "factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions."[20] Courts have further recognized these concepts as "reaching

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[16] *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).

[17] 40 U.S.C. § 101.

[18] *Id.* § 121(a) (emphasis added).

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

[20] *Id.* at 789.

beyond any narrow" construction, and include "secondary policy views that deal with government contractors' employment practices—policy views that are directed beyond the immediate quality and price of goods and services purchased."[21]

Applying these established principles, the Rule does not exceed the President's authority. 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] Beyond that, 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."[23] 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."[24] Those are precisely the bases on which Congress authorized the President to invoke authority under the Procurement Act.

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[21] *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.

[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.")

[23] 86 Fed. Reg. at 22,835.

[24] *Id.*

Additionally, 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."[25] 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."[26] 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."[27]

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.

Contrary to Plaintiffs' allegation that the Department "did not provide any substantive justification for anything" in the Rule, Compl. ¶ 34, the record before the Department amply supports its conclusion that an increased minimum wage supports "efficiency and economy … in government procurement."[28] Studies and

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[25] 86 Fed. Reg. at 67,206
[26] *Id.*
[27] *Id.* at 67,206–07.
[28] 86 Fed. Reg. at 67,212.

literature cited in the Rule show the link between increased wages and efficiencies, including increases in morale and productivity and decreases in employee turnover and absenteeism, as well as the larger social benefits of reducing poverty and racial and gender wage disparities by increasing wages for workers.[29] 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.[30] And while Plaintiffs allege that the Rule relied only on literature related to voluntary wage increases, had no context with government contracting, and largely focused on the restaurant industry, Compl. ¶ 31, the evidence cited in the Rule proves otherwise. As demonstrated below, the Department looked at literature assessing the impacts of wage increases across various industries and relied on studies and literature related to local living wage ordinances, which like the Rule, establish nonvoluntary *wage requirements* for entities that do business with State and local governments.

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[29] *Id.* The Rule also contradicts Plaintiffs' assertions that the Department did not meaningfully consider unemployment or underemployment. Compl. at 25. The Department in fact did consider 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 entities required to increase wages from $7.50 to $15/hour "who might be more limited in their ability to pass costs along to the Federal government," disemployment would still be small, "a reduction of 0.9 percent employment." *Id.* at 67,212.

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

To support its conclusion regarding increased worker morale and productivity, the Department reviewed studies on the efficiency wage theory, an established economic principle[31] 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."[32] 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."[33]

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."[34] For warehouse workers, the study found that a $1 increase in pay resulted in increased productivity that "represents an hourly savings of $1.10 for the retailer."[35] Similar productivity gains were found for customer

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[31] 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.

[32] 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.

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

[34] Emanuel, *supra* note 33, at 3.

[35] *Id.* at 13.

service representatives.[36] Another cited study concluded that "increasing the federal minimum wage immediately enhances restaurant productivity for up to two years."[37]

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.[38]

Evidence also supports the Department's conclusion that increased wages reduce employee turnover and absenteeism. Reduced turnover represents "both potential productivity gains and cost savings for the employer."[39] 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."[40]

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[36] *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.").

[37] Kim, *supra* note 33, at 1.

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

[39] 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.

[40] *Id.*

In considering employee turnover, the Department cited to studies assessing local living wage ordinances.[41] 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."[42] More than 140 cities and the State of Maryland have adopted such laws.[43] Such ordinances often cover not only employers that contract directly to supply services to the governments, but also concession businesses that "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."[44]

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.[45] 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

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[41] *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 31; 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.

[42] Fairris, *supra* note 39, at 1.

[43] Sonn, *supra* note 41, at 13.

[44] Fairris, *supra* note 39, at 15.

[45] Reich, *supra* note 41, at 7.

wage increases of 10 percent or more."[46] For airport screeners, the turnover fell from 94.7% to 18.7% in fifteen months—a nearly 80% decrease.[47]

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.[48] Similarly, a study concluded that employers subject to Los Angeles's living wage ordinance had less turnover than those that were not.[49]

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.[50] 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."[51]

As to absenteeism, one study found a statistically significant decrease in employee absenteeism for contractor employers required to pay higher wages under Los Angeles's living wage ordinance, when compared to those that were not.[52] And

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[46] *Id.* at 10.
[47] *Id.*
[48] Howes, *supra* note 41, at 161.
[49] Fairris, *supra* note 39, at 105-06.
[50] Reich, *supra* note 41, at 10.
[51] Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There are Significant Business Costs to Replacing Employees* 1 (2012), https://ampr.gs/3gMouL6.
[52] Fairris, *supra* note 39, at 109, 116.

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%).[53] 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,"[54] it reasonably concluded that the "other evidence is strong enough to suggest a relationship between increased wages and reduced absenteeism."[55]

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 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.[56] 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

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[53] Reich, *supra* note 41, at 10.

[54] 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).

[55] 86 Fed. Reg. at 67,214.

[56] *Id*. *See Poverty Thresholds*, U.S. Census Bureau, https://bit.ly/3BtACKw, (last visited May 5, 2022).

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.[57] 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 "represented 13.2% of the total population in the United States," it accounted for "23.8% of the poverty population."[58] Similarly, for the Latinx population, while it comprises "18.7% of the total population," it accounted for "28.1% of the population in poverty."[59] The Department also cited to analysis and data provided by commenters, including from *Amici* Economic Policy Institute and National Employment Law Project, as well as U.S. Bureau of Labor Statistics data, showing that many of the industries affected by

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[57] 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.")

[58] 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.

[59] *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, and wage gaps are particularly wide for many groups of women of color relative to white, non-Hispanic men. Nat'l Women's Law Ctr., *The Wage Gap: The Who, How, Why, and What to Do* 1 (2021).

the Rule are disproportionately comprised of people of color and/or women.[60] As courts have long recognized, workplace racial inequities undermine efficiency in government contracting, and thus, taking action to combat those inequalities is authorized by the Procurement Act.[61]

II. E.O. 14,026 DOES NOT CONFLICT WITH OTHER FEDERAL LAWS ADDRESSING MINIMUM WAGES.

Plaintiffs incorrectly allege that the minimum wage established by E.O. 14,026 conflicts with other federal statutes applicable to federal contractors. Compl. ¶¶ 77-90. Pointing to the Fair Labor Standards Act ("FLSA"),[62] 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"),[63] the Walsh-Healey Public Contracts Act (PCA),[64] and the Service Contract Act (SCA),[65] which contain wage standard provisions for specified sets of federal contractors, Plaintiffs contend that these laws provide "evidence that Congress intended to reserve for itself authority to set minimal wage policies,

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[60] 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).").

[61] *See, e.g., Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971).

[62] 29 U.S.C. § 201 *et seq.*

[63] 40 U.S.C. § 3142 *et seq.*

[64] 41 U.S.C. § 6501 *et seq.*

[65] 41 U.S.C. § 6701 *et seq.*

particularly in the federal contracting sphere." Compl. ¶ 87. However, the statutes they cite provide no support for Plaintiffs' assertions. Each of the applicable provisions of the FLSA, DBA, PCA, and the SCA demonstrates 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.[66] Thus, by its terms, the FLSA contemplates that possibility that other federal laws may establish higher minimum wages, and, as a result, E.O. 14,026 and the

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[66] 29 U.S.C. § 218(a) (emphasis added). Plaintiffs point to this same provision as recognizing "States' authority to set their minimum wages at any rate higher than the figure in the FLSA or maintain the FLSA rate," Compl. ¶ 84, but fail to recognize, as provided above, that the same provision also preserves the federal government's authority to do the same under applicable federal law. Plaintiffs also make the unsubstantiated allegation that the Rule "*could* put 'substantial pressure on [Texas] to change [its] laws,'" Compl. ¶ 90 (emphasis added and citation omitted). E.O. 14,026 does not prevent a State from setting a different minimum wage than the one established by the E.O., nor does it pose a conflict with a lower minimum wage under state law since it is possible for a federal contractor to both comply with a lower state minimum wage requirement and the wage requirement established by E.O. 14,026. It simply requires that if entities *choose* to contract with the federal government and fall within the scope of E.O. 14,026, they must adhere to the wage requirement. *See* 86 Fed. Reg at 67,225 (defining a contract or contract-like instruments with the federal government as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law."). Thus, E.O. 14,026 cannot be fairly read as pressuring States to amend or change their laws.

Rule do not "purport[] to override or effectively amend the FLSA," as Plaintiffs contend. Compl. ¶ 89.

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*."[67] Similarly, the minimum wage provisions of the PCA, applicable to contracts over $15,000 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.[68]

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[67] 40 U.S.C. § 3146 (emphasis added).

[68] 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 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).

Plaintiffs 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, Plaintiffs' 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."[69] And "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[70]

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, in order for federal contractors to come within the scope of E.O. 14,026, employees' wages generally must be governed by the FLSA, SCA, or DBA.[71]

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[69] *United States v. Borden Co.,* 308 U.S. 188, 198 (1939).
[70] *Morton v. Mancari*, 417 U.S. 535, 551 (1974)
[71] 86 Fed. Reg. at 67,227.

The Court should reject Plaintiffs' attempts to read a conflict between these statutes and the broad authority provided by the Procurement Act, when none exists.

CONCLUSION

For the reasons above and in Defendants' filings, *Amici* urge this Court to grant Defendants' motion to dismiss, or alternatively, enter summary judgment in favor of Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the total number of words in this proposed brief, less portions excluded under Court Procedure 16(c), is 4,992, as counted by Microsoft Word.

/s/ Sean A. Lev

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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: May 6, 2022