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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 **Mark Brnovich, et al.,**

18 *Plaintiffs,*

19 v.

20 **Martin J. Walsh, et al.,**

21 *Defendants.*

Civil Case No. 2:22-cv-213-  
JJT

22 **[PROPOSED] BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT,**  
23 **COMMUNICATIONS WORKERS OF AMERICA, SERVICE EMPLOYEES**  
24 **INTERNATIONAL UNION, NATIONAL WOMEN’S LAW CENTER,**  
25 **ECONOMIC POLICY INSTITUTE, INDIANA COMMUNITY ACTION**  
26 **POVERTY INSTITUTE, AND GRAND CANYON INSTITUTE AS *AMICI***  
27 ***CURIAE* IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS, OR IN THE**  
28 **ALTERNATIVE, FOR SUMMARY JUDGMENT AND IN OPPOSITION TO**  
**PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

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**CORPORATE DISCLOSURE STATEMENT**

The National Employment Law Project, Communications Workers of America, Service Employees International Union, National Women’s Law Center, Economic Policy Institute, Indiana Community Action Poverty Institute, and Grand Canyon 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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**Cases**

*Am. Fed’n of Lab. & Cong. of Indus. Organizations v. Kahn*,  
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*Chamber of Com. of U.S. v. Reich*,  
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*City of Albuquerque v. DOI*,  
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*Contractors Ass’n of E. Pa. v. Sec’y of Lab.*,  
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*Golden Gate Rest. Ass’n v. City & Cnty. of San Francisco*,  
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*Kentucky v. Biden*,  
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*Lopez v. Heckler*,  
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*Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,  
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*Massachusetts v. Mellon*,  
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*Morton v. Mancari*,  
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*Roman v. Wolf*,  
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*UAW-Lab. Emp. & Training Corp. v. Chao*,  
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*United States v. Borden Co.*,  
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1 *Winter v. Nat. Res. Def. Council, Inc.*,  
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3 **Statutes, Rules & Regulations**

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5 40 U.S.C. § 121(a)..... 1, 6

6 Davis-Bacon Act, 40 U.S.C. § 3142 *et seq.* ..... 14, 15

7 Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ..... 13, 14

8 Service Contract Act, 41 U.S.C. § 6701 *et seq.* ..... 14, 15

9 Walsh-Healey Public Contracts Act, 41 U.S.C. § 6501 *et seq.*..... 13, 15

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11 Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (November 3, 1978)..... 1

12 Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014)..... 2

13 Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018) ..... 2

14 Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021) ..... 2, 7

15 H.R. Rep. No. 89–948 (1965) ..... 15

16 Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg.  
 17 67,126 (Nov. 24, 2021) ..... 3, 4, 7, 8, 12, 13, 14, 15, 16, 17

18 S. Rep. No. 89–798 (1965)..... 15

19 **Other Authorities**

20 George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q. J.  
 21 Econ, 543 (1982)..... 8

22 Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There are*  
 23 *Significant Business Costs to Replacing Employees* (2012),  
 24 <https://ampr.gs/3gMouL6>..... 11

25 Jeff Chapman & Jeff Thompson, Econ. Pol’y Inst., Briefing Paper No. 170,  
 26 *The Economic Impact of Local Living Wages* (2006),  
 27 <https://bit.ly/3GOwLZA>..... 8, 10

28

1 John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic*  
 2 *Lows in 2019: Inequalities Persist Despite Decline in Poverty For All*  
 3 *Major Race and Hispanic Origin Groups*, U.S. Census Bureau (Sept.  
 15, 2020), <https://bit.ly/3xZzpL4> ..... 13

4 Georges Dionne & Benoit Dostie, *New Evidence on the Determinants of*  
 5 *Absenteeism Using Linked Employer-Employee Data*, 61 *Indus. Lab.*  
 6 *Rel. Rev.* 108 (2007), <https://bit.ly/3oNkC0S> ..... 12

7 Natalia Emanuel & Emma Harrington, *The Payoffs of Higher Pay:*  
 8 *Elasticities of Productivity and Labor Supply with Respect to Wages*  
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9 David Fairris et al., *Examining the Evidence, The Impact of the Los Angeles*  
 10 *Living Wage Ordinance on Workers and Businesses* (2015),  
 11 <https://bit.ly/3LCPqey> ..... 10, 11

12 Candace Howes, *Living Wages and Retention of Homecare Workers in San*  
 13 *Francisco*, 44 *Indus. Rel.* 139 (2005), <https://bit.ly/34Ty63R> ..... 10, 11

14 Hong Soon Kim & SooCheong Jang, *Minimum Wage Increase and Firm*  
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 16 *Mgmt.* 378 (2019) ..... 9

17 Alexandre Mas & Enrico Moretti, *Peers at Work*, 99 *Am. Econ. Rev.* 112  
 18 (2009), <https://bit.ly/3GR7pdm>..... 9

19 Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why, and What*  
 20 *to Do* (2021), <https://bit.ly/36Oo712> ..... 13

21 Michael Reich et al., U.C. Berkley Inst. of Indus. Rel., *Living Wages and*  
 22 *Economic Performance, the San Francisco Airport Model* (2003)..... 10, 11, 12  
 23 *SAM.gov Search Page*, <https://bit.ly/3vBKsXU>..... 16

24 Paul Sonn & Tsedeye Gebreselassie, Nat’l Emp. L. Project, *The Road to*  
 25 *Responsible Contracting: Lessons from States and Cities for Ensuring*  
 26 *the Federal Contracting Delivers Good Jobs and Quality Services*  
 27 (2009), <https://bit.ly/3GOxvhk>; ..... 9

28 *Poverty Thresholds*, U.S. Census Bureau, <https://bit.ly/3BtACKw>..... 12

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> ..... 12

1 **INTEREST OF *AMICI CURIAE***<sup>1</sup>

2 As provided in the accompanying motion for leave, proposed *Amici* are non-profit  
3 organizations and unions that advocate for workers’ rights, including for increased wages  
4 and benefits and for the closing of racial and gender wage gaps. Proposed *Amici*  
5 accordingly have a strong interest in improved employment standards for workers  
6 employed by businesses who benefit from contracts with the federal government.  
7

8 **SUMMARY OF THE ARGUMENT**

9 For decades, courts have recognized that the Federal Property and Administrative  
10 Services Act of 1949 (widely known as the “Procurement Act”) provides the President  
11 “particularly direct and broad-ranging authority” to set standards “the President considers  
12 necessary” to promote economy and efficiency for those who choose to contract with the  
13 federal government.<sup>2</sup>

14 Acting pursuant to this authority in 1978, President Carter issued Executive Order  
15 12,092, conditioning federal contracts on contractors’ compliance with the  
16 Administration’s otherwise voluntary wage-and-price controls.<sup>3</sup> Those controls limited  
17 workers’ wage increases to “no more than a seven percent annual rise.”<sup>4</sup> The D.C. Circuit  
18 upheld the order as a valid exercise of the President’s Procurement Act authority, even  
19 while acknowledging that “there may be occasional instances where a low bidder will not  
20 be awarded a contract.”<sup>5</sup>

21  
22 Using the same authority in 2014, President Obama issued Executive Order 13,658,  
23

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24 <sup>1</sup> *Amici* certifies that no party’s counsel authored this brief in whole or in part, no  
25 party or party’s counsel contributed money intended to fund this brief, and no person other  
26 than *amici*, their members, and their counsel contributed money intended to fund this brief.

26 <sup>2</sup> *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).

27 <sup>3</sup> *Kahn*, 618 F.2d at 785-86; Exec. Order No. 12,092, 43 Fed. Reg. 51,375  
(November 3, 1978).

28 <sup>4</sup> *Kahn*, 618 F.2d at 786.

<sup>5</sup> *Id.* at 792-93.

1 establishing a federal minimum wage for federal contractors; that minimum wage applied  
2 to outdoor recreational outfitters and guides operating on federal lands.<sup>6</sup> Executive Order  
3 13,658 also contained provisions applicable to federal contractors who employ tipped  
4 workers and established a process by which the minimum hourly wage for tipped workers  
5 would incrementally increase until the hourly cash wage equals 70 percent of the wage for  
6 non-tipped covered employees.<sup>7</sup> In 2018, acting pursuant to the same authority, President  
7 Trump issued Executive Order 13,838, which decided, as a matter of policy, to exempt  
8 from these requirements certain outdoor recreational service employers operating on  
9 federal lands, but kept in place the minimum wage rules for other contract workers.<sup>8</sup>

11 Just like his predecessors, President Biden exercised his Procurement Act authority  
12 in issuing Executive Order 14,026 (“E.O. 14,026”), which addresses wage rules for  
13 companies that choose to contract with the federal government.<sup>9</sup> In order to “promote[]  
14 economy and efficiency,” he determined it was necessary to increase the federal contractor  
15 minimum wage to \$15/hour and to revoke Executive Order 13,838’s exemption of outdoor  
16 recreational service employers operating on federal lands from this requirement.<sup>10</sup> Like  
17 Executive Order 13,658, E.O. 14,026 also incrementally increased tipped workers’  
18 minimum hourly wage, so that beginning January 1, 2024, federal contractors are required  
19 to pay tipped workers 100 percent of the wage set for non-tipped workers.<sup>11</sup>

21 Notwithstanding that E.O. 14,026 aligns with decades of executive action taken  
22 pursuant to the Procurement Act addressing wage standards, Plaintiffs—the States of  
23 Arizona, Idaho, Indiana, Nebraska, and South Carolina—assert that the President lacks  
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25 <sup>6</sup>Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014).

26 <sup>7</sup>*Id.* § 3.

27 <sup>8</sup>Exec. Order No. 13,838, 83 Fed. Reg. 25,341 (May 25, 2018).

28 <sup>9</sup>Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* § 3.



1 authority to set wage standards to which those who choose to contract with the government  
2 must adhere. Even more stunning is that to the extent Plaintiffs have chosen to enter into  
3 contracts with the federal government covered by Executive Order 13,658, those contracts  
4 have been subject to minimum wage requirements established by the President pursuant to  
5 the Procurement Act for *more than seven years*. Yet, Plaintiffs did not challenge Executive  
6 Order 13,658 or its application to them.<sup>12</sup> Plaintiffs may disagree with the *policy* choices  
7 reflected in E.O. 14,026, i.e., setting a higher minimum wage that will improve efficiency  
8 for both federal contract employers and the federal government, while also improving the  
9 lives of many employees of federal contractors by providing them a decent wage. But their  
10 allegations that the President lacked authority under the Procurement Act to issue E.O.  
11 14,026, and that the Rule exceeds the Procurement Act authority, Count I, Compl. ¶ 118,  
12 ECF No. 1, are legally and factually unsupported.<sup>13</sup>

14 The Department of Labor (“Department”) reasonably concluded in its Rule  
15 implementing E.O. 14,026<sup>14</sup> that increasing the federal contractor minimum wage will  
16 increase employee productivity and decrease employee turnover and absenteeism. In doing  
17 so, it relied on studies across various industries and academic literature demonstrating that

19 \_\_\_\_\_  
20 <sup>12</sup> See Compl. ¶ 84 (acknowledging that Executive Order 13,658 and the  
21 Department’s implementing regulations have “never been subject to court challenge or  
22 review.”).

23 <sup>13</sup> Plaintiffs take issue with E.O. 14,026’s rescission of the exemption from the  
24 minimum wage requirement for outdoor recreational services operating on federal lands,  
25 Compl. ¶ 87, the requirements related to tipped workers, *id.*, as well as several other  
26 provisions of E.O. 14,026, including its application to subcontractors and the Rule’s  
27 definition of what constitutes a contract or “contract-like instruments” for purposes of the  
28 wage requirement, *id.* ¶¶ 39, 140. 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).

<sup>14</sup> Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126  
(Nov. 24, 2021) (codified at 29 C.F.R. pts. 10, 23).

1 higher wages incentivize workers to stay in their jobs, thereby reducing employee turnover  
2 and absenteeism and therefore the costs associated with such activities and increasing  
3 employee morale and productivity. Thus, ample evidence supports the Department's  
4 conclusion that increasing the minimum wage will increase the value of the government's  
5 investments.<sup>15</sup> Critically, moreover, the Department estimates that increasing wages will  
6 impact more than 327,000 contract workers—including in industries largely comprised of  
7 women, and disproportionately Black and Latinx, workers—helping to rectify the racial  
8 and gender wage gaps in federal contractor workforces.<sup>16</sup>  
9

10 And despite Plaintiffs' efforts to argue otherwise, E.O. 14,026 does not conflict with  
11 other federal laws addressing wage standards in federal contracting, such as the Davis-  
12 Bacon Act, the Walsh-Healey Public Contracts Act, and the Service Contract Act. While  
13 these laws operate to set baseline minimum prevailing wages, they do not preclude  
14 application of other wage standards made pursuant to other federal authorities, as E.O.  
15 14,026 does here and as Executive Orders issued by Presidents Carter, Obama, and Trump  
16 did in the past.  
17

18 On April 18, 2022, Plaintiffs filed a motion for preliminary injunction asking this  
19 Court to preliminarily enjoin the Department from enforcing the Rule, nearly five months  
20 after the Rule was published in the Federal Register and nearly three months after the Rule  
21 took effect. For the reasons stated herein and in Defendants' filing, ECF No. 30, Plaintiffs  
22 have failed to demonstrate a likelihood of success on the merits. Further, Plaintiffs' delay  
23 in seeking preliminary relief demonstrates a lack of irreparable harm. And Plaintiffs do not  
24 even try to explain why they delayed seeking preliminary relief. On the other side of the  
25 equitable balance, Plaintiffs' request, especially after such a long delay, would have real  
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27 <sup>15</sup> *Id.* at 67,212.

28 <sup>16</sup> *Id.* at 67,194, 67,214-5.

1 and substantial impacts for those workers in Plaintiffs’ States that are already relying on  
2 the benefits of the Rule’s higher wage requirements.

3 Because Plaintiffs’ claims are meritless—and because the equitable balance and  
4 public interest in greater income and workplace equality cut sharply against their request—  
5 the Court should deny Plaintiffs’ motion for a preliminary injunction, and instead, grant  
6 Defendants’ motion to dismiss, or alternatively, enter summary judgment in favor of  
7 Defendants.

### 8 ARGUMENT

#### 9 **I. Plaintiffs are unlikely to succeed on the merits because E.O. 14,026 is within** 10 **the President’s Procurement Act authority.**

11 The Rule does not exceed the President’s Procurement Act authority. E.O. 14,026  
12 and the Rule align with prior precedent and advance economy and efficiency in government  
13 contracting. Further, the Rule’s stated benefits were amply supported by the record  
14 developed before the Department. Thus, Plaintiffs are unlikely to succeed on the merits.

#### 15 **A. The President’s Procurement Act authority extends to setting minimum** 16 **wage requirements for those who choose to contract with the federal** 17 **government.**

18 Plaintiffs allege that the Procurement Act does not give the President authority to  
19 regulate the minimum compensation of employees of contractors. Compl. ¶¶ 105-07; Mot.  
20 for Prelim. Inj., ECF No. 21 at 12. They further assert that E.O. 14,026 does not support  
21 economy and efficiency. Compl. ¶¶ 112, 114; Mot. for Prelim. Inj. at 15. They are wrong  
22 on both counts—the text of the Procurement Act and decades of precedent interpreting the  
23 President’s authority under the Act contradict Plaintiffs’ assertions.

24 The Procurement Act vests in the President “broad-ranging authority” with  
25 “necessary flexibility.”<sup>17</sup> The Act’s stated purpose is to provide the government “with an  
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28 <sup>17</sup> *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).

1 economical and efficient system” for activities including “[p]rocuring and supplying  
 2 property and nonpersonal services.”<sup>18</sup> The Act grants the President wide discretion to  
 3 “prescribe policies and directives that *the President* considers necessary to carry out” the  
 4 Act’s goals.<sup>19</sup> Courts will sustain a President’s action made under the Act so long as it has  
 5 a “sufficiently close nexus” to “the values of ‘economy’ and ‘efficiency.’”<sup>20</sup> The terms  
 6 “efficiency” and “economy” encompass “factors like price, quality, suitability, and  
 7 availability of goods or services that are involved in all acquisition decisions.”<sup>21</sup> Courts  
 8 have further recognized these concepts as “reaching beyond any narrow” construction, and  
 9 include “secondary policy views that deal with government contractors’ employment  
 10 practices—policy views that are directed beyond the immediate quality and price of goods  
 11 and services purchased.”<sup>22</sup>

13 Applying these established principles, the Department’s Rule does not exceed the  
 14 President’s authority. E.O. 14,026 addresses wage standards for federal contractors,  
 15 something that multiple circuits have expressly recognized is within the President’s  
 16 Procurement Act authority.<sup>23</sup> Beyond that, President Biden concluded that “[r]aising the  
 17 minimum wage enhances worker productivity and generates higher-quality work by  
 18 boosting workers’ health, morale, and effort; reducing absenteeism and turnover; and  
 19 lowering supervisory and training costs.”<sup>24</sup> He reasoned that “ensuring that Federal  
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21 <sup>18</sup> 40 U.S.C. § 101.

22 <sup>19</sup> *Id.* § 121(a) (emphasis added).

23 <sup>20</sup> *See, e.g., Kahn*, 618 F.2d at 792.

24 <sup>21</sup> *Id.* at 789.

25 <sup>22</sup> *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996). Courts  
 26 have upheld the use of Procurement Act authority for a number of these secondary  
 27 purposes; perhaps the “most prominent” involve “a series of anti-discrimination  
 28 requirements for Government contractors.” *Kahn*, 618 F.2d at 790.

29 <sup>23</sup> *Kahn*, 618 F.2d at 792-93; *Kentucky v. Biden*, 23 F.4th 585, 607 (6th Cir. 2022)  
 30 (noting that use of the Procurement Act authority to require federal contractors “to abide  
 31 by wage and price controls” “has a ‘close nexus’ to the ordinary hiring, firing, and  
 32 management of labor.”)

33 <sup>24</sup> 86 Fed. Reg. at 22,835.

1 contractors pay their workers an hourly wage of at least \$15.00 will bolster economy and  
2 efficiency in Federal procurement.”<sup>25</sup> Those are precisely the bases on which Congress  
3 authorized the President to invoke authority under the Procurement Act.

4 Additionally, the Department determined that, in the event that “Government  
5 expenditures may rise,” the benefits “expected to accompany any such increase in  
6 expenditures” will result in “greater value to the Government.”<sup>26</sup> Further, the Department  
7 concluded, “[e]ven without accounting for increased productivity and cost-savings”—  
8 which it also concluded were likely to result from the Rule—“direct costs to employers  
9 and transfers are relatively small compared to Federal covered contract expenditures (about  
10 0.4 percent of contracting revenue . . .),” and thus “any potential increase in contract prices  
11 or decrease in profits will be negligible.”<sup>27</sup> For companies unable to pass costs to the  
12 government, such as permittees on federal lands, the Department noted that increased  
13 payroll costs are likely to be small and may be mitigated through the Rule’s stated benefits,  
14 passing along costs to the public, and “negotiating a lower percentage of sales paid as rent  
15 or royalty to the Federal government in new contracts.”<sup>28</sup>

16  
17  
18 **B. The Department properly relied on evidence that increasing the federal**  
19 **contractor minimum wage increases employee morale and productivity**  
20 **and reduces turnover, absenteeism, and income inequality.**

21 Contrary to the Plaintiffs’ allegation that Department’s analysis of the benefits of  
22 the increase minimum wage requirement was “perfunctory,” Compl. ¶ 101, the record  
23 before the Department amply supports its conclusion that an increased minimum wage  
24 supports “efficiency and economy . . . in government procurement.”<sup>29</sup> Studies and literature  
25 cited in the Rule show the link between increased wages and efficiencies, including

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26 <sup>25</sup> *Id.*

27 <sup>26</sup> 86 Fed. Reg. at 67,206

28 <sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 67,206-07.

<sup>29</sup> 86 Fed. Reg. at 67,212.

1 increases in morale and productivity and decreases in employee turnover and absenteeism,  
2 as well as the larger social benefits of reducing poverty and racial and gender wage  
3 disparities by increasing wages for workers.<sup>30</sup> Thus, evidence supports the Department’s  
4 position that, “by increasing the quality and efficiency of services” provided to the  
5 government, E.O. 14,026 will improve the value of the government’s investments.<sup>31</sup> And  
6 while Plaintiffs allege that the Rule relied on only literature related to voluntary wage  
7 increases, had no context with government contracting and largely focused on the  
8 restaurant industry, Compl. ¶ 96, the evidence cited in the Rule proves otherwise. As  
9 demonstrated below, the Department looked at literature assessing the impacts of wage  
10 increases across various industries and relied on studies and literature related to local living  
11 wage ordinances, which like the Rule, establish nonvoluntary *wage requirements* for  
12 entities that do business with State and local governments.

14 To support its conclusion regarding increased worker morale and productivity, the  
15 Department reviewed studies on the efficiency wage theory, an established economic  
16 principle<sup>32</sup> that provides that employers paying a premium in wages give “the worker[s] an  
17 incentive to try to keep their job, to lower recruiting and turnover costs, or to increase  
18 morale and effort.”<sup>33</sup> This is because employees “with better pay, training, and job security

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21 <sup>30</sup> *Id.* The Department also considered disemployment, i.e. when employers employ  
22 fewer higher-wage workers for work previously performed by more low-wage workers,  
23 and concluded the Rule “would result in negligible or no disemployment.” *Id.* at 67,211. It  
24 recognized that, even under conservative estimates, with which the Department did not  
25 agree, for entities required to increase wages from \$7.50 to \$15/hour “who might be more  
26 limited in their ability to pass costs along to the Federal government,” disemployment  
27 would still be small, “a reduction of 0.9 percent employment.” *Id.* at 67,212.

28 <sup>31</sup> *Id.* at 67,131.

<sup>32</sup> 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>.

<sup>33</sup> 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/34YuRli>.

1 satisfy both the internal and external needs of employees and, therefore, enhance employee  
2 satisfaction.”<sup>34</sup>

3 One study cited in the Rule looked at the effects of “higher pay on productivity for  
4 warehouse workers and customer service representatives, using objective productivity  
5 metrics” and estimated that “the increase in productivity caused by raising wages fully pays  
6 for itself.”<sup>35</sup> For warehouse workers, the study found that a \$1 increase in pay resulted in  
7 increased productivity that “represents an hourly savings of \$1.10 for the retailer.”<sup>36</sup>  
8 Similar productivity gains were found for customer service representatives.<sup>37</sup> Another cited  
9 study concluded that “increasing the federal minimum wage immediately enhances  
10 restaurant productivity for up to two years.”<sup>38</sup>

11 The Department also considered indirect productivity increases that could result  
12 from the Rule. In a study of cashiers in a grocery store, which the study recognized as an  
13 industry “particularly prone to” reduced employee productivity, found “strong peer effects  
14 associated with the introduction of high-productivity workers into work groups,” meaning  
15 that in addition to a “high-productivity worker” raising “total output directly because the  
16 worker has higher productivity,” the worker also boosts productivity in others.<sup>39</sup>

17 Evidence also supports the Department’s conclusion that increased wages reduce  
18 employee turnover and absenteeism. Reduced turnover represents “both potential  
19 productivity gains and cost savings for the employer.”<sup>40</sup> When employees remain in their  
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23 <sup>34</sup> Hong Soon Kim & SooCheong Jang, *Minimum Wage Increase and Firm  
Productivity: Evidence from the Restaurant Industry*, 71 *Tourism Mgmt.* 378, 380 (2019).

24 <sup>35</sup> Emanuel, *supra* note 33, at 3.

25 <sup>36</sup> *Id.* at 13.

26 <sup>37</sup> *Id.* at 14 (“We find that each \$1/hr increase in relative pay is associated with a  
27 7.5% increase in call volume, 1.9 additional calls per day off of a based of 26.”).

28 <sup>38</sup> Kim, *supra* note 34, at 1.

<sup>39</sup> Alexandre Mas & Enrico Moretti, *Peers at Work*, 99 *Am. Econ. Rev.* 112, 143,  
(2009), <https://bit.ly/3GR7pdm>.

<sup>40</sup> 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>.

1 jobs, it means “more experienced employees, who need less supervision and are more  
2 skilled at their jobs” and “decreased spending on recruitment, hiring, and supervisor time  
3 spent training new employees.”<sup>41</sup>

4 In considering employee turnover, the Department cited to studies assessing local  
5 living wage ordinances.<sup>42</sup> These laws “set wage and benefit standards for companies that  
6 do business with the government” in order “to improve the quality of contracted jobs and  
7 increase the standard of living for low-income workers.”<sup>43</sup> More than 140 cities and the  
8 State of Maryland have adopted such laws.<sup>44</sup> Such ordinances often cover not only  
9 employers that contract directly to supply services to the governments, but also concession  
10 businesses that “contract with the city to operate a business on city property, and typically  
11 agree to pay the city a percentage of the revenue generated by that business.”<sup>45</sup>

12 For example, the San Francisco Airport (“SFO”) adopted two ordinances in 1999,  
13 one “establishing compensation, recruitment and training standards” for airport safety and  
14 security employees and another setting living wage requirements for airport leases and  
15 service contracts.<sup>46</sup> A study of implementation of these requirements found that after wages  
16 increased, employee turnover fell by an average of 34% for all contractors surveyed and  
17 60% for contractors that “experienced average wage increases of 10 percent or more.”<sup>47</sup>  
18 For airport screeners, the turnover fell from 94.7% to 18.7% in fifteen months—a nearly  
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21 <sup>41</sup> *Id.*

22 <sup>42</sup> *See id.*; Michael Reich et al., U.C. Berkley Inst. of Indus. Rel., *Living Wages and*  
23 *Economic Performance, the San Francisco Airport Model* (2003); Chapman & Thompson,  
24 *supra* note 32; Paul Sonn & Tsedeye Gebreselassie, Nat’l Emp. L. Project, *The Road to*  
25 *Responsible Contracting: Lessons from States and Cities for Ensuring the Federal*  
26 *Contracting Delivers Good Jobs and Quality Services* (2009), <https://bit.ly/3GOxvhk>;  
27 Candace Howes, *Living Wages and Retention of Homecare Workers in San Francisco*, 44  
28 Indus. Rel. 139 (2005), <https://bit.ly/34Ty63R>.

<sup>43</sup> Fairris, *supra* note 40, at 1.

<sup>44</sup> Sonn, *supra* note 42, at 13.

<sup>45</sup> Fairris, *supra* note 40, at 15.

<sup>46</sup> Reich, *supra* note 42, at 7.

<sup>47</sup> *Id.* at 10.



1 80% decrease.<sup>48</sup>

2 Other cited studies reach similar conclusions. One study assessing the impacts of an  
3 ordinance nearly doubling wages for in-home health care workers found a 31% reduction  
4 in turnover for all workers and 57% reduction for new workers.<sup>49</sup> Similarly, a study  
5 concluded that employers subject to Los Angeles’s living wage ordinance had less turnover  
6 than those that were not.<sup>50</sup>

7 The Department also considered the cost savings associated with reduced employee  
8 turnover. Per the SFO study, the cost to replace an employee was on average \$4,275, and  
9 the new wage requirements saved \$6.6 million per year from reduced turnover.<sup>51</sup> The  
10 findings at SFO are not an outlier—a review of thirty studies estimated that employee  
11 turnover costs employers “about one-fifth of a worker’s salary to replace that worker.”<sup>52</sup>

12 As to absenteeism, one study found a statistically significant decrease in employee  
13 absenteeism for contractor employers required to pay higher wages under Los Angeles’s  
14 living wage ordinance, when compared to those that were not.<sup>53</sup> And the SFO study found  
15 that one-third of employers reported higher job performance among covered employees,  
16 including measures like higher morale (reported by 47% of these employers), fewer  
17 employee grievances (45%), decreases in disciplinary issues (44%), and a decrease in  
18 absenteeism (29%).<sup>54</sup> And while the Department noted that one study “attributes a decrease  
19 in absenteeism to mechanisms of the firm other than an increase in worker pay,”<sup>55</sup> it  
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23 <sup>48</sup> *Id.*

<sup>49</sup> Howes, *supra* note 42, at 161.

<sup>50</sup> Fairris, *supra* note 40, at 105-06.

<sup>51</sup> Reich, *supra* note 42, at 10.

<sup>52</sup> Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There are Significant Business Costs to Replacing Employees* 1 (2012), <https://ampr.gs/3gMouL6>.

<sup>53</sup> Fairris, *supra* note 40, at 109, 116.

<sup>54</sup> Reich, *supra* note 42, at 10.

<sup>55</sup> 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>).

1 reasonably concluded that the “other evidence is strong enough to suggest a relationship  
2 between increased wages and reduced absenteeism.”<sup>56</sup>

3 The Department further explained that increasing the minimum wage could lead to  
4 decreased poverty, as well as inequality based on race and gender, among workers on  
5 federal contracts. The Department noted that for a full-time worker making \$10.95/hour—  
6 the minimum wage rate immediately preceding the Rule—the worker’s “annual salary  
7 would be \$22,776, which is below the 2020 Census Poverty Threshold for a family of  
8 four,” of \$27,949.<sup>57</sup> Increasing the minimum wage to \$15/hour increases full-time annual  
9 earnings for a family of four above the poverty threshold.  
10

11 Relying on public comments, studies, and statistics, the Department recognized that  
12 increasing the minimum wage will aid in reducing income inequality and racial and gender  
13 wage gaps, given the disproportionate number of people of color and women who are paid  
14 low wages and are represented in federal contractor workforces.<sup>58</sup> Data from the Current  
15 Population Survey Annual Social and Economic Supplement from the U.S. Census Bureau  
16 provided in literature relied on by the Department shows that as of 2019, while the Black  
17 population “represented 13.2% of the total population in the United States,” it accounted  
18 for “23.8% of the poverty population.”<sup>59</sup> Similarly, for the Latinx population, while it  
19 comprises “18.7% of the total population,” it accounted for “28.1% of the population in  
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21 <sup>56</sup> 86 Fed. Reg. at 67,214.

22 <sup>57</sup> *Id.* See *Poverty Thresholds*, U.S. Census Bureau, <https://bit.ly/3BtACKw> (last  
23 visited May 5, 2022).

24 <sup>58</sup> 86 Fed. Reg. at 67,215. See Jesse Wursten & Michael Reich, Inst. for Rsch. On  
25 Lab. and Emp., *Racial Inequality and Minimum Wages in Frictional Labor Markets*  
26 (2021), <https://bit.ly/3w5bF5V> (finding minimum wage increases between 1990 and 2019  
27 reduced the Black–white “wage gap by 12 percent overall and by 60 percent among  
28 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.”).

<sup>59</sup> 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>.

1 poverty.”<sup>60</sup> The Department also cited to analysis and data provided by commenters,  
 2 including from *Amici* Economic Policy Institute and National Employment Law Project,  
 3 as well as U.S. Bureau of Labor Statistics data, showing that many of the industries affected  
 4 by the Rule are disproportionately comprised of people of color and/or women—and that  
 5 “[b]ecause they are otherwise paid disproportionately low wages, Black and Hispanic  
 6 workers would also receive the largest pay increases.”<sup>61</sup> As courts have long recognized,  
 7 workplace racial inequities undermine efficiency in government contracting; thus, taking  
 8 action to combat those inequalities is authorized by the Procurement Act.<sup>62</sup>  
 9

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

12 Plaintiffs incorrectly allege that the minimum wage established by E.O. 14,026  
 13 conflicts with other federal statutes applicable to federal contractors. Compl. ¶¶ 59-67.  
 14 Pointing to the Fair Labor Standards Act (“FLSA”),<sup>63</sup> which sets the nationwide federal  
 15 minimum wage for all employers that have an annual dollar volume of sales or business of  
 16 at least \$500,000 and/or engage in interstate commerce, and the Davis-Bacon Act  
 17 (“DBA”), the Walsh-Healey Public Contracts Act (“PCA”), and the Service Contract Act  
 18

19 \_\_\_\_\_  
 20 <sup>60</sup> *Id.* Further, data demonstrate that women experience a wage gap at all education  
 21 levels and in nearly every occupation and are overrepresented in low-paid jobs, and wage  
 22 gaps are particularly wide for many groups of women of color relative to white, non-  
 23 Hispanic men. Nat’l Women’s Law Ctr., *The Wage Gap: The Who, How, Why, and What*  
 24 *to Do* 1 (2021), <https://bit.ly/36Oo712> (Also noting that “[w]omen in the U.S. who work  
 25 full-time, year-round are typically paid only 83 cents for every dollar paid to their male  
 26 counterparts.”).

24 <sup>61</sup> 86 Fed. Reg. at 67,215 (“Federal agencies contract billions of dollars each year to  
 25 businesses in industries like building services (13% Black, 41% Latinx, 56% female),  
 26 administrative services (12% Black, 45% female), warehousing (22% Black, 20% Latinx),  
 27 food service (14% Black, 27% Latinx, 52% female), security services (26% Black, 18%  
 28 Latinx, 23% female), waste management and remediation (15% Black, 22% Latinx), and  
 construction (30% Latinx).”).

27 <sup>62</sup> *See, e.g., Contractors Ass’n of E. Pa. v. Sec’y of Lab.*, 442 F.2d 159, 170 (3d Cir.  
 28 1971).

<sup>63</sup> 29 U.S.C. § 201 *et seq.*

1 (“SCA”),<sup>64</sup> which contain wage standard provisions for specified sets of federal  
2 contractors, Plaintiffs contend that these laws provide “evidence that Congress intended to  
3 reserve for itself authority to set minimal wage policies, particularly in the federal  
4 contracting sphere.” Compl. ¶ 67. However, the statutes they cite provide no support for  
5 Plaintiffs’ assertions. Each of the applicable provisions of the FLSA, DBA, PCA, and the  
6 SCA demonstrates that they were intended to be floors—not ceilings—under federal law  
7 for minimum wage requirements.  
8

9 The FLSA, which sets the federal minimum wage broadly applicable to public and  
10 private employers nationwide, explicitly states that the provisions of the FLSA do not  
11 “excuse noncompliance with any *Federal* or *State law* or municipal ordinance *establishing*  
12 *a minimum wage higher than the minimum wage established*” by the Act.<sup>65</sup> Thus, by its  
13 terms, the FLSA contemplates the possibility that other federal laws may establish higher  
14 minimum wages, and, as a result, E.O. 14,026 and the Rule do not conflict with the FLSA,  
15 as Plaintiffs contend. Compl. ¶ 124.  
16

17 Plaintiffs’ reliance on federal laws directed at certain federal contractors fares no  
18 better. The DBA, which applies to contracts for construction and repairs for public  
19 buildings and works in excess of \$2,000, sets a prevailing wage standard as determined by  
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21 <sup>64</sup> Davis-Bacon Act, 40 U.S.C. § 3142 *et seq.*; Walsh-Healey Public Contracts Act,  
41 U.S.C. § 6501 *et seq.*; Service Contract Act, 41 U.S.C. § 6701 *et seq.*

22 <sup>65</sup> 29 U.S.C. § 218(a) (emphasis added). Plaintiffs point to this same provision as  
23 recognizing that “States and municipalities can set their minimum wages higher than the  
24 figure in the FLSA,” Compl. ¶ 73, but fail to recognize, as provided above, that the same  
25 provision also preserves the federal government’s authority to do the same under applicable  
26 federal law. Further, E.O. 14,026 does not prevent a State from setting a different minimum  
27 wage than the one established by the E.O., nor does it pose a conflict with a lower minimum  
28 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.”).

1 the Secretary of Labor and explicitly provides for the possibility of different wage rates  
2 established by other federal laws: “This subchapter *does not supersede or impair any*  
3 *authority otherwise granted by federal law to provide for the establishment of specific wage*  
4 *rates.”*<sup>66</sup> Similarly, the minimum wage provisions of the PCA, applicable to contracts over  
5 \$15,000 relating to the manufacture and furnishing of supplies and equipment, and the  
6 SCA, which generally governs service contracts over \$2,500, do not impose limitations on  
7 higher wage requirements established by other applicable federal authorities.<sup>67</sup>  
8

9 Plaintiffs fail to explain how their restrictive interpretation of the Procurement Act  
10 is mandated by any of the statutory language cited above, nor can they. The text of the  
11 FLSA, DBA, PCA, and SCA establishes that none of the statutes were intended to tie the  
12 hands of the President in establishing higher minimum wage standards for federal contracts  
13 where other applicable federal law provides such authority. Further, Plaintiffs’ attempt to  
14 manufacture a conflict between these laws and Congress’ decision to provide the President  
15 with broad government-wide management and administrative authorities within the  
16 Procurement Act goes against general principles of statutory construction. “It is a cardinal  
17 principle of construction that ... [w]hen there are two acts upon the same subject, the rule  
18 is to give effect to both if possible.”<sup>68</sup> And “courts are not at liberty to pick and choose  
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21 <sup>66</sup> 40 U.S.C. § 3146 (emphasis added).

22 <sup>67</sup> 41 U.S.C. § 6502(1) (requiring that employees of the contractors to be paid “not  
23 less than the prevailing minimum wages, as determined by the Secretary.”); 41 U.S.C. §  
24 6703(1) (requiring that covered contracts contain a minimum wage provision “in  
25 accordance with prevailing rates in the locality” as determined by the Secretary.)  
26 Additionally, the Rule cites to the SCA’s legislative history demonstrating that Congress  
27 intended this provision to create a minimum wage floor. *See* 86. Fed. Reg. at 67,130; *see*,  
28 *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).

<sup>68</sup> *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

1 among congressional enactments, and when two statutes are capable of co-existence, it is  
 2 the duty of the courts, absent a clearly expressed congressional intention to the contrary, to  
 3 regard each as effective.”<sup>69</sup>

4 The cited statutes thus easily co-exist with the authorities vested in the President by  
 5 the Procurement Act and E.O. 14,026 setting a higher minimum wage standard. E.O.  
 6 14,026 does not conflict with the locality-specific prevailing wage provisions of these laws,  
 7 as Plaintiffs contend. Compl. ¶¶ 116-17. The Order simply establishes a minimum wage  
 8 for covered contracts that are also governed by the DBA, FLSA, or SCA,<sup>70</sup> which as  
 9 explained above, the wage provisions of those statutes permit. But the E.O. does not  
 10 otherwise affect the Secretary’s ability to set prevailing wages for an industry, based on  
 11 the locality, at or above the \$15.00 minimum.<sup>71</sup> As such, E.O. 14,026 does not undermine  
 12 the “prevailing wage” provisions of the DBA, PCA, and SCA. The Court should reject  
 13 Plaintiffs’ attempts to read a conflict between these statutes and the broad authority  
 14 provided by the Procurement Act, when none exists.  
 15

16  
 17 **III. Plaintiffs’ delay in seeking preliminary injunction relief and the**  
 18 **countervailing harms such relief would cause to workers entitled to higher**  
 19 **wages under the Rule weigh against such relief.**

20 Plaintiffs have failed to establish that they are likely to suffer irreparable harm in  
 21 the absence of preliminary relief, that the balance of equities tips in their favor, or that an  
 22 injunction is in the public interest.<sup>72</sup> Injunctions, like the one Plaintiffs seek here, “that alter  
 23 the status quo ‘are not granted unless extreme or very serious damage will result and are

24 <sup>69</sup> *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

25 <sup>70</sup> 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. 86 Fed. Reg.  
 at 67,227.

26 <sup>71</sup> See *SAM.gov Search Page*, <https://bit.ly/3vBKsXU> (last accessed May 5, 2022)  
 (indexing prevailing wage determinations under the DBA and SCA).

27 <sup>72</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). And when the  
 28 government is a party to a case “the balance of the equities and public interest factors  
 merge.” *Roman v. Wolf*, 977 F.3d 935, 941 (9th Cir. 2020).

1 not issued in doubtful cases.”<sup>73</sup> Plaintiffs fail to meet this high bar. Plaintiffs are wrong to  
2 suggest that “[e]njoining the Rule will not cause cognizable harm to anyone.” Mot. for  
3 Prelim. Inj. at 27. Were the Court to enjoin the Rule at this stage, after the Rule has taken  
4 effect, that would mean that impacted workers, who are disproportionately people of color  
5 and women, receiving the benefits the Rule’s higher wages would be stripped of these  
6 higher wages. Doing so would have a real and substantial impact on these workers’ lives  
7 and livelihood, and they would have no ability to later recoup these lost wages. More than  
8 327,000 workers across the nation are estimated to be impacted by the higher wages in the  
9 first year of implementation of the Rule.<sup>74</sup> For the workers already receiving the benefits  
10 of the Rule, they may have already made financial decisions in reliance on the higher  
11 wages, such as making purchases, entering into leases, or taking out loans. As the Ninth  
12 Circuit has recognized, when “[f]aced with ... a conflict between financial concerns and  
13 preventable human suffering,” including economic hardship, “we have little difficulty  
14 concluding that the balance of hardships tips decidedly in favor of the latter.”<sup>75</sup>  
15  
16

### 17 CONCLUSION

18 For the reasons above and in Defendants’ filings, *Amici* urge this Court to deny  
19 Plaintiffs’ preliminary injunction motion, grant Defendants’ motion to dismiss, or in the  
20 alternative, enter summary judgment in favor of Defendants.  
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25 <sup>73</sup> *Id.* (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d  
26 873, 879 (9th Cir. 2009) (quotation marks omitted)).

27 <sup>74</sup> 86 Fed. Reg. at 67,194.

28 <sup>75</sup> *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1126  
(9th Cir. 2008) (quotation marks omitted) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1437  
(9th Cir. 1983)).

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 9, 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 9, 2022

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