

No. 22-1023

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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BRADFORD, *ET AL.*,

*Plaintiffs-Appellants,*

v.

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

*Defendants-Appellees.*

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

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**CONSENTED-TO MOTION FOR LEAVE TO FILE BRIEF OF  
NATIONAL EMPLOYMENT LAW PROJECT,  
COMMUNICATIONS WORKERS OF AMERICA, SERVICE  
EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S  
LAW CENTER, AND ECONOMIC POLICY INSTITUTE AS *AMICI  
CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES'  
OPPOSITION TO MOTION FOR INJUNCTION PENDING  
APPEAL**

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Pursuant to Federal Rule of Appellate Procedure 29, Proposed *Amici* move for leave to file the attached brief in support of Defendants-Appellees' opposition to the motion for injunction pending appeal.

Counsel for Proposed *Amici* have consulted with the parties' counsel, who have indicated their consent to the filing of this motion.

Proposed *Amici* include five 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 National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include minimum wages, workplace health and safety, and worker mobility. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in Tenth Circuit states, and has litigated and participated as *amicus curiae* in numerous cases addressing workers' 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 (“NLWC”) is a non-profit legal advocacy organization dedicated to the advancement and protection of the rights of all people to be free from sex discrimination. 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 before the Supreme Court, federal courts of

appeals, federal district courts, and state courts to secure protections against sex discrimination. NWLC is committed to advocating for workers' rights and closing the racial and gender wage gaps that particularly harm women and people of color. Accordingly, NWLC also has a strong interest in supporting increased minimum wage requirements for employees of those employers who 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.

As organizations that advocate for workers' rights, *Amici* have a strong interest in improved labor standards for workers who are employed by businesses who benefit from contracts with the federal government. Based on review of relevant precedent and the literature and studies cited by the Department of Labor in its regulations<sup>1</sup> implementing the federal contractor minimum wage requirements established by Executive Order 14,026,<sup>2</sup> the attached brief reflects *Amici's* position that the regulations are lawful and advance economy and efficiency for the federal government. Accordingly, the proposed brief will assist the Court as it considers Plaintiffs-Appellants' motion for injunction pending appeal, demonstrating that the district court correctly concluded that Plaintiffs-Appellants are unlikely to succeed on the merits of their claims.

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<sup>1</sup> Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126, 67,206 (Nov. 24, 2021).

<sup>2</sup> Increasing the Minimum Wage for Federal Contractors, Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021).

“Federal courts have discretion in allowing participation as *amicus curiae*.” *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175 (10th Cir. 2021) (citing *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020)). Courts consider whether “the proffered information of *amicus* is timely, useful, or otherwise necessary to the administration of justice.” *United States v. State of Mich.*, 940 F.2d 143, 165 (6th Cir. 1991); *see also Prairie Rivers Network v. Dynegy Midw. Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers) (“[T]he court looks at whether the submission will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties.” (internal quotation omitted)); *Neonatology Assocs., 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 . . . their brief is ‘desirable’ and discusses matters that are ‘relevant to the disposition of the case’” (quoting Fed. R. App. P. 29(b))). Accordingly, the Court should grant Proposed *Amici* leave to file the attached brief as *amici curiae*.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), 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.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,149 words according to the word count function of Microsoft Word 365.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

/s/ Sean A. Lev

Date: February 15, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that on February 15, 2022, a true and accurate copy of the foregoing motion 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: February 15, 2022

No. 22-1023

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supervision of Democracy Forward  
lawyers.

## **CORPORATE DISCLOSURE STATEMENTS**

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

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

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

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

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

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## **INTEREST OF *AMICI CURIAE***

As provided in their motion for leave to file, submitted pursuant to Federal Rule of Appellate Procedure 29, *Amici* are non-profit organizations and unions that advocate for workers' rights, including advocating for increased wages and benefits and for closing the racial and gender wage gaps that particularly harm people of color and women. They accordingly have a strong interest in supporting increased federal contractor minimum wage requirements.<sup>1</sup>

## **SUMMARY OF THE ARGUMENT**

President Biden lawfully exercised his authority under the Federal Property and Administrative Services Act of 1949 ("Procurement Act") in issuing Executive Order 14,026 ("E.O. 14,026"),<sup>2</sup> increasing the federal contractor minimum wage to \$15/hour and revoking President Trump's Executive Order 13,838, which exempted from these requirements certain outdoor recreational service employers operating on federal lands. The Department of Labor ("Department") reasonably concluded in

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<sup>1</sup> *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.

<sup>2</sup> Increasing the Minimum Wage for Federal Contractors, Exec. Order No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021).

its Rule implementing E.O. 14,026<sup>3</sup> that increasing the federal contractor minimum wage will increase employee productivity and decrease employee turnover and absenteeism. The Department estimates that increasing wages will impact more than 327,000 contract workers—including in industries largely comprised of women, and disproportionately Black and Latinx, workers—helping to rectify the racial and gender wage gaps in federal contractor workforces.<sup>4</sup> Therefore, the Court should deny Appellants’ request for an injunction pending appeal.

## ARGUMENT

### **I. E.O. 14,026 is within the President’s Procurement Act authority because it promotes economy and efficiency.**

Appellants contend that E.O. 14,026 does not support economy and efficiency, arguing the President’s Procurement Act authority is limited to actions that result in cost savings to the federal government.<sup>5</sup> Appellants’ Mot. at 17-18. They are incorrect.

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<sup>3</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).

<sup>4</sup> *Id.* at 67,194, 67,214-5.

<sup>5</sup> Appellants contend that the President’s Procurement Act authority to control the supply of nonpersonal services does not extend to permittees on federal lands. Appellants’ Mot. at 13. Amici agree with the United States’ position on this issue and will not repeat its arguments.

The Procurement Act vests in the President “broad-ranging authority” with “necessary flexibility.”<sup>6</sup> The Act’s stated purpose is to provide the government “with an economical and efficient system” for activities including “[p]rocurring and supplying property and nonpersonal services.”<sup>7</sup> The Act grants the President wide discretion to “prescribe policies and directives that *the President* considers necessary to carry out” the Act’s goals.<sup>8</sup> 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.’”<sup>9</sup> The terms “efficiency” and “economy” encompass “factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions.”<sup>10</sup> In addition, this authority includes “secondary policy views that deal with government contractors’ employment practices—policy views that are

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<sup>6</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).

<sup>7</sup> 40 U.S.C. § 101.

<sup>8</sup> *Id.* § 121(a) (emphasis added).

<sup>9</sup> *See, e.g., Am. Fed’n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979).

<sup>10</sup> *Id.* at 789.

directed beyond the immediate quality and price of goods and services purchased.”<sup>11</sup>

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.”<sup>12</sup> Courts have likewise upheld executive orders addressing wage and price controls, requirements to post notices informing employees of their rights regarding unions, and mandates to confirm employees’ immigration status.<sup>13</sup> Courts have affirmed Presidential actions even when their nexus with economy and efficiency is “attenuated” and “one can with a straight face advance an argument claiming opposite [efficiency] effects or no effects at all.”<sup>14</sup>

Applying these established principles, the Department’s Rule does not exceed the President’s authority. President Biden concluded that “[r]aising the minimum wage enhances worker productivity and

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<sup>11</sup> *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996).

<sup>12</sup> *Kahn*, 618 F.2d at 790.

<sup>13</sup> *Id.* at 785-86; *Chao*, 325 F.3d at 361; *Chamber of Com. v. Napolitano*, 648 F. Supp. 2d 726, 730-32 (D. Md. 2009); *see also Kahn*, 618 F.2d at 790-91 (detailing other executive orders).

<sup>14</sup> *See, e.g., Chao*, 325 F.3d at 366–67.

generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.”<sup>15</sup> 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.”<sup>16</sup> Thus, E.O. 14,026 addresses wage standards for federal contractors, something that multiple circuits have expressly recognized as within the President's Procurement Act authority.<sup>17</sup>

The Department recognized that, while “Government expenditures may rise” from the increased wage requirement, the benefits “expected to accompany any such increase in expenditures” will result in “greater value to the Government.”<sup>18</sup> 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

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<sup>15</sup> 86 Fed. Reg. at 22,835.

<sup>16</sup> *Id.*

<sup>17</sup> *Kahn*, 618 F.2d at 792-93; *Kentucky v. Biden*, 23 F.4th 585, 607 (6th Cir. 2022).

<sup>18</sup> 86 Fed. Reg. at 67,206.

thus “any potential increase in contract prices or decrease in profits will be negligible.”<sup>19</sup> 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 amounts paid to the government.<sup>20</sup>

The Department reasonably determined the Rule’s benefits apply to all “contracts” and “contract-like instruments,” defined as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”<sup>21</sup> These agreements include “contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.”<sup>22</sup> The government has a direct interest in the efficiency of these contracts, as, depending on the permit type and issuing federal agency, permittees must meet certain requirements to operate on federal lands, including potentially being subject to competitive bidding

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 67,206-07.

<sup>21</sup> *Id.* at 67,225

<sup>22</sup> *Id.* at 67,225.

processes<sup>23</sup> and paying fees up to 3% of their adjusted-gross revenue from permitted activities.<sup>24</sup>

**II. The Department considered evidence and properly concluded that increasing the federal contractor minimum wage increases employee morale and productivity and reduces turnover, absenteeism, and income inequality.**

The Department properly relied on evidence demonstrating the benefits of an increased minimum wage that indicate “the efficiency and economy gained in government procurement.”<sup>25</sup> Studies and literature cited in the Rule show the link between increased wages and efficiencies, including morale and productivity increases and decreases in employee turnover and absenteeism, and the larger social benefits of increasing wages for workers by reducing poverty and income inequality.<sup>26</sup> Thus,

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<sup>23</sup> Mark K. DeSantis, Cong. Rsch. Serv., R46380, *Guides and Outfitters on Federal Lands: Background and Permitting Process* 20 (2020), <https://bit.ly/3gNglWA>.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> 86 Fed. Reg. at 67,212.

<sup>26</sup> *Id.* The Department considered disemployment, when employers employ fewer higher-wage workers for work previously performed by more low-wage workers, and concluded the Rule “would result in negligible or no disemployment.” *Id.* at 67,211. It recognized that, even under conservative estimates, with which the Department did not agree, for permittees on federal lands required to increase wages from \$7.50 to \$15/hour, disemployment would still be small, “a reduction of 0.9 percent employment.” *Id.* at 67,212.

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.<sup>27</sup>

To support its conclusion regarding increased worker morale and productivity, the Department reviewed studies on the efficiency wage theory, an established economic principle<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup>

One study cited in the Rule looked at the effects of "higher pay on productivity for warehouse workers and customer service

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<sup>27</sup> *Id.* at 67,131.

<sup>28</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>29</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/34YuRIi>.

<sup>30</sup> Hong Soon Kim & SooCheong Jang, *Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry*, 71 Tourism Mgmt. 378, 380 (2019).

representatives, using objective productivity metrics” and estimated that “the increase in productivity caused by raising wages fully pays for itself.”<sup>31</sup> Another cited study concluded that “increasing the federal minimum wage immediately enhances restaurant productivity for up to two years.”<sup>32</sup>

The Department also considered indirect productivity increases that could result from the Rule. In particular, a study found that a “high-productivity worker” raises “total output directly because the worker has higher productivity,” and indirectly by inducing higher productivity among co-workers.<sup>33</sup>

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.”<sup>34</sup> When employees remain in their jobs, it means “more experienced employees, who need less supervision and are more skilled

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<sup>31</sup> Emanuel, *supra* note 29, at 3.

<sup>32</sup> Kim, *supra* note 30, at 1.

<sup>33</sup> Alexandre Mas & Enrico Moretti, *Peers at Work*, 99 Am. Econ. Rev. 112, 143, (2009), <https://bit.ly/3GR7pdm>.

<sup>34</sup> Davis 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>.

at their jobs” and “decreased spending on recruitment, hiring, and supervisor time spent training new employees.”<sup>35</sup>

In considering employee turnover, the Department cited to studies assessing local living wage ordinances.<sup>36</sup> 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.”<sup>37</sup> More than 140 cities and the State of Maryland have adopted such laws.<sup>38</sup> Such ordinances often cover not only employers that contract directly to supply services to the governments, but also concession businesses that, similar to Appellants, “contract with the city to operate a business on city property, and

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<sup>35</sup> *Id.*

<sup>36</sup> *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 28; 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>.

<sup>37</sup> Fairris, *supra* note 34, at 1.

<sup>38</sup> Sonn, *supra* note 36, at 13.

typically agree to pay the city a percentage of the revenue generated by that business.”<sup>39</sup>

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.<sup>40</sup> A study of implementation of these requirements found that after wages increased, employee turnover fell by an average of 34% for all contractors surveyed and 60% for contractors that “experienced average wage increases of 10 percent or more.”<sup>41</sup> For airport screeners, the turnover fell from 94.7% to 18.7% in fifteen months—a nearly 80% decrease.<sup>42</sup>

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%

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<sup>39</sup> Fairris, *supra* note 34, at 15; *Bradford v. DOL*, 2022 WL 204600, at \*3 (D. Colo. Jan. 24, 2022) (Noting one Appellant is required to pay “the greater of either \$100 per year or 3% of AVA’s gross revenue from the activities listed on the permit.”).

<sup>40</sup> Reich, *supra* note 36, at 7.

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.*

reduction for new workers.<sup>43</sup> Similarly, a study concluded that employers subject to Los Angeles’s living wage ordinance had less turnover than those that were not.<sup>44</sup>

The Department 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.<sup>45</sup> A review of thirty studies estimated that employee turnover costs employers “about one-fifth of a worker’s salary to replace that worker.”<sup>46</sup>

For absenteeism, one study found a “statistically significant” decrease in employee absenteeism for contractor employers required to pay higher wages per Los Angeles’s living wage ordinance, when compared to those that were not.<sup>47</sup> And the SFO study found that one-third of employers reported higher job performance among covered employees, including measures like higher morale (reported by 47% of

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<sup>43</sup> Howes, *supra* note 36, at 161.

<sup>44</sup> Fairris, *supra* note 34, at 105-06.

<sup>45</sup> Reich, *supra* note 36, at 10.

<sup>46</sup> Heather Boushey & Sarah Jane Glynn, Ctr. for Am. Progress, *There are Significant Business Costs to Replacing Employees 1*, <https://ampr.gs/3gMouL6>.

<sup>47</sup> Fairris, *supra* note 34, at 109, 116.

these employers), fewer employee grievances (45%), decreases in disciplinary issues (44%), and a decrease in absenteeism (29%).<sup>48</sup> 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,”<sup>49</sup> it reasonably concluded that the “other evidence is strong enough to suggest a relationship between increased wages and reduced absenteeism.”<sup>50</sup>

The Department explained that increasing the minimum wage could lead to decreased poverty and racial inequality in federal contracting. 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.<sup>51</sup> Increasing the minimum wage to \$15/hour increases full-time annual earnings for a

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<sup>48</sup> Reich, *supra* note 36, at 10.

<sup>49</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>).

<sup>50</sup> 86 Fed. Reg. at 67,214.

<sup>51</sup> *Id.* See *Poverty Thresholds*, U.S. Census Bureau, <https://bit.ly/3BtACKw>.

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, given the disproportionate number of people of color and women who are paid low wages and are represented in federal contractor workforces.<sup>52</sup> As courts have long recognized, workplace racial inequities undermine efficiency in government contracting.<sup>53</sup>

### CONCLUSION

For the reasons above and in Defendants-Appellees' filings, *Amici* urge this Court to deny Plaintiffs-Appellants' motion for injunction pending appeal.

Respectfully submitted,

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<sup>52</sup> 86 Fed. Reg. at 67,215.

<sup>53</sup> See, e.g., *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170 (3d Cir. 1971).

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## CERTIFICATE OF COMPLIANCE

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/s/ Sean A. Lev

Date: February 15, 2022

**CERTIFICATE OF SERVICE**

I hereby certify that on February 15, 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: February 15, 2022