No. 23-40671

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS, et al.,

Plaintiffs – Appellees,

v.

PRESIDENT JOSEPH R. BIDEN, et al.,

Defendants – Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
Honorable Drew B. Tipton, District Judge

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons are entities as described in the fourth sentence of Rule 28.2.1 as having an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Persons Involved in Related Litigation in the Tenth Circuit

- Duke Bradford
- Arkansas Valley Adventure, LLC
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Dated: March 29, 2024.

/s/Michael Poon
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Other Authorities

STATEMENT OF THE ISSUES

Whether the Department of Labor's rule, *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 24, 2021), exceeded the limited statutory authority delegated by Congress in the Federal Property and Administrative Services Act, 40 U.S.C. § 101, *et seq*. (Procurement Act).

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Pacific Legal Foundation is a nonprofit, tax-exempt California corporation organized to litigate matters affecting the public interest in individual liberty, property rights, and the separation of powers. Founded over 50 years ago, PLF is the most experienced legal organization of its kind and routinely participates as *amicus curiae* in important cases concerning constitutional limits on the Executive Branch. *See, e.g.*, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 2684377; *Lucia v. SEC*, 585 U.S. 237 (2018) (No. 17-130), 2018 WL 1156621; *Nat'l Rest. Ass'n v. Dep't of Labor*, 138 S. Ct. 2697 (2018) (No. 16-920), 2017 WL 727982.

[1] No person or entity other than *amici* and their counsel assisted in or made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

PLF has challenged the rule on behalf of outdoor recreation businesses in parallel litigation. *See Bradford v. U.S. Dep't of Labor*, 582 F. Supp. 3d 819 (D. Colo. 2022) (denying plaintiffs' motion for preliminary injunction); *Bradford v. U.S. Dep't of Labor*, No. 22-1023, Doc. 010110646538 (10th Cir. Feb. 17, 2022) (granting plaintiffs' motion for an injunction pending appeal). PLF's clients include Arkansas Valley Adventure, LLC (AVA), a small business that offers river-rafting and other recreational services to the public at an accessible price, and the Colorado River Outfitters Association (CROA), an industry association that represents up to 50 river outfitters, including AVA. AVA is not a federal contractor, but it holds special use permits that allow it to operate in certain federal lands in Colorado. Because the government considers the permit a "contract-like instrument" relating to federal land for the purpose of offerings services to the public, 86 Fed. Reg. at 67,134, DOL's wage rule applies against AVA. Similarly, most CROA members possess federal permits that allow them and their clients to access federal lands, also subjecting them to the wage rule.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law

firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Amici take interest in this case due to the financial burden and job-destroying effects of the rule on small government contractors, small subcontractors of government contractors, and those small entities seeking to gain government contracts. Further, as in the case of AVA and CROA, *amici* wish to raise concerns about the expansive impact of the rule for firms that would not normally be considered government contractors.

As the district court recognized, this case implicates significant questions about the proper separation of powers. In the Department of Labor's (Department or DOL) telling, the President has essentially unlimited power to control the American economy through the

Procurement Act, even as he displaces comprehensive statutory schemes at both the national and state level. Under this view, the judiciary cannot meaningfully review the administrative rules enacting the President's expansive policies. But, as the district court wrote while rejecting this view, "Our Constitution's Framers viewed the principle of separation of powers as not just a guarantee, but the central guarantee of our Government." And by engaging in genuine judicial scrutiny of the President's actions one thing becomes clear: "The Procurement Act's text, history, and purpose do not offer the President broad policy-making authority to set the minimum wage of certain employees of federal contractors and subcontractors."

SUMMARY OF ARGUMENT

Congress did not, through vague words and imprecise drafting, grant the President unfettered discretion to remake a significant portion of the American economy and saddle hundreds of thousands of private businesses with job-killing minimum wage requirements. Congress certainly did not delegate the power to remake federal procurement policy into a mass transfer of wealth from the public and government reserves to a favored portion of the labor force. But through the rule,

Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021), the President, acting through the Department, has attempted such unlawful measures.

When Congress enacted the Federal Property and Administrative Services Act, 40 U.S.C. § 101, *et seq*., it did so to streamline and standardize federal policy. Above all, it intended to create an "economical and efficient system" of procurement, administered by the President, but limited by specific statutory measures.

The President has distorted that authority with his attempt to impose a minimum wage for any firm that contracts with the government, is a subcontractor for such a firm, or even, as in the case of AVA and CROA, merely obtains permits to use federal lands. The wage rule has no specific statutory basis—indeed it displaces several other statutes specifically addressing wage limits for certain federal contractors. And rather than promoting efficient and economical government contracting it unabashedly raises government expenditures, saddles firms with massive new costs, and kills jobs. The Procurement Act merely presents the flimsiest pretext for the President's political aims.

To justify the rule, the President and the Department present a view of Executive authority that is at odds with the careful balance of powers established by the Constitution. The President insists that he has the only say in what makes procurement policy "economical and efficient," no matter how irrational his reasoning. Indeed, he insists that up is down, and increased government expenditures and harm to the economy is the picture of sound government policy. The Department meanwhile insists that it need not face the ordinary skepticism that courts must apply to expansive regulations clothed in ill-fitting statutory language because they act at the direction of the President himself. But such too-clever arguments obscure the real conflict between Congressional delegations of power and the Executive's mere administration of the law. The Constitution does not allow Congress to abdicate lawmaking entirely, nor does it allow the Executive to strive beyond the confines of his limited statutory authority.

The district court, acting as the remaining coordinate branch of government, took these concerns seriously, and correctly answered the only pertinent question: "Did the President violate the Procurement Act in unilaterally raising the minimum wage paid by federal contractors to

their employees to $15 an hour?" By engaging in meaningful review of the President's actions, and striking down the rule, the district court carefully preserved Constitutional order. This Court should affirm the court's fundamental respect for the separation of powers and its conclusion about the rule.

ARGUMENT

I. The Procurement Act Is a Limited Congressional Delegation of Legislative Authority

The district court correctly recognized that the key to resolving this case was a simple, indeed basic, question of conducting a "textual analysis of the statute" invoked by the President. *See* Dist. Ct. Op. at 12. The President now complains that this analysis represents a radical departure from the deferential, and atextual approach occasionally adopted by courts during the last century when reviewing actions taken under the Procurement Act. This Court has recognized that such errors don't become legitimate simply by being repeated. *See Louisiana v. Biden*, 55 F.4th 1017, 1031 (5th Cir. 2022) (noting the "effectively boundless scope" of the "'close nexus' test" employed by some courts when reviewing Procurement Act regulations); *cf. Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194, 204 (5th Cir. 2021) (en banc) ("the consensus view

is not always correct*"), aff'd sub nom. Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023). Indeed, a panel of this Court has already identified the problem: Many Presidential actions might "pass the 'close nexus' test … and yet [they] would undoubtedly strike reasonable minds as too great a stretch under the Procurement Act." *Louisiana*, 55 F.4th at 1031.

By looking at the statutory text, and not merely repeating the reflexive errors of other courts, the district court correctly recognized that Congress set up a clear and limited means for controlling the system of government procurement, and delegated an *administrative* function to the President. Instead of setting broad policy objectives, the President is tasked with *administering* procurement according to the law. But the minimum wage rule doesn't fit with that statutory delegation. It far exceeds the President's role and is an unlawful effort to legislate in Congress' place.

A. The Act Delegates Administrative Functions, Not Policy Objectives, to the President

The Procurement Act authorizes the President to set directives for four limited categories of government activities, including "procuring and supplying property and nonpersonal services." 40 U.S.C. §§ 101(1),

121(a). But understanding the proper scope of the Procurement Act involves going back to first principles. The federal procurement "authority rests in Congress's hands in the first instance—not the President's." *Georgia v. President of the United States*, 46 F.4th 1283, 1293 (11th Cir. 2022). Thus, the question is "not whether Congress *could* authorize" agency action, but it "is whether Congress did so in the Procurement Act." *Id*.

"Before the Act was passed in 1949, no centralized agency organized the procurement activities of the federal government." *Id*. The Procurement Act was passed to help centralize the process. *Id.* And "the statute vested supervisory authority in the President. But the Procurement Act's delegation to the President was not unlimited; the Act confers broad but not unbounded authority." *Id*.

40 U.S.C. § 121(a) thus provides: "The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle."

"Two stipulations jump off the page." *Georgia*, 46 F.4th at 1293. First, the "policies and directives must 'carry out this subtitle.'" *Id.* "A delegation to carry out those provisions does not grant the President free-

wheeling authority to issue any order he wishes relating to the federal government's procurement system." *Id*. The President must instead point to "a specified part of the U.S. Code." *Id*.

The Supreme Court confirmed this reading of the Act in *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979), where it considered the validity of an executive order prohibiting employment discrimination by federal contractors. Though it ultimately found a different source of authority for the executive order, the Court suggested that the Act's language allowing measures "necessary to effectuate its provisions," was insufficient, because "nowhere in the Act is there a specific reference to employment discrimination." *Id*. As the Eleventh Circuit has explained, the Court "doubted that the Procurement Act on its own delegated sufficient authority," *Georgia*, 46 F.4th at 1294, which "thus points to interpreting the Act as a limited grant of authority, empowering the President to carry out the Act's specific provisions—but not more." *Id.* at 1295.

"The second constraint on the President's authority is the requirement that his policies be 'consistent with this subtitle.'" *Id.* at 1294. "[H]is actions must also be consistent with the policies and

directives that Congress included in the statute. Those explicit legislative policies . . . include the rule that agencies must 'obtain full and open competition' through most procurement procedures." *Id.*

Thus "the President can issue policies to assist and direct the GSA Administrator and other executive actors as they carry out their authority under the Act. But the President cannot issue policies that require those officials to take steps outside the Act or contrary to the Act—however useful such steps may appear." *Id.* "Instead, the statutory scheme establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want." *Id.* at 1295.

B. It Is Implausible That Congress Meant to Implicitly Delegate the Power to Set Wages in the Procurement Act When Other Statutes Directly Address This Issue

The Procurement Act says nothing about the wages that federal contractors must pay to their employees. This, alone, suggests that the President doesn't have the power to order DOL to implement new wage rules.

Moreover, Congress *has* comprehensively addressed the issue of how much federal contractors must be paid in several other statutes. The Fair Labor Standards Act (FLSA) set "standards of minimum wages and

maximum hours" for most private employers. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945). And at least three statutes, the Davis-Bacon Act (DBA), the Walsh-Healey Public Contracts Act (PCA), and the Service Contract Act (SCA) set wage standards for federal contractors. *See* 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(a). When Congress passed the SCA in 1965 it did so because "[t]he service contract is the only remaining category of Federal contracts to which no labor standards protection applies." S. Rep. No. 798, 89th Cong., 1st Sess., 3 (Oct. 1, 1965). Congress, therefore, meant to extend specific coverage to *certain* federal contractors. *See id.*

Congress has thus spoken to the issue of whether federal contractors should be required to pay a minimum wage—deciding that only *some* contractors have obligations to do so. *See* 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(a). Congress also carefully limited those requirements. The DBA applies to "mechanics or laborers" working on public buildings. 40 U.S.C. § 3142(a). The PCA covers manufacturing "contract[s] made by an agency of the United States." 41 U.S.C. § 6502. The SCA excludes contracts that do not principally furnish "services" to

federal agencies. *See* 40 U.S.C. § 3142. All three statutes require payment of a certain wage. *See* 40 U.S.C. § 3142(b); 41 U.S.C. §§ 6502(1), 6703(1).

Confronted with these clear Congressional directives, it is curious that DOL now points to the Procurement Act as a source of authority to go far beyond these wage requirements. Why would Congress have bothered to set such complex and limited wage rules, if it also meant for the President, through DOL, to impose his own standards at will?

"Agency authority may not be lightly presumed." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). An agency "may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 485 (2001).

"In determining whether an agency's regulations are valid under a particular statute . . . [a court will] begin with the question of whether the statute unambiguously addresses the 'precise question at issue.'" *New Mexico v. DOI*, 854 F.3d 1207, 1221 (10th Cir. 2017) (quoting *Chevron, U.S.A., Inc. v. N.R.D.C.*, *Inc.*, 467 U.S. 837, 842 (1984)). "If Congress has spoken *directly* to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress's unambiguously

expressed intent." *Id.* (citation omitted). "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

Under these well-known principles, it is "implausible" that Congress meant to grant the President the "implicit power to create an alternative to the explicit and detailed [] scheme" that Congress set out in the DBA, PCA and SCA. *See New Mexico*, 854 F.3d at 1226. This is particularly apt considering that the SCA, which comes the closest to the rule's reach, came after the Procurement Act of 1949. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("[T]he implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.") (citation omitted).

Congress's longstanding rules governing contractor wages cannot be read as a free pass for the Department to legislate wherever the statutes end. The rule applies *only* to employers who are already covered by the FLSA, the SCA, or the DBA. *See* 86 Fed. Reg. at 67,225. The new

rule exists simply to extend requirements to those already regulated by Congress but in a manner separate and apart from the existing statutes.

Regardless of whether the President or DOL can regulate wages in other contexts, the question presented here is whether they may do so *pursuant to the Procurement Act* and whether that Act's grant of authority gave the President and the agency the "implicit power to create an alternative" to these statutes. *See New Mexico*, 854 F.3d at 1226. Recall that the Department's rule and the corresponding executive order invoke only the Procurement Act for their authority. *See* 86 Fed. Reg. at 67,129. And the Procurement Act, which never mentions wages, cannot plausibly be read to have always been the source of such a vast authority over wages. *See New Mexico*, 854 F.3d at 1226. Instead, if the Executive Branch wants to wade in here, it should look to the statutes Congress passed concerning these matters.

C. The Act Requires Any Procurement Rule to at Least Be Fiscally Sound

Even if this Court accepts a view of the Procurement Act as granting broad leeway to the President over which types of policies he can promote, the Act still limits his discretion. Indeed, understanding that the President's role is not to drive broad policy objectives, Congress

enacted a clear limit on the President's directives—they must be economical and efficient for the public fisc.

Courts have thus concluded that "some content must be injected into the general phrases 'not inconsistent with' the [Act] and 'to effectuate the provisions' of the Act," to avoid a completely "open-ended" grant of authority. *AFL-CIO v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979) (*en banc*). "Any order" "must accord with the values of 'economy' and 'efficiency,'" and have "a sufficiently close nexus between those criteria and the procurement [] program[.]" *Id.* at 792; *accord Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981) (policies must be "reasonably related to the Procurement Act's purpose"). The "nexus" to cost savings should be "close," and must relate to procurement and supply, not other benefits asserted "as a naked pretext." *Kentucky v. Biden*, 23 F.4th 585, 607, 609 (6th Cir. 2022). It is not enough to claim that a rule makes "contractor employees . . . more 'economical and efficient'" through, for instance, reduced absenteeism. *Id.* at 606. It is "[i]mportan[t]," therefore, for the President to show a "nexus between the wage and price standards and likely savings to the Government." *Kahn*, 618 F.2d at 793. And this nexus must mean *something*—a test that simply takes the President at

his word hardly "provides such a line," indeed, such a "line is no line at all." *Louisiana*, 55 F.4th at 1031.

These limits derive from the statutory text. The Act limits the President to actions he "considers necessary" for "economical and efficient" "[p]rocuring and supplying property." 40 U.S.C. §§ 101(1), 121(a). The word "necessary" "suggests [] something 'indispensable', 'essential', something that 'cannot be done without.'" *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George*, 685 F.3d 917, 923 (10th Cir. 2012) (citation omitted). "Economical" implies the use of fewer resources—"marked by careful, efficient, and prudent use of resources." "Economical," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/economical. "Efficient" likewise suggests *less* of something—"capable of producing desired results with little or no waste (as of time or materials)." "Efficient," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/efficient. This all suggests that there must be actual *cost savings* from the policy at issue.

Moreover, the statute's qualification that the President must only "consider[]" the policy necessary for economical and efficient procurement

is not a complete abdication of judicial review. Indeed, the Eleventh Circuit has flatly rejected this reading. "The problem is that the statute does not offer the breadth of authority that the federal government asserts. Its proposed reading rests on an upside-down view of the statutory scheme—that Congress has granted the President complete authority to control the federal contracting process in a way he thinks is economical and efficient, subject only to certain statutory limitations. The statute's language does not support this reading." *Georgia*, 46 F.4th at 1298.

The Act "does not give the President authority to 'carry out' the *purpose* of the statute. . . . So while it tells us that Congress crafted the [] Act to promote economy and efficiency in federal contracting, the purpose statement does not authorize the President to supplement the statute with any administrative move that may advance that purpose." *Id.* After all, "statements of purpose, . . . by their nature cannot override a statute's operative language." *Sturgeon v. Frost*, 587 U.S. 28, 57 (2019) (cleaned up).

Even courts applying a broader reading of the statute require meaningful oversight. Reviewing courts have long recognized that it is

not enough for the President to simply assert his view that the rule is necessary; rules must actually be in "accord with the [statutory] values of 'economy' and 'efficiency.'" *Kahn*, 618 F.2d at 792. To avoid "writ[ing] a blank check for the President to fill in at his will," those terms have to mean something; there must be a "nexus between the . . . standards and likely savings to the Government," and the "procurement power must be exercised consistently with the structure and purpose of the statute that delegates the power." *Id.* at 793. The "economical and efficient" requirement is a "legislative-branch prescription," not a grant of executive discretion, and is therefore subject to careful judicial review. *Kentucky*, 23 F.4th at 589, 606.

Perhaps more significantly, the Supreme Court has recently emphasized that courts cannot read this type of language in the way DOL insists. In *Alabama Ass'n of Realtors v. HHS*, the Court addressed a statute that allowed an agency to issue rules that were "in [its] judgment [] necessary to prevent the . . . spread of communicable diseases[.]" 141 S. Ct. 2485, 2487–88 (2021). While the agency said this gave it "authority to take whatever measures it deems necessary to control the spread of COVID-19, including issuing [an eviction] moratorium," the Court read

other statutory limits to tamp down the scope of the agency's discretion. *Id.* at 2488. So too here—the economy and efficiency limits must mean *something*.

D. The Wage Rule Will Have Dire Economic Consequences

Under any rational understanding of the limits set out by Congress, the rule fails to promote economical or efficient government procurement policy. Indeed, DOL itself recognizes that the rule will make government procurement *less* economical and efficient. It expects increased wage costs to be passed on to the government, and thus "Government expenditures may rise." *See* 86 Fed. Reg. at 67,206. If firms don't pass the costs on to the government, the firms will have to make up their losses from "the public in the form of higher prices," at least to the extent that the public is willing to bear them. *Id*. To the extent the public is unwilling to pay, firms will be less competitive, and their employees will likely face "disemployment" of up to 0.9%. *Id*. at 67,207, 67,211. The net result will be more costs to the public, to non-procurement firms, and to the government—the opposite of a permitted action under the Act. *See Kahn*, 618 F.2d at 792.

DOL's own numbers paint a troubling picture. DOL estimated the rule would affect more than 500,000 private firms, including approximately 40,000 firms that provide concessions or recreational services pursuant to special use permits on federal lands. 86 Fed. Reg. at 67,194–96. DOL also estimated the rule would result in "transfers of income from employers to employees in the form of higher wage rates" of "$1.7 billion per year over 10 years," with "average annualized direct employer costs" of "$2.4 million" for each firm. *Id.* at 67,194. None of these figures include overtime costs, which the government did not even attempt to calculate. *Id.* Unsurprisingly, the "final rule is economically significant[.]" *Id.*

A closer look at the studies *relied on* by DOL tells an even worse story. For instance, DOL insisted that it "believes this final rule would result in negligible or no disemployment effects." 86 Fed. Reg. at 67,211. But one of the studies it relies on concluded that a minimum wage *can* result in slight increase in overall employment, but only with respect to more privileged workers. *See* Tom Ahn, Peter Arcidiacono & Walter Wessels, *The Distributional Impacts of Minimum Wage Increases When Both Labor Supply and Labor Demand Are Endogenous*, 29 J. Bus. &

Econ. Stat.1, 13 (2011). On balance "there are possibly large negative welfare effects from a minimum wage increase, even if the employment level stays constant or increases," because "a minimum wage hike is then not a transfer from rich firms to poor workers, but from *poor* workers to *rich* workers." *Id*. This is a point reinforced in other studies DOL cited. *See, e.g.*, Arindrajit Dube & Atilla Lindner, *City Limits: What Do Local-Area Minimum Wages Do?*, 35 J. Econ. Persp. 1, 42 (2021) ("There is a clear drop in employment at the bottom of the wage distribution . . . in cities with minimum wage[.]").

DOL's literature suggests more significant negative effects. In one study concerning Los Angeles' living wage ordinance, the authors concluded that "[e]mployers have cut costs by making small reductions in employment and fringe benefits." David Fairris et al., *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses* 4 (UCLA IRLE Reports, 2015). Indeed, in a metanalysis of 15 years of research, which DOL itself cited to, the authors concluded that a "minimum wage [] has negative employment effects," which are "statistically significant." Paul Wolfson & Dale Belman, *15*

Years of Research on US Employment and the Minimum Wage, 33 Labour 488 (2019).

Even if the net loss in jobs might be small, DOL's research explains how the job losses hurt the poorest workers. As discussed, minimum wage rules simply shift opportunities *away* from less-qualified workers. *See* Ahn, Arcidiacono, and Wessels, *supra* at 13. As other studies confirm, "The entirety of these [wage] gains accrued to workers with above-median experience at baseline; less-experienced workers saw no significant change to weekly pay," and, in fact, minimum wage rules resulted in "a significant reduction in the rate of new entries into the workforce." Ekaterina Jardim, et al., *Minimum Wage Increases and Individual Employment Trajectories* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25182, 2018). Jobs that can be accomplished by automation are also simply eliminated. Grace Lordan & David Neumark, *People Versus Machines: The Impact of Minimum Wages on Automatable Jobs*, 52 Labour Econ. 40, 42 (2018). Workers in such jobs are "quite vulnerable to employment changes and job loss because of automation following a minimum wage increase." *Id.*

DOL also dismissed concerns about price increases, which "would impact [companies'] profits, competitiveness, and viability," saying that there was no "data or substantive information" submitted by commentators and asserting that there was "little literature showing a link between minimum wages and profits." 86 Fed. Reg. at 67,207. The one study cited by the agency, however, concluded that there is "a significant negative association between the [minimum wage] introduction and firm profitability." Mirko Draca, Stephen Machin & John Van Reenen, *Minimum Wages and Firm Profitability*, 3 Am. Econ. J. 129, 130 (2011).

Yet again, DOL's "supporting" evidence proves its error. According to one study cited by DOL, "It is well established in the literature that minimum wage increases compress the wage distribution. Firms respond to these higher labour costs by reducing employment, reducing profits, or raising prices." Sara Lemos, *A Survey of the Effects of the Minimum Wage on Prices*, 22 J. Econ. Surv. 1, 187 (2008). The single study DOL cited concerning job losses to automation found "full or near-full price pass-through of minimum-wage-induced higher costs of labor." Orley Ashenfelter and Štěpán Jurajda, *Wages, Minimum Wages, and Price*

Pass-Through: The Case of McDonald's Restaurants, (Princeton U. Indus. Rel. Section, Working Paper No. 646, at 2, 2021). Other researchers concluded that "firms respond to minimum wage increases not by reducing production and employment, but by raising prices." Lemos, *supra* at 187. In still other instances, "Firms have adapted to the remaining costs [by] cutting fringe benefits and overtime, hiring more highly trained workers, cutting profits and passing on costs to the city or to the public." Fairris, et al., *supra* at 2. In yet others, wage-related costs resulted in "higher prices, lower profit margins, wage compression, reduced turnover, and higher performance standards." Barry Hirsch, Bruce E. Kaufman & Tetyana Zelenska, *Minimum Wage Channels of Adjustment* (IZA Institute of Labor Economics, Discussion Paper No. 6132, at 1, 2011).

This is the evidence DOL uses to *support* its policy. It's hard to think of more damning praise.

As *amici* know firsthand, this dry academic recitation obscures the real-world impact on businesses across the country. NFIB's members who are government contractors face these new costs, and must make them up somewhere. Some might pass the costs on to the government,

deflecting the burden onto ordinary taxpayers. Other will raise costs to their other customers—taxing ordinary Americans to pay for DOL's policy. Still others will reduce employee hours or cut jobs altogether. As PLF's clients, AVA and CROA, understand, the wage rule would force them to primarily reduce opportunities for their employees because they cannot otherwise continue to provide services to their customers. None of these outcomes serve public interests.

In fact, the NFIB Research Center's analysis paints a dire picture. The Center studied the impact of proposed legislation that would have increased the federal minimum wage from the current $7.25 per hour to $15 per hour over a period of six years, with subsequent adjustment for inflation. The Center's resulting report, Michael J. Chow, et al., *Economic Effects of Enacting the Raise the Wage Act on Small Businesses and the U.S. Economy* (Jan. 25, 2019), https://www.remi.com/wp-content/uploads/2021/11/Economic-Effects-of-Enacting-the-Raise-the-Wage-Act-on-Small-Businesses-and-the-U.S.-Economy.pdf, estimated that in its first 10 years, such a policy "would reduce private sector employment by over 1.6 million jobs and produce a cumulative U.S. real output loss of more than $2 trillion." The doubling of the minimum wage

also would have a particularly strong adverse impact on small businesses, as the report notes that "[b]usinesses with fewer than 500 employees are forecast to experience 57 percent of private sector job losses (over 900,000 lost jobs), and businesses with fewer than 100 employees are forecast to lose nearly 700,000 jobs, about 43 percent of all jobs lost." *Id.* A high minimum wage does nothing for a worker who loses the job and has no paycheck at all.

II. This Court Must Take Care to Subject the Rule to Meaningful Judicial Review

The chilling economic impacts of the wage rule more than suffice to invalidate it as a putative exercise of responsible procurement policy. But *amici* wish to further emphasize the danger to constitutional order that a contrary conclusion would create.

When a court reviews agency action, the first question should always be "whether Congress in fact meant to confer the power the agency has asserted." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022). Sometimes "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* (citations omitted). In such

circumstances, "both separation of powers principles and a practical understanding of legislative intent" require the agency to "'point to clear congressional authorization' for the power it claims." *Id.* at 723. This, "major questions doctrine," carefully preserves Congress' role in lawmaking. *Id.*

"Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional guarantees." *Id.* at 735 (Gorsuch, J., concurring). Indeed, the "major questions doctrine works . . . to protect the Constitution's separation of powers" by preventing usurpation of legislative authority by the Executive Branch. *Id.* at 737. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." Preamble; Art. I, § 1. By doing so, "the Constitution sought to ensure 'not only that all power [w]ould be derived from the people,' but also 'that those [e]ntrusted with it should be kept in dependence on the people.'" *Id.* at 738 (quoting The Federalist No. 37, at 227 (Madison) (C. Rossiter ed. 1961)). "When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize

agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives." *Id.* at 752–53.

This case seems tailor made for the major questions doctrine. It involves a controversial policy decision purportedly lurking in a long-dormant statute, and one with extraordinary economic consequences. DOL rightly acknowledges that the rule "is economically significant," since it would result in direct costs to employers of "$1.7 billion per year over 10 years." 86 Fed. Reg. at 67,194. This is in addition to "regulatory familiarization costs," "implementation costs," "compliance costs, increased consumer costs, and reduced profits," "disemployment," and even increased "Government expenditures." *Id.* at 67,204, 67,206, 67,211. A court should therefore be willing to simply ensure that Congress "in fact meant to confer the power the agency has asserted." *West Virginia*, 597 U.S. at 721.

The application of the major questions doctrine saves the Procurement Act from what would otherwise be an unconstitutional delegation of legislative power. The Court has long understood that the canon of constitutional avoidance instructs that a court must "construe [a] statute to avoid [serious constitutional] problems unless such

construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988). Thus, if an agency's broad reading of a statute implicates "concerns over separation of powers principles" under the "nondelegation doctrine," a court must read the statute narrowly. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 611, 617 (5th Cir. 2021), *aff'd*, *NFIB v. OSHA*, 142 S. Ct. 661 (2022).

An interpretation of the Procurement Act that permits the rule to stand would so weaken statutory limits as to "raise a nondelegation problem." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021). "In applying the nondelegation doctrine, the 'degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.'" *Id.* (quoting *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001)). But holding that economy and efficiency are served by increasing costs for the public and firms subject to the rule, while producing no savings for the government, would render that requirement a dead letter.

Nullifying these key restrictions would provide the President with unlimited discretion. This is not a new concern. *Kahn* emphasized the

need to enforce strict limits under the Procurement Act to avoid "the constitutional prohibition against excessive delegation of legislative power to the President." 618 F.2d at 793 n.51. As this Court said when invalidating other actions taken under the Procurement Act, "Congress has not spoken clearly to authorize such a dramatic shift in the exercise of the President's power under the Procurement Act." *Louisiana*, 55 F.4th at 1033. To avoid these severe constitutional issues, and the "essentially indeterminate" scope of authority the President has espoused, this Court must narrowly construe the Procurement Act. *See id.* (cleaned up).

In the end, this Court must respect the underlying role of *Congress*. Congress wrote the Procurement Act. The President, through his subordinates within DOL, has claimed to execute that Act with the wage rule. In mediating the dispute concerning the words written by the legislature and the Executive's expansive reading, the judiciary must apply a meaningful level of scrutiny. Otherwise, the separation of powers becomes a hollow sentiment easily cast aside.

CONCLUSION

The judgment below should be affirmed.

Dated: March 29, 2024.

Respectfully submitted,
/s/Michael Poon

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,052 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief 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 it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook font.

Dated: March 29, 2024.

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