No. 23-15179

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF NEBRASKA, et al.,

Plaintiffs – Appellants,

v.

MARTIN WALSH, et al.,

Defendants – Appellees,

On Appeal from the United States District Court
for the District of Arizona
Honorable John Joseph Tuchi, District Judge

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF APPELLANTS

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CIRCUIT RULE 29(a)(4)(A) STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 29(a)(4)(A), Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, states it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Amicus Curiae National Federation of Independent Business Small Business Legal Center, Inc., a nonprofit corporation, states it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

CIRCUIT RULE 29(a)(4)(E) STATEMENT

This amicus brief was not authored in whole or in part by counsel for any party. No party or counsel for a party, and no person other than Amici or their counsel, contributed money to fund this brief's preparation or submission. Amici sought and obtained consent to file this amicus brief from both Plaintiffs-Appellants and Federal Defendant-Appellees.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutions

Regulations

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*.

IDENTITY AND INTEREST OF *AMICI CURIAE*

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*, 138 S. Ct. 2044 (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.

PLF has challenged the rule on behalf of outdoor recreation businesses in parallel litigation. *See Bradford v. U.S. Dep't of Labor*, No.

21-cv-3283, Docket No. 31, 2022 WL 204600 (D. Colo. Jan. 24, 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 to be government contractors.

At bottom, this case implicates significant questions about the proper separation of powers. In the Department of Labor's 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 this understanding undermines Congress' role and embraces an unlawful delegation of legislative function. Only by engaging in genuine judicial scrutiny can the constitutional balance be restored.

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 of Labor, has attempted such unlawful measures.

When Congress enacted the Federal Property and Administrative Services Act (Procurement 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. This Court, as the remaining coordinate branch of government, must meaningfully limit these actions and strike down the rule.

ARGUMENT

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

In dismissing the case below, the district court fundamentally erred in its conceptualization of the Procurement Act as a mere mechanism for the use of unlimited Executive power instead of a limited delegation of Congressional authority. But this framing matters. In the district court's view, the Act is little more than a framework for understanding how the President can act as he exercises complete control over huge portions of the economy. But that is not so. 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," 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." *Georgia*, 46 F.4th at 1294.

"The second constraint on the President's authority is the requirement that his policies be 'consistent with this subtitle.'" *Id*. "[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 to Think 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 "prevailing 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 prevailing 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 agency 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. 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 id*. 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]mportant[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.[1]

[1] In *Mayes v. Biden*, 67 F.4th 921, 940 (9th Cir. 2023), a panel of this Court declined to adopt a precise standard of review under the Act, instead opining that the policy at issue in that case satisfied the major standards adopted by other courts.

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 without wasting materials, time, or energy." "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*, 139 S. Ct. 1066, 1086 (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 794. 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* Ahn, Arcidiacono, and Wessels, *The Distributional Impacts of Minimum Wage Increases When Both Labor Supply and Labor Demand Are Endogenous*, Journal of Business & Economic Statistics, Vol. 29, No. 1, at 13 (Jan. 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.*, Dube and Lindner, *City Limits: What Do Local-Area Minimum Wages Do?*, Journal of Economic Perspectives, Vol. 35, No. 1, at 42 (Winter 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." Fairris, Runsten, Briones, and Goodheart, *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses,* at 4 (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." Wolfson and Belman, *15 Years of Research on US Employment and the Minimum Wage*, Labour Vol. 33, at 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." Jardim, Long, Plotnick, van Inwegen, Vigdor and Wething, *Minimum Wage Increases and Individual Employment Trajectories*, NBER Working Paper No. 25182, at 2 (Oct. 2018). Jobs that can be accomplished by automation are also simply eliminated. Lordan and Neumark, *People versus machines: The impact of minimum wages on automatable jobs*, Labour Economics Vol. 52, at 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." Draca, Machin and Van Reenen, *Minimum Wages and Firm Profitability*, American Economic Journal, Applied Economics Vol. 3, at 130 (Jan. 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." Lemos, *A Survey of the Effects of the Minimum Wage on Prices*, Journal of Economic Surveys, Vol. 22, No. 1, at 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." Ashenfelter and Jurajda, *Wages, Minimum Wages, and Price Pass-Through: The Case of McDonald's Restaurants*, Working Paper #646, Princeton University Industrial Relations Section, at 2 (Jan. 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, Runsten, Briones and Goodheart, *supra* at 2. In yet others, wage-related costs resulted in "higher prices, lower profit margins, wage compression, reduced turnover, and higher performance standards." Hirsch, *Minimum Wage Channels of Adjustment*, IZA Discussion Paper No. 6132, at 1 (Nov. 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, *Economic Effects of Enacting the Raise the Wage Act on Small Businesses and the U.S. Economy* (January 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." *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608 (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 2609. 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 2616 (Gorsuch, J., concurring). Indeed, the "major questions doctrine works … to protect the Constitution's separation of powers" by preventing excessive delegation of lawmaking power. *Id.* 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.* (quoting The Federalist No. 37, p. 227 (C. Rossiter ed. 1961) (J. Madison)). "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 2626.

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, 67,208, 67,211. A court should therefore be willing to simply ensure that Congress "in fact meant to confer the power the agency has asserted." *W. Virginia*, 142 S. Ct. at 2608.

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 by NFIB v. OSHA*, 142 S. Ct. 661, 664 (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. To avoid these severe constitutional issues, the Court must narrowly construe the Procurement Act.

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 reversed and this Court should preliminarily enjoin the wage rule, and remand for further proceedings.

DATED: June 27, 2023.

Respectfully submitted,

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