No. 23-15179

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF NEBRASKA, et al.,

Plaintiffs-Appellants,

v.

JULIE A. SU, IN HER OFFICIAL CAPACITY AS ACTING U.S. SECRETARY OF LABOR, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

No. 2:22-cv-00213
The Honorable John J. Tuchi

BRIEF OF AMICI CURIAE ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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IDENTITY AND INTEREST OF AMICI STATES

Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin ("amici States") submit this brief in support of Defendants-Appellees pursuant to Federal Rule of Appellate Procedure 29(a)(2).

Amici States have an interest in the public welfare, which includes promoting fair wages and enhancing the well-being and financial security of their residents. That interest is implicated by this case, where plaintiffs challenge defendants' authority to direct the inclusion in certain federal contracts of a clause requiring the payment of a $15 minimum hourly wage to employees working on or in connection with the covered contract.

More broadly, amici States are supportive of policies that improve the wages and well-being of their workers while also benefiting employers and consumers. Although amici States have taken different approaches to achieve this goal within their borders, they agree with

defendants that increasing wages for workers generates important benefits, including improved services, increased morale and productivity, and reduced poverty and income inequality. Accordingly, many amici States have recently enacted measures increasing the minimum wage for workers within their borders. Indeed, workers in at least 27 States will see an increase in the minimum wage in 2023, due either to legislative enactments or inflation adjustments.[1]

Plaintiffs' request to prohibit defendants from raising the minimum wage for federal contract workers, if granted, would run counter to these important interests. Amici States thus urge this court to affirm the district court's decision denying plaintiffs' motion for preliminary injunctive relief and granting defendants' motion to dismiss.

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[1] Dan Avery, *Minimum Wage by State: Base Pay Rising in Over Half of US States in 2023*, CNET (Jan. 6, 2023), https://bit.ly/45mGO4M (Alaska, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, and Washington). In addition, the State of Hawai‘i increased its minimum wage to $12.00 per hour effective October 1, 2022, with scheduled increases up to $18.00 in 2028.

SUMMARY OF ARGUMENT

In April 2021, the President exercised his authority under the Federal Property and Administrative Services Act, 40 U.S.C. § 101 *et seq.* ("Procurement Act") to issue an executive order increasing the minimum wage for federal contractors from $10.10 per hour—a rate that had been established in 2014 via executive order and follow-on rulemaking—to $15.00 per hour. *See* 86 Fed. Reg. 22,835 (Apr. 27, 2021) ("2021 Order"). In November 2021, the U.S. Department of Labor ("DOL") promulgated a final rule implementing the 2021 Order. *See* 86 Fed. Reg. 67,126 (Nov. 24, 2021) ("Federal Contractor Rule" or "Rule").

Plaintiffs brought suit challenging defendants' actions under the Procurement Act, Administrative Procedure Act ("APA"), nondelegation doctrine, and Spending Clause. ER113-21. Shortly thereafter, plaintiffs filed a motion for preliminary injunctive relief on their Procurement Act and APA claims, and defendants moved to dismiss the complaint in its entirety. ER5; SER62. Following briefing and argument on these motions, the district court entered an order denying a preliminary injunction and dismissing the complaint. ER4.

On appeal, plaintiffs assert that the district court erred in reaching this decision because (1) defendants have exceeded their authority under the Procurement Act, (2) the major questions doctrine applies to defendants' actions, and (3) the Federal Contractor Rule violates the APA. *E.g.*, AT Br. 11-13. Amici States agree with defendants that the district court properly rejected these arguments because both the 2021 Order and Federal Contractor Rule were lawful exercises of authority. Amici States write separately, however, to address two specific aspects of these issues that are relevant to their interests and experience.

First, amici States explain that the major questions doctrine is inapplicable to this case, the crux of which is a challenge to a narrow minimum wage requirement applicable to certain federal contractors. Although raising the minimum wage for this group of workers will yield important benefits, the Rule does not implicate questions of sufficient economic and political significance to warrant application of the major questions doctrine. Nor is there any indication that the doctrine is implicated because of the allegation that the President acted outside of his statutory authority or in tension with past practice; on the contrary,

his actions are in line with those taken by his predecessors under the Procurement Act.

Second, amici States refute plaintiffs' contention that defendants violated the APA by failing to provide adequate support for the minimum wage increase in the course of the administrative rulemaking process. As detailed below, DOL provided ample support for the Rule. The studies and analyses that DOL cited in support of its conclusion, moreover, are consistent with state and local experiences with raising wages for their contractors.

ARGUMENT

I. The Major Questions Doctrine Is Not Implicated By This Case.

Application of the major questions doctrine is reserved for a limited set of circumstances that are not implicated by the increase in the minimum wage for federal contractors. The Supreme Court has applied the doctrine only in "extraordinary cases," *King v. Burwell*, 576 U.S. 473, 485 (2015) (internal quotations omitted), where an agency has acted on "a question of deep economic and political significance" and where the agency has not identified a clear statutory statement indicating Congress has delegated decision-making authority, *Biden v.*

Nebraska, 143 S. Ct. 2355, 2375 (2023) (internal quotations omitted); *see also, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (limiting the doctrine to "extraordinary" cases). As part of this analysis, the Court has considered whether the agency has undertaken an unprecedented regulatory effort that is wholly outside of its expertise. *E.g.*, *Biden*, 143 S. Ct. at 2374 (discussing "sweeping and unprecedented impact" of a program that was outside of the agency's "wheelhouse") (internal quotations omitted); *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (applying major questions doctrine where "EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority") (cleaned up).

Plaintiffs assert that this court should apply the major questions doctrine to this case—and thus adopt a narrow view of executive authority under the Procurement Act—because, in their view, the question of the appropriate minimum wage has "vast economic and political significance" and because the "Procurement Act's vague delegation of power does not clearly state a congressional intention to allow the Executive to set a federal contractor minimum wage." AT Br.

34 (internal quotations omitted). But plaintiffs are incorrect. As the district court rightly concluded, the decision to increase the minimum wage for federal contractors does not implicate the major questions doctrine. ER15.[2]

For starters, applying the major questions doctrine is unwarranted because increasing the minimum wage for federal contractors does not raise "a question of deep economic and political significance." *King*, 576 U.S. at 486 (internal quotations omitted). In recent decisions involving this doctrine, the Supreme Court has considered actions to be sufficiently economically and politically significant when they affect millions of Americans and involve the expenditure of billions of dollars annually—which is not the case with the 2021 Order and the Federal Contractor Rule.

As one example, the Court determined that the evictions moratorium implemented during the Covid-19 pandemic was a matter

[2] As defendants explain, *see* AE Br. 34-38, plaintiffs' reliance on the major questions doctrine is foreclosed by this court's decision in *Mayes v. Biden*, 67 F.4th 921 (9th Cir. 2023), which held that the major questions doctrine does not apply to actions taken by the President under the Procurement Act. *Id.* at 933. But even if *Mayes* were not controlling on this point, plaintiffs' invocation of the major questions doctrine would still be misplaced, as explained in text.

of "vast economic and political significance" because the moratorium imposed an economic burden of approximately $50 billion and applied to "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction." *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (internal quotations omitted). Likewise, the Court invoked the major questions doctrine in a case challenging an emergency rule that would have affected 84 million workers by requiring "all employers with at least 100 employees to ensure their workforces are fully vaccinated or show a negative test at least once a week." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (internal quotations omitted); *see also Biden*, 143 S. Ct. at 2372 (applying doctrine to loan forgiveness program that would "release 43 million borrowers from their obligations to repay $430 billion in student loans"); *West Virginia*, 142 S. Ct. at 2604 (applying doctrine to agency action that "would reduce GDP by a least a trillion 2009 dollars by 2040"); *King*, 576 U.S. at 485 (implementation of tax credits under the Patient Protection and Affordable Care Act constitutes a major question, since those tax credits "involv[e] billions of dollars in spending

each year and affect[ ] the price of health insurance for millions of people").

Contrary to plaintiffs' assertions otherwise, *see* AT Br. 36, the reach of the action challenged in this case is much more modest than any context in which the Supreme Court has applied the major questions doctrine. According to DOL's findings, the Rule's minimum wage increase will affect just 327,300 employees, 86 Fed. Reg. at 67,194, which, at less than .1% of the American population, is a fraction of the individuals affected by the ACA tax credits, the student loan forgiveness program, the Covid-19 policies, or any other agency action in which the Court has invoked the doctrine. Plaintiffs do not explain how an action affecting such a limited class could constitute a major question under Supreme Court precedent. Nor could they: determining the price and associated costs in contracts for federal services is a standard exercise of executive authority under the Procurement Act, *see* AE Br. 14-21, 36, and not a question of deep economic and political significance. Again, the Supreme Court has never invoked the major questions doctrine on an issue affecting so few Americans.

Instead, plaintiffs wrongly suggest that the increase in the minimum wage applies to one-fifth of the American workforce. AT Br. 36. As support, they cite *Mayes*, which stated in a footnote that "[b]ecause the federal government contracts with approximately one-fifth of the American workforce, almost any procurement policy will have 'external' effects." 67 F.4th at 935 n.25. This footnote, however, does not address the Rule at issue in this case, and plaintiffs' claim about the Rule's reach is refuted by DOL's actual findings. As noted, DOL found that the Rule would affect roughly 327,300 employees—roughly 0.2% of the U.S. civilian labor force, which was most recently estimated at over 167 million.[3] Even using DOL's estimate of "potentially affected" employees—i.e., including those workers not likely to be affected by the Rule because they make over $15 per hour—the Rule could conceivably affect only 1.8 million employees, or roughly 1% of the labor force. *See* 86 Fed. Reg. 67,195.

In terms of economic impact, DOL reported that the Rule would increase wages by $1.7 billion per year for 10 years. 86 Fed. Reg. at

[3] *See* U.S. Bureau of Labor Stats., Employment Status of the Civilian Population By Sex And Age (July 2023), https://bit.ly/3YJp9lG.

67,194. Even the cumulative effect of the Rule ($17 billion) is meaningfully less than the economic impact recognized by the Supreme Court as sufficient to invoke the major questions doctrine. As the district court rightly noted, the cumulative economic estimate provided by DOL is "far less than the $1 trillion reduction in GDP projected to result from the Clean Power Plan by 2040 or the $50 billion the Supreme Court found to be a 'reasonable proxy' of the economic impact of the nationwide eviction moratorium." ER16-17 (citations omitted). And even assuming, as plaintiffs do, that the Rule would continue "in perpetuity," AT Br. 37, it would take nearly 588 years and 30 years, respectively, for the economic effect of the Rule to reach the $1 trillion and $50 billion estimates recently relied upon by the Supreme Court.

In any event, the executive branch has acted within its clearly delegated statutory authority and in a manner consistent with prior practice. This case is thus unlike those where the Supreme Court has called an agency action into question upon finding that the agency regulates in an area where it "has no expertise," *King*, 576 U.S. at 486, or where it cannot identify any statutory basis or historical precedent for the regulation, *West Virginia*, 142 S. Ct. at 2612; *NFIB*, 142 S. Ct. at

666; *Utility Air Regulatory Grp v. EPA*, 573 U.S. 302, 324 (2014). Indeed, in one of the first cases applying this doctrine, the Court rejected the Food and Drug Administration's claim that it could regulate the tobacco industry, where it had never before asserted such statutory authority and, in fact, had previously disclaimed its ability to do so. *Brown & Williamson*, 529 U.S. at 159-60.

The challenged actions here are distinguishable from those cases. To start, as defendants explain in greater detail, *see* AE Br. 14-21, the actions taken by the executive branch to increase the minimum wage for federal contractors are clearly authorized by the text of the Procurement Act. Indeed, the Act assigns to the President the authority to implement "policies and directives" that he or she "considers necessary to carry out" the objectives of economy and efficiency in federal procurement. 40 U.S.C. §§ 101(1), 121(a). And as this court has recognized, this language reflects congressional intent to bestow "'broad-ranging authority'" and "'flexibility'" on the President so that he or she may achieve the goal of providing the government "an economical and efficient 'system' for both procuring services and performing contracts." *Mayes*, 67 F.4th at 941 (quoting *UAW-Labor*

Emp. & Training Corp. v. Chao, 325 F.3d 360, 366 (D.C. Cir. 2003)); *see also, e.g.*, *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) ("Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act]").

Courts have thus upheld a wide range of executive orders issued under the Procurement Act, including those that set price and wage guidelines, *AFL-CIO v. Kahn*, 618 F.2d 784, 792-93 (D.C. Cir. 1979); require federal contractors to inform workers of their rights under federal labor laws, *Chao*, 325 F.3d at 366-67; establish Covid-19 safety protocols, *Mayes*, 67 F.4th at 926; and implement antidiscrimination requirements, *e.g.*, *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159, 171 (3d Cir. 1971); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967).

Beyond this broad statutory authority, there is historical precedent for presidents issuing executive orders setting a minimum wage for federal contractors and determining the scope of its application. In addition to the 2021 Order issued by President Biden, *see* 86 Fed. Reg. 22,835 (Apr. 27, 2021), President Obama issued an executive order establishing a $10.10 minimum wage for federal

contractors in 2014, 79 Fed. Reg. 9,851 (Feb. 20, 2014), and President Trump issued an executive order in 2018 that exempted certain seasonal recreational providers from that minimum-wage requirement, 83 Fed. Reg. 25,341 (June 1, 2018). Notably, the 2018 executive order did not cast doubt on the President's authority to set minimum wages for federal contractors; on the contrary, it retained the $10.10 minimum wage and carved out a narrow exemption to its terms. *Id.* Executive orders setting a minimum wage for federal contractors have thus been in place for nearly eight years and over the course of three presidential administrations. Given this precedent and the recognized breadth of the Procurement Act's delegation of authority to the President, this case is unlike those where an agency has issued a regulation based on a claim to have discovered "an unheralded power" in a "long-extant statute." *Utility Air*, 573 U.S. at 324.

Finally, there is no merit to the argument that reading the Procurement Act broadly would disrupt the balance of power between the federal government and the States. AT Br. 32. To be sure, the relationship between federal and state authority can be a relevant factor in the major questions analysis where that balance is

"significantly alter[ed]" by executive action. *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1850 (2020). But the narrow action at issue here—which, as discussed, reflects a proprietary decision affecting only 327,300 employees, 86 Fed. Reg. at 67,194—does not fall within that category. Instead, as the district court rightly noted, "the government here is setting minimum wages only for those workers connected to federal contracting." ER17.

Plaintiffs nevertheless argue that the Rule interferes with their state interests because minimum wages are "traditionally a subject for state legislatures." AT Br. 32. But as the district court explained, the "Rule do[es] not encroach upon states' traditional police power." ER17. On the contrary, the States' ability to use their police powers to protect their residents and workers by regulating wages above the federal floor remains intact. Indeed, the 2021 Order expressly reserves to States and localities the ability to enforce "any applicable law or municipal ordinance establishing a minimum wage higher than the minimum age established under this order." 86 Fed. Reg. at 22,835. Furthermore, as explained, *see supra* pp. 1-2, the Rule serves state interests by improving the financial security of their residents while benefitting

employers and consumers. All told, the 2021 Order and the Rule do not improperly alter the balance of power between federal and state governments.

II. The Federal Contractor Rule Is Amply Supported By Social Science And Empirical Data.

Plaintiffs are also wrong to assert that the Federal Contractor Rule violates the APA because DOL purportedly increased the minimum wage without providing a "reasoned basis for its judgment." AT Br. 45-46. On the contrary, DOL clearly articulated reasoning for implementing a $15.00 minimum wage for federal contractors. Among other findings, DOL concluded that increasing the minimum wage would "generate several important benefits," including "improved government services, increased morale and productivity, reduced turnover, reduced absenteeism, and reduced poverty and income inequality for Federal contract workers." 86 Fed. Reg. at 67,195. DOL also determined that any costs employers would incur would be modest. *Id.* at 67,206-08.

A. The minimum wage increase provides important benefits to employers, consumers, and employees.

To begin, numerous studies and reports, including those relied on by DOL, have shown that by paying employees higher wages, employers improve the morale, productivity, and performance of employees; reduce turnover; and are able to attract higher quality workers. 86 Fed. Reg. at 67,212-14. And these benefits, in turn, lead to improved services and better consumer experiences. *Id.* Such findings, moreover, are well-documented: improvements in worker efficiency, recruitment, and retention have been found across many different sectors, including air travel, policing, retail, manufacturing, and construction.[4] As DOL noted, given the consistency of these findings, there is "no reason to believe that the trends found in the literature do not also apply to the Federal contract worker community." 86 Fed. Reg. at 67,213.

As one example, a recent study of minimum wage increases in nursing homes provided "direct evidence" linking those increases to

[4] *E.g.*, Paul K. Sonn & Tsedeye Gebreselassie, The Road To Responsible Contracting, National Employment Law Project at 3-4 (2009), https://bit.ly/3s54ZpN (collecting studies); Justin Wolfers & Jan Zilinsky, *Higher Wages for Low-Income Workers Lead to Higher Productivity* (Jan. 13, 2015), https://bit.ly/45pXpo0 (same).

improved worker performance and efficiency.[5] The study found that "higher minimum wages induc[ed] better performance among current workers" and improved the service quality through increased retention.[6] Among other indicators of better performance, the study noted improvements in the health and safety of the nursing home residents, including fewer health inspection violations and deaths each year.[7] In fact, the study estimates that in 2013 (one of the years it examined), there would have been approximately 15,000 fewer nursing home deaths had comparable wage increases been implemented in nursing homes across the country.[8]

There is also evidence that these benefits endure well beyond the initial wage increase: according to a 2019 report, "wage raises increase productivity for up to two years after the wage increase." 86 Fed. Reg. at 67,213. The nursing home study similarly reported that health and

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[5] Krista Ruffini, *Worker Earnings, Service Quality, and Firm Profitability: Evidence from Nursing Homes and Minimum Wage Reforms*, at 1 (Apr. 25, 2022), https://bit.ly/3KEc1YX.

[6] *Id.* at 3, 9, 15.

[7] *Id.* at 2.

[8] *Id.* at 20.

safety improvements—in particular, the lower rate of deaths—persisted after the initial increase.[9]

Increased wages, like those in the Federal Contractor Rule, can also facilitate retention and recruitment. 86 Fed. Reg. at 67,213. According to a recent study cited by DOL, improved wages "at a Fortune 500 company found that a 1 percent wage increase" resulted in reduced turnover, increased recruitment, and increased productivity. *Id.*

Another substantial benefit of the Federal Contractor Rule, as explained by DOL, is the corresponding reduction in poverty for workers, especially those in historically underpaid or otherwise disadvantaged groups. *Id.* at 67,214-15. A recent study indicates that increasing the minimum wage provides net benefits to workers living in poverty, even when accounting for potential negative effects of a minimum wage increase on employment opportunities, such as reduced hours or fewer available positions.[10] It further determined that these improvements are meaningful; in fact, the authors suggest that

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[9] *Id.* at 2.

[10] Kevin Rinz & John Voorheis, *The Distributional Effects of Minimum Wages: Evidence from Linked Survey and Administrative Data*, at 20-22 (2018), https://bit.ly/3YFpWUM.

increasing the minimum wage during the Great Recession would have "blunt[ed] the worst of the income losses."[11]

Increased wages are particularly important for groups that face disproportionate income inequality, such as women, people of color, younger workers, and less educated workers. 86 Fed. Reg. at 67,214-15 (collecting studies). For example, according to a 2019 study assessing the role that gender plays in wages, "less-educated, less-experienced, and female workers are more directly affected by a rise in the minimum wage than more-educated, more-experienced, and male workers."[12] A case study of firms covered by Boston's living wage law likewise concluded that the "living wage beneficiaries are . . . primarily women and people of color."[13] As DOL explained, increasing the wage of federal contractors would directly benefit these groups, since "many of the contracts that would be covered by this rule can be found in industries

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[11] *Id.* at 21.

[12] Tatsushi Oka & Ken Yamada, *Heterogeneous Impact of the. Minimum Wage*, Journal of Human Resources at 18 (July 2019), https://bit.ly/3sdPTyn.

[13] Mark D. Brenner & Stephanie Luce, *Living Wage Laws in Practice: The Boston*, New Haven and Hartford Experiences, Political Economy Research Institute, at 45 (2005), https://bit.ly/3DZ7aOo.

characterized by low pay and workforces largely comprised of" people of color, women, and LGBTQ+ workers. 86 Fed. Reg. at 67,215 (internal quotations omitted).

These justifications are amply supported not only by the case studies and other literature discussed by DOL, *id.* at 67,212-15, but also by the experience of state and local governments with implementing similar policies for their contractors, which are often described as "living wage laws."[14] Indeed, the States and localities that have raised minimum wages for their own contractors have found that such policies "create better quality jobs for communities" and "improve[ ] the contracting process both by reducing the hidden public costs of the procurement system, and by shifting purchasing towards more reliable, high road contractors."[15] As one example, "[r]esearch by independent, academic economists indicates that New York's prevailing wage law is a uniquely valuable component of state policy that simultaneously uplifts residents and communities while imposing minimal, if any, cost on

[14] Sonn, *supra* note 4, at 13 (describing state and local "living wage laws").

[15] *Id.*

taxpayers."[16] The research also found that high-wage contractors attract more skilled and productive workers and use the industry's most advanced technology, allowing them to place competitive bids on contracts.[17] In a similar vein, a study of the "Los Angeles living wage law found that staff turnover rates at firms affected by the law averaged 17 percent lower than those at firms that were not, and that the decrease in turnover offset 16 percent of the cost of the higher wages."[18]

Plaintiffs do not challenge the conclusions of these studies or DOL's description of them. Instead, they assert that DOL improperly relied on "numerous benefits that have nothing to do with procurement," such as "[e]quity, poverty reduction, and income equality." AT Br. 52. According to plaintiffs, these considerations should be cast aside because they are "social policy objectives" that "do not bear on the economy and efficiency of government procurement."

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[16] Russell Ormiston, et al., *New York's Prevailing Wage Law*, Economic Policy Institute (Nov. 1, 2017), https://bit.ly/3OELewP.

[17] *Id.*

[18] Sonn, *supra* note 4, at 14 (citing David Fairris et al., *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses*, Los Angeles Alliance for a New Economy).

Id. at 52-53. This is incorrect. For instance, DOL explained that reducing poverty and income inequality could improve the efficiency and economy of procurement by increasing worker morale and decreasing absenteeism. 86 Fed. Reg. at 67,214-15.

Furthermore, plaintiffs' analysis ignores the many other benefits discussed in the Rule, which will increase the productivity and performance of employees, enable employers to recruit higher quality workers while reducing turnover, and result in improved products and services. 86 Fed. Reg. at 67,212-14. There are many ways in which these benefits directly affect the "economy" and "efficiency" of government procurement. *See Mayes*, 67 F.4th at 938 (discussing the "broad understandings of those terms"); *Kahn*, 618 F.2d at 789 (similarly noting that these are "not narrow terms"). For example, a productive and high-performing workforce with less turnover is able to provide services to the government in a more efficient manner. Likewise, the provision of improved goods and services furthers the government's overarching interest in obtaining high-quality products through "an economical and efficient system of federal government

procurement." *Mayes*, 67 F.4th at 936. Plaintiffs' attempts to diminish the relevance of these benefits should thus be rejected.

B. The benefits of the minimum wage increase outweigh any minimal costs to employers.

Additionally, there is substantial evidence that any additional costs to employers are outweighed by the benefits associated with the wage increase. Indeed, DOL reviewed literature examining the impact of minimum wage increases on prices to the public and concluded that while the "size of price increases will vary based on the company and industry," the extent of the price increases at issue here have been "overstated" by commentators opposed to the Federal Contractor Rule. 86 Fed. Reg. at 67,207. In reaching that conclusion, DOL also accounted for the "various benefits [employers] will observe, such as increased productivity and reduced turnover," which could, in turn, improve the quality of services and "attract more customers and result in increased sales." *Id.* DOL also noted that contractors would likely be able to renegotiate their contracts with the federal government to account for any increased costs associated with the minimum wage increase. *Id.*

Additionally, local experience bears out DOL's conclusion that any costs associated with an increase in the minimum wage would be minimal. Indeed, a "review of the effects of living wages in a dozen local jurisdictions found that contract costs increased by less than 1.0 percent of each jurisdiction's total budget."[19] A Johns Hopkins University study likewise found that contract costs increased by only 1.2% in Baltimore, the first locality to implement a living wage requirement for city contractors, upon review of 26 contracts "compared before and after the living wage law was implemented."[20]

Plaintiffs contend, however, that DOL's reliance "on general findings from the literature to conclude the Rule's benefits will offset its 1.7 billion annual price tag" was insufficient. AT Br. 51 (internal quotations omitted). Instead, plaintiffs argue, DOL was required to assign monetary values to the benefits so that it could calculate the difference between the benefits and the costs. *Id.* As sole support for this proposition, plaintiffs cite *Diebold v. United States*, 947 F.2d 797

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[19] *Impact of the Maryland Living Wage*, Maryland Dep't of Legislative Services, at 5 (2008), https://bit.ly/3qxXFTo.

[20] *Id.*

(6th Cir. 1991), a case addressing a different legal question—specifically, whether "a decision by the army to privatize or to contract-out the operations of its dining halls at Fort Knox" is judicially reviewable under the APA or whether it is subject to the agency's discretion by law. *Id.* at 789 (internal quotations omitted). This question, the court explained, turned on whether there is a body of law governing that decision, such as "standards, definitions, or other grants of power that confine an agency within limits." *Id.* at 795-96 (cleaned up). Against that backdrop, the court noted that the applicable procurement statutes contained such standards, including the policy directive in the Procurement Act to "pursue economy and efficiency, which implicates numbers, measurement, and accountability." *Id.* at 796. The court did not, as plaintiffs suggest, AT Br. 51, hold that an agency is required to undertake certain calculations or measurements under the Procurement Act in order to be sufficient under the APA.

Plaintiffs further assert that DOL's analysis was incomplete because it failed to consider the impact of the Federal Contractor Rule on the States. AT Br. 49-50. This, too, is untrue. DOL recognized that the Rule "could potentially result in increased expenditures by state

and local governments that hold contracts with the Federal Government." 86 Fed. Reg. at 67,223. Based on its experience, however, it noted that these costs "should be small" because States are parties to a "relatively small number" of covered contracts and because "costs are a small share of revenues." *Id.* at 67,224. In short, there is no merit to plaintiffs' arguments that DOL's analysis was insufficient or incomplete.

CONCLUSION

For these reasons, this Court should affirm the judgment below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-15179

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I hereby certify that on August 28, 2023, I electronically filed the foregoing Brief of Amici Curiae Illinois et al. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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