No. 22-1023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUKE BRADFORD, et al.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Defendants-Appellees.

Interlocutory Appeal from the United States District Court for the District of Colorado, No. 1:21-cv-3283

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

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IDENTITY AND INTEREST OF AMICI STATES

Illinois, California, Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington (collectively, the "amici States") submit this brief in support of Defendants-Appellees President Joseph R. Biden, Secretary Martin J. Walsh, Acting Administrator Jessica Looman, the U.S. Department of Labor ("DOL"), and the DOL Wage and Hour Division 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-Appellants Duke Bradford, Arkansas Valley Adventure, and the Colorado River Outfitters Association challenge defendants' authority to apply the $15.00 minimum wage for federal contractors to the subset of federal contractors who provide seasonal recreational services or equipment on federal lands. Amici States have an interest in ensuring that their residents who offer these seasonal

recreational services on federal lands are paid a fair wage equal to their federal contractor counterparts in other sectors.

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 21 States saw an increase in their minimum wages on January 1, 2022, due either to legislative enactments or inflation adjustments.[1]

Plaintiffs' request to prohibit defendants from raising the minimum wage for seasonal recreational workers, if granted, would run

[1] David Cooper *et al.*, *Twenty-one States Raised Their Minimum Wages on New Year's Day*, Economic Policy Institute (Jan. 6, 2022), https://www.epi.org/blog/ states-minimum-wage-increases-jan-2022/ (Arizona, California, Colorado, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Vermont, Virginia, and Washington).

counter to these important interests. Amici States thus urge this court to affirm the district court's decision denying preliminary injunctive relief.

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, 86 Fed. Reg. 22,835 (Apr. 27, 2021) ("2021 Order"). Relevant here, the 2021 Order also rescinded an exemption to the federal contractor minimum wage—an exemption that was created via executive order in 2018—for "seasonal recreational services" workers whose employers have special use permits on federal lands allowing them to provide recreational equipment or offer recreational tours and other similar activities, such as "river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps," 83 Fed. Reg. 25,341 (May 25, 2018) ("Exemption"). In November 2021, the U.S. Department of

Labor ("DOL") promulgated a final rule implementing the 2021 Order, 86 Fed. Reg. 67,126 (Nov. 24, 2021) ("Federal Contractor Rule").

Plaintiffs in this case, who provide seasonal recreational services and equipment on federal lands, challenge defendants' actions on three grounds, all of which center on the revocation of the Exemption. First, plaintiffs allege that defendants lack authority to impose a minimum wage on outfitters and guides under the Procurement Act because their use of federal lands is not related to procuring and supplying services for the government, within the meaning of the Act. App'x at 25-27. Second, they allege that the Rule is arbitrary and capricious because it rescinded the Exemption "for non-procurement contractors like Plaintiffs" without sufficient explanation. *Id.* at 28. Third, they allege that the Rule violates nondelegation principles because "Congress did not bestow the President with the authority to issue a federal minimum wage requirement for entities like Plaintiffs, who do not have procurement contracts with the government." *Id.* at 29.

Amici States agree with defendants that these arguments should be rejected because both the 2021 Order and the Federal Contractor Rule were lawful exercises of defendants' authority—in particular, that

the President acted well within his authority under the Procurement Act and that DOL validly promulgated the Federal Contractor Rule. We write separately, however, to address two specific aspects of these issues that are relevant to amici States' 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 exemption for recreational service workers on federal lands. Although extending the minimum wage to this group of workers will yield important benefits, the rescission of the Exemption 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 by an action that exceeds the scope of presidential authority or one that is in tension with past practice; on the contrary, the President's actions are consistent with those taken by his predecessors under the Procurement Act.

Second, amici States refute the notion that the Federal Contractor Rule is arbitrary and capricious based on any failure of DOL, in the course of its administrative rulemaking process, to provide adequate support for the rescission of the Exemption. As detailed below, DOL

provided ample support for the entirety of the Rule, including the rescission of the Exemption. These studies and analyses, moreover, are consistent with state and local experiences with raising wages for their contractors. For these reasons and those outlined by defendants, this court should affirm the district court's decision.

ARGUMENT

I. The District Court Correctly Determined That 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 rescission of the Exemption or the increase in the minimum wage for federal contractors. Although the precise contours of the doctrine remain undefined, the Supreme Court has applied it only in "extraordinary cases" where an agency has acted on "a question of deep economic and political significance" and where the agency has not identified a basis to believe that Congress delegated such decision-making authority to it. *King v. Burwell*, 576 U.S. 473, 486 (2015) (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). Stated differently, the Court invokes this doctrine when an agency has

undertaken a major regulatory effort in an area wholly outside of its expertise or in a manner that is incompatible with the underlying statutory delegation of authority. *E.g.*, *King*, 576 U.S. at 485; *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

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 "deep economic and political significance" and because the executive branch has acted outside of the scope of its authority. Opening Br. 32 (internal quotations omitted). Plaintiffs' amici urge this court to employ the doctrine for the additional reason that, according to their argument, the Federal Contractor Rule upsets the balance of federal and state power. *See* Arizona Br. 6-11. Plaintiffs and their amici are incorrect: neither the decision to revoke the Exemption—which is the relevant action at issue here, *supra* p. 4—nor the decision to increase the minimum wage for federal contractors implicates the major questions doctrine.

To start, application of the major questions doctrine is not warranted because the rescission of the Exemption does not constitute

"a question of deep economic and political significance." *King*, 576 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. *E.g.*, *id.* 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").

As one example, the Court determined that the evictions moratorium implemented during the Covid-19 pandemic was a matter 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 Services*, 141 S. Ct. 2485, 2489 (2021). Likewise, the Court invoked the 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).

Contrary to plaintiffs' suggestion, the reach of the action challenged in this case is substantially more modest than any where the Court has applied the major questions doctrine. Rescission of the Exemption—which, again, is the only action challenged here, *supra* p. 4—impacts only those employees of federal contractors who provide seasonal recreational services, such as guided tours or equipment rentals, on federal lands. Plaintiffs and their amici do not explain how an action affecting such a narrow class could constitute a major question under Supreme Court precedent. Nor could they: determining whether seasonal recreational service employees working on federal lands should receive the minimum wage for federal contractors is a standard exercise of executive authority under the Procurement Act, *see* Gov. Br. 16-30, and not a question of deep economic and political significance.

Plaintiffs and their amici thus focus instead on the scope and impact of the Federal Contractor Rule as applied to *all* federal

contractors subject to the Rule. *E.g.*, Opening Br. 32-34; Arizona Br. 9-11. At the threshold, however, such a focus is improper—as discussed, *see supra* p. 4, all three of plaintiffs' claims are grounded in their status as recreational services providers. But even if it were correct to assess the entirety of the Rule, the major questions doctrine would still not be implicated by this case. 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 or the Covid-19 policies. The Supreme Court has never invoked the major questions doctrine on an issue affecting so few Americans.

In terms of economic impact, DOL reported that the Rule would increase wages by $1.7 billion per year for 10 years. *Id.* Even the cumulative effect of the Rule ($17 billion) is meaningfully less than the $50 billion in short-term emergency relief recently recognized by the Supreme Court as sufficient to invoke the major questions doctrine. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. Furthermore, as the district court rightly noted, the economic estimate provided by DOL, although certainly "significant," is "far below the range that the Office

of Management and Budget quantifies to have a measurable effect, in macroeconomic terms, on the gross domestic product"—a number that, according to the court, is ".25% of the GDP, which is $52.3 billion." App'x at 120 (citing 86 Fed. Reg. 67,224). Plaintiffs assert that it was improper for the district court to impose a "$52.3 billion threshold" on application of the major questions doctrine. *See* Opening Br. 34. But that is not what the district court did. On the contrary, the court referenced that measurement as one of many data points in its analysis of whether the Rule implicates a question of deep economic significance.

In any event, the major questions doctrine is inapplicable for the additional reason that the executive branch has acted within its delegated statutory authority and in a manner consistent with prior practice. This case is thus unlike those where the Court has called an agency action into question upon finding that the agency is attempting to regulate in an area where it "has no expertise," *King*, 576 U.S. at 486, or where it cannot identify any statutory or historical precedent for the regulation, *Utility Air*, 573 U.S. at 324. 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 Tobacco Corp.*, 529 U.S. at 159-60; *see also, e.g.*, *NFIB v. OSHA*, 142 S. Ct. at 666 (noting the "lack of historical precedent") (internal quotations omitted); *King*, 576 U.S. at 486 ("It is especially unlikely that Congress would have delegated this decision to the *IRS,* which has no expertise in crafting health insurance policy of this sort.") (emphasis in original).

The challenged actions here are distinguishable from those cases. To start, as the government explains in greater detail, *see* Gov. Br. 16-21, the actions taken by the executive branch—including the rescission of the Exemption and the increase in 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. § 121(a). As the D.C. Circuit 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

procurement and supply." *UAW-Labor Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (internal quotations omitted); *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; and implement antidiscrimination requirements, *e.g.*, *Contractors Ass'n of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967).

In addition to 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 protections. In addition to the 2021 Order issued by President Biden, *see* 86 Fed. Reg. 22,835, 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 created the Exemption at issue in this case, 83 Fed. Reg. 25,341. 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—raised solely by plaintiffs' amici—that the executive branch has improperly disrupted the balance of power between the federal government and the States. Arizona Br. 6. 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—the President's decision to once again apply the minimum wage for federal contractors to employees of recreational services providers that operate on federal lands—does not meaningfully alter the balance of state and federal authority, an assertion that even plaintiffs' amici do not contest.

Instead, plaintiffs' amici assert that this court should apply the major questions doctrine because implementing a "sweeping nationwide minimum wage" interferes with traditional state authority. Arizona Br. 2; *see also id.* at 8. As discussed, however, even when viewed in its entirety, the 2021 Order does not impose a nationwide minimum wage. On the contrary, it reflects a proprietary decision affecting only 327,300 employees. 86 Fed. Reg. at 67,194. But to the extent this argument is considered, it is flawed in a number of additional ways.

According to plaintiffs' amici, the reason that the 2021 Order interferes with their state interests is because it prevents States from "fill[ing] the gaps and regulat[ing] wages above the federal statutory floor according to their local conditions." Arizona Br. 5. This state authority, they claim, is preserved with respect to federal contractors

"in a trio of statutes"—the Davis Bacon Act, the Walsh-Healey Public Contracts Act, and the Service Contract Act—"which mandate that minimum federal contractor wages must hew to *locally* prevailing wages, not an inflexible blanket federal minimum." *Id.* at 5-6 (emphasis in original).

At the threshold, plaintiffs' amici misattribute the source of the "locally prevailing wages" that apply to federal contractors under these statutes. As this court has explained, the federal government—specifically, DOL—is responsible for "determin[ing] the prevailing wage for each type of work in each locality." *Int'l Bhd. of Elec. Workers, Loc. 113 v. T & H Servs.*, 8 F.4th 950, 954 (10th Cir. 2021) (describing the process for setting prevailing wages under the Davis Bacon Act).[2] This determination is made based on a wide range of factors, such as statements showing wage rates paid on projects, signed collective bargaining agreements, and wage rates for public construction by state and local officials. 29 C.F.R. § 1.3. It is thus untrue, as plaintiffs' amici

[2] *See also* Paul K. Sonn & Tsedeye Gebreselassie, *The Road To Responsible Contracting*, National Employment Law Project at 7 (2009), https://s27147.pcdn.co/wp-content/uploads/2015/03/responsiblecontracting2009.pdf (describing wage surveys conducted by DOL to calculate locally prevailing wage).

suggest, that defendants' actions here interfere with preexisting state authority to set locally prevailing wages under those statutes or that, as a result, the Order or Rule substantially alter the balance of federal and state power by standardizing the minimum-wage floor for federal contractors.

Furthermore, the States' ability to protect their workers by "fill[ing] the gaps and regulat[ing] wages," Arizona Br. 5, remains intact. Indeed, the 2021 Order expressly reserves to the 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 22,836. In this way, too, the 2021 Order does not unduly alter the balance of power between federal and state governments.

II. DOL's Rescission Of The Exemption Is Amply Supported By Social Science And Empirical Data.

Plaintiffs and their amici are also wrong to assert that the Federal Contractor Rule is arbitrary and capricious because it purportedly rescinded the Exemption without explanation. *E.g.*, Opening Br. 40-41, 43-44; Arizona Br. 14-17. On the contrary, DOL clearly articulated its reasoning for implementing a $15.00 minimum wage for federal

contractors, including those federal contractors that provide recreational services on federal lands and, as such, were previously exempted from the minimum wage rule. Among other findings, DOL concluded that increasing the minimum wage for recreational services providers 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; *see also id.* at 67,212 (applying these reasons to recreational services employees). DOL also determined that any costs to contractors operating on federal lands would be limited and likely outweighed by these important benefits. *Id.* at 67,206-08. Accordingly, this court should thus affirm the district court's decision on this ground as well.

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.[3] Given the consistency of these findings, as DOL noted, 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.

A recent study of minimum wage increases in nursing homes is particularly relevant to the federal contractors at issue here—outfitters and guides—because it examined how minimum wage increases affected workers in a consumer-based industry without easily quantifiable metrics for performance.[4] As DOL noted, the study provided "direct evidence" linking those increases to improved worker

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[3] *E.g.*, Sonn, *supra* note 2, at 3-4 (collecting studies); Justin Wolfers & Jan Zilinsky, *Higher Wages for Low-Income Workers Lead to Higher Productivity* (Jan. 13, 2015), https://www.piie.com/blogs/realtime-economic-issues-watch/higher-wages-low-income-workers-lead-higher-productivity?p=4700 (same).

[4] Krista Ruffini, *Worker Earnings, Service Quality, and Firm Profitability: Evidence from Nursing Homes and Minimum Wage Reforms*, at 1 (Apr. 25, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830657.

performance and efficiency in this context. *Id.* at 67,213. The study found that "higher minimum wages induc[ed] better performance among current workers" and improved the service quality through increased retention.[5] 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.[6] 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.[7]

There is also evidence that these benefits remain 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 safety improvements—in particular, the lower rate of deaths—persisted after the initial increase.[8]

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[5] Ruffini, *supra* note 4, at 3, 9, 15.

[6] *Id.* at 2.

[7] *Id.* at 20.

[8] Ruffini, *supra* note 4, at 2.

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. Indeed, a recent study found 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.[9] It further determined that these improvements are meaningful; in fact, the authors suggest that

[9] Kevin Rinz & John Voorheis, *The Distributional Effects of Minimum Wages: Evidence from Linked Survey and Administrative Data*, at 20 (2018), https://www.census.gov/content/dam/Census/library/working-papers/2018/adrm/carra-wp-2018-02.pdf.

increasing the minimum wage during the Great Recession would have "blunt[ed] the worst of the income losses."[10]

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."[11] 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."[12] As DOL explained, increasing the wage of federal contractors would directly benefit these groups, since "many of the

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[10] *Id.* at 21.

[11] Tatsushi Oka & Ken Yamada, *Heterogeneous Impact of the Minimum Wage*, Journal of Human Resources, at 18 (July 2019), https://web.archive.org/web/20220301005426id_/http://jhr.uwpress.org/content/early/2021/08/17/jhr.58.3.0719-10339R1.full.pdf.

[12] Mark D. Brenner & Stephanie Luce, *Living Wage Laws in Practice: The Boston, New Haven and Hartford Experiences*, Political Economy Research Institute, at 45 (2005), http://peri.umass.edu/fileadmin/pdf/research_brief/RR8.pdf.

contracts that would be covered by this rule can be found in industries 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 State and local experience of implementing similar policies for their contractors, which are often described as "living wage laws."[13] 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."[14] 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

[13] Sonn, *supra* note 2, at 13 (describing state and local "living wage laws").

[14] *Id.*

while imposing minimal, if any, cost on taxpayers."[15] 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.[16] 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."[17]

Plaintiffs argue, however, that DOL's stated reasoning—improved government services, increased morale and productivity, reduced turnover, and reduced poverty and income inequality—cannot serve as a basis for rescinding the Exemption because it was also the "agency's justification for the *entire rule*." Opening Br. 43 (emphasis in original). But plaintiffs offer no support for this theory and, as DOL explained,

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[15] Russell Ormiston, *et al.*, *New York's Prevailing Wage Law*, Economic Policy Institute (Nov. 1, 2017), https://www.epi.org/publication/new-yorks-prevailing-wage-law-a-cost-benefit-analysis/.

[16] *Id.*

[17] Sonn, *supra* note 2, 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).

there is no reason to believe that these general benefits are industry-specific or that they "would not apply to the outfitters and guide industry." 86 Fed. Reg. at 67,212. Plaintiffs' argument is wrong for the additional reason, too, that DOL expressly applied these justifications to the Exemption on numerous occasions in its analysis. *E.g.*, *id.* at 67,206 (weighing increased costs against benefits of increased productivity and reduced turnover in context of nonprocurement contracts); *id.* at 67,207 (noting that "efficiency gains" apply to "seasonal recreational businesses"); *id.* at 67,212 ("benefits such as increased morale and productivity and decreased turnover" apply to outfitters and guides).

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, including outfitters and guides, are outweighed by the benefits associated with the wage increase. Furthermore, and contrary to plaintiffs' suggestions otherwise, Opening Br. 41, DOL recognized the possibility of increased costs for federal contractors who provide seasonal recreational services on federal lands and engaged in a lengthy analysis that describes why those costs would be minimal and

likely outweighed by the aforementioned benefits, 86 Fed. Reg. at 67,206-08.

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 Rule, including to rescission of the Exemption. *Id.* at 67,207. In reaching that conclusion, DOL also took into account 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.*; *see also id.* (discussing the efficiency gains in the context of seasonal recreational workers). DOL also noted that contractors, including those providing seasonal recreational services, 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.*

Furthermore, DOL expressly considered whether any such increased costs would "deter access" to national parks and other federal

lands. DOL concluded that it is unlikely that access would be deterred because any payroll increases for recreational seasonal workers "are generally small" and because "establishments operating on Federal property compete on characteristics other than price" and are able to offer advantages that are not present on non-federal lands, including aesthetics and remoteness. *Id.* It is thus untrue, as plaintiffs assert, that DOL neither addressed the costs to the employers nor "explain[ed] why these serious harms should be cast aside." Opening Br. 41.

Additionally, DOL's conclusion that any costs associated with an increase in the minimum wage would be minimal is borne out by local experience. 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."[18] 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

[18] *Impact of the Maryland Living Wage*, Maryland Dep't of Legislative Services, at 5 (2008), https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/011000/011487/unrestricted/20090376e.pdf.

requirement for city contractors, upon review of 26 contracts "compared before and after the living wage law was implemented."[19]

C. Any injunctive relief should be limited to the Exemption.

Finally, plaintiffs take the position that DOL's purportedly insufficient justification for the Exemption provides a basis for this court to preliminarily enjoin the entirety of the Federal Contractor Rule. Opening Br. 52. As defendants explain, however, such relief is inappropriate here, where plaintiffs challenge only a portion of the Rule and where the Rule contains a severability clause. Gov. Br. 45-48; *see also* 86 Fed. Reg. at 67,228. Indeed, enjoining the entirety of the Rule would grant relief that goes well beyond what would be necessary to redress plaintiffs' purported injuries. Gov. Br. 45.

Furthermore, granting such relief would be unwarranted because the Rule in its entirety is supported for the reasons just discussed. Among other benefits, increasing the minimum wage for federal contractors would improve worker productivity and reduce poverty, without imposing substantial costs on employers. 86 Fed. Reg. at

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[19] *Id.*

67,195. If the court reaches the entirety of the Rule in its analysis, notwithstanding the narrow challenge at hand, it should affirm the district court's conclusion that the Rule was validly promulgated.

CONCLUSION

This Court should affirm the district court order denying preliminary injunctive relief.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. of App. P. 29(a)(4)(G) and 32(g), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because it contains 5,372 words, excluding the parts of the brief exempted by Fed. R. App. P. 29(a)(5) and 32(a)(7).

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 14-point Century Schoolbook font using Microsoft Word.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 27, 2022, 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 Tenth Circuit by 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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