No. 22-1023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUKE BRADFORD, et al.,
Plaintiff-Appellants,
v.
U.S. DEPT. OF LABOR, et al.,
Defendant-Appellees

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

BRIEF AS *AMICI CURIAE* STATES OF ARIZONA, ALABAMA, ARKANSAS, GEORGIA, IDAHO, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, AND SOUTH CAROLINA IN SUPPORT OF PLAINTIFF-APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amici curiae—the States of Arizona, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, and South Carolina (the "States")—all have compelling interests in protecting their sovereign powers under the Constitution and in the federal separation of powers. These structural protections in the U.S. Constitution ensure individual liberty, and Defendants' Rule threatens both Congress's authority and the States' ability to enforce their own laws and govern their own employees.

The States also have an interest in the orderly operation of administrative law under the Administrative Procedure Act ("APA"). Defendants' rule flouts these procedural protections and seeks to impose the complicated provisions of a nationwide minimum wage without any meaningful justification for most of its provisions, including many significant changes in position from previous rules and statutes.

SUMMARY OF ARGUMENT

In March of 2021, the U.S. Senate decisively rejected the Biden Administration's proposal to include an increase in the minimum wage to the $15 per hour. It wasn't particularly close, failing by a vote of 42-

58.[1] Undeterred by this this resounding rejection, the President issued EO 14026 shortly thereafter. The order, along with the Department's implementing rule, seeks to impose a sweeping nationwide minimum wage and overtime requirements on vast swaths of the U.S. economy (collectively, "Minimum Wage Mandate" or "Mandate"). *See also Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 24, 2021) (the "Rule"). Indeed, it will affect *one-fifth* of the U.S. workforce, including numerous state employees. That minimum wage? Without hint of shame, it is $15 per hour—the *very same* wage that Congress rejected. *But see* U.S. Const. art I, §1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

The Administration justifies this brazen end-run around Congress's authority by pointing to the Procurement Act, 40 U.S.C. § 101 *et seq.*, which grants the President limited authority to adopt policies necessary to implement a system for efficient and economical government acquisition of goods and services. This post-World War II statute was

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[1] *See* Emily Cochrane & Catie Edmondson, *Minimum wage increase fails as 7 democrats vote against the measure.*, New York Times (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/us/minimum-wage-senate.html

created to ensure that government procurement is efficient and non-duplicative. It was never intended to give the President a license to regulate the economy to achieve his desired social equity aims by fiat whenever Congress proves uncooperative.

This is the second time this Administration has illegally attempted to seize Congressional authority by means of the Procurement Act. During 2021, the Administration also sought to impose nationwide vaccine mandates on federal contractors relying on the same statutory authority and many of the same arguments. However, all courts (6 of 6) which considered challenges by States to that vaccine mandate on the merits ruled it was unlawful. *See, e.g.*, *Kentucky v. Biden*, 23 F.4th 585, 608 (6th Cir. 2022); *Brnovich v. Biden*, No. 21-01568, 2022 WL 252396 at *17 (D. Ariz. Jan. 27, 2022).[2]

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[2] *See also Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at *10 (S.D. Ga. Dec. 7, 2021) (issuing nationwide injunction) *stayed denied Georgia v. President*, No. 21-14269 (11th Cir. Dec. 17, 2021); *Louisiana v. Biden*, No. 21-CV-3867, 2021 WL 5986815, at *1 (W.D. La. Dec. 16, 2021); *Missouri v. Biden*, No. 4:21-CV-1300-DDN (E.D. Mo. Dec. 20, 2021); *Florida v. Nelson*, No. 21-cv-2524 (M.D. Fl. Dec. 22, 2021). A district court in Texas denied a preliminary injunction not on the merits but as duplicative with the existing nationwide injunction. *Feds for Med. Freedom v. Biden*, No. 3:21-CV-356, 2022 WL 188329, at *8 (S.D. Tex. Jan. 21, 2022)

As is ably explained in the Appellant's Brief, like the vaccine mandates before it, the Minimum Wage Mandate exceeds the President's authority under the Procurement Act. In addition, the Mandate and the President's continued abuse of his procurement powers also undermines key interests of the States and threatens the federal system. The Supreme Court has repeatedly emphasized that *Congress* must expressly authorize any interference with traditional areas of State authority. Here, as illustrated by the contractor vaccine mandate, the President has found in the Procurement Act a convenient tool to regulate one-fifth of the U.S. economy—without any apparent limiting principle. But that role belongs to Congress, or, when Congress does not exercise it, to the States. *See* U.S. Const. Amend. X.

Furthermore, DOL's choice to flout bedrock requirements of the APA in promulgating the Rule sets a worrisome precedent. DOL's assertion that it has no obligation to consider alternatives or justify decisions because the President's Executive Order already dictated their decision would gut the APA. 86 Fed. Reg. at 67,217 ("[D]ue to the prescriptive nature of Executive Order 14026, the Department does not have the discretion to implement alternatives that would violate the text

of the Executive order, such as the adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses.").

But unquestioningly following executive orders cannot supplant the Departments' *statutory* obligations under the APA, which mandates reasoned decision-making, not blind obedience. Defendants explicitly admitted to violating that obligation, but contend that they are excused from compliance because the President directed them to do so. The APA, however, has no such "just following orders" exception.

ARGUMENT

The Minimum Wage Mandate is unlawful for all of the reasons that Appellants identify in their Opening Brief. This brief expounds upon two reasons why particular skepticism of the Administration's aggressive power-grab is warranted.

First, the Mandate interferes with traditional state prerogatives, as States have traditionally filled the gaps and regulated wages above the federal statutory floor according to their local conditions. This choice was expressly protected by Congress in the federal contractor context in a trio of statutes, Davis Bacon Act ("DBA"), the Walsh-Healey Public Contracts Act ("PCA") and the Service Contract Act ("SCA"), which generally

mandate that minimum federal contractor wages must hew to *locally* prevailing wages, not an inflexible blanket federal minimum. *See* 40 U.S.C. § 3142; 41 U.S.C. §§6502(1); 6702(a).

Second, the Department of Labor openly abdicated its responsibility under the APA to engage in reasoned decision-making here. The choice DOL made to not explain or justify the choices made in the Mandate was neither legally mandated by the EO nor permissible under the APA.

I. The States Have Important Interests In Setting Minimum Wages And State Employee Wages

The Supreme Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)); *see also National Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022). The Procurement Act has no such language, but that has not stopped the Administration from relying on it in an attempt to usurp traditional state authority.

Wage regulation—particularly regulation of state employee

wages—has long been a state prerogative, subject only to the federal floor in the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. § 218(a) (preserving State and municipal authority to impose minimum wages higher than the federal floor). While Congress, when acting pursuant to a legitimate constitutional power, can interpose federal law into these sovereign interests—and in the case of the FLSA, DBA, PCA and SCA, has done so expressly—any such mandates must be promulgated pursuant to clear statutory authority. The States also have significant sovereign interests in their relationships with their own employees, and the Supreme Court has long recognized that this is a separate and important sovereign interest. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 558 (1985) (Powell, J., dissenting) (citing cases). *See also Brnovich*, 2022 WL 252396 at *12 ("Because the Contractor Mandate clearly conflicts with Arizona's laws and governance policies … the State has Article III standing to challenge its legality."). Accordingly, the agency's authority under the Procurement Act is at least subject to the same clear statement standard the Court applied in *Alabama*. *See Alabama*, 141 S. Ct. at 2489 (citation omitted)).

The State interests here are significant. Many states and

municipalities have minimum wages above the floor set by the FLSA. *See, e.g.*, Department of Labor, *State Minimum Wage Laws* (Jan. 1, 2022), https://www.dol.gov/agencies/whd/minimum-wage/state. For example, Arizona has a minimum wage of $12.80 per hour, Montana has a minimum wage of $9.20 per hour, Indiana and Idaho have minimum wages that match the federal minimum ($7.25/hour), and four of the Amici States do not have any state minimum wages at all.

These minimum wages often reflect local conditions that do not prevail nationwide. While it may make sense to impose a nationwide floor on wages as in the FLSA, the $15 per hour minimum reflected in the Mandate is significantly higher than virtually all state minimum wages in the country (save California at the same $15/hour). In one fell swoop, the Administration then is displacing and inflating *nearly all* state minimum wages for one-fifth of the national workforce.

Congress has generally sought to protect these local wage preferences. This is particularly apparent for federal contractors, as Congress has *explicitly and repeatedly* mandated that minimum wages for federal contractors should be set with respect to local conditions (*i.e.*, "prevailing wages"). *See* 40 U.S.C. § 3142; 41 U.S.C. §§6502(1); 6702(a).

These statutes, the DBA, the PCA, and the SCA, unlike the Procurement Act, speak comprehensively and specifically to the subject of minimum wages for federal contractors. All three of these statutes require payment of a *local* "prevailing wage," not a fixed hourly rate applicable *nationwide*. *See* 40 U.S.C. § 3142(b); 41 U.S.C. §§6502(1); 6703(1).

As the Appellants properly observe, in none of these statutes did Congress leave room for the President to meddle freely via other, more-general authority. In fact, these statutes each have their own regulatory scheme, provide for the possibility of exceptions and carve-outs, and are designed for their unique contexts. Opening Br. at 28-32. It defies established principles of statutory interpretation that the Procurement Act could provide a separate statutory reservoir for the President to legislate minimum wages above the floors set in those statutes.

But the DBA, PCA and SCA stand for more than the fact that Congress has effectively occupied the field for contractor wage regulation. Rather, in these statutes Congress stated unequivocally that contractor wages were to be set *locally* and not nationally. The Rule, by setting a blanket minimum which applies nationwide, flouts the unambiguous commands of the DBA, PCA, and SCA and destroys the significance of

local conditions. Further, the statutory prevailing wage provisions embody the specific intent *not* to put undue upward pressure on these local market wages. Because prevailing wages are, by definition, locality-specific and not higher than the market wage, they should not create significant upward pressures. But the Rule directly conflicts with Congress's purpose and imposes a nationwide, one-size-fits-all minimum creating the very forces that Congress intentionally sought to avoid, pushing wages up in localities around the country. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) ("The President's authority [under the Procurement Act] to pursue 'efficient and economic' procurement" does not extend to EOs that "conflict with another federal statute."). While Congress repeatedly sought to avoid mandating New York City- or San Francisco-appropriate wages in places like Culbertson, Montana, or Tombstone, Arizona or Nebraska City, that crucial policy choice is unlawfully obliterated by the Rule.

These considerations together warrant the conclusion that the Procurement Act cannot be read to enable the President to displace unilaterally State authority to set minimum wages, even in the "limited" context of government contracts—which actually is about one-fifth of the

U.S. workforce: *i.e.*, greater than the agricultural, educational, mining, construction, and informational sectors *combined*. *But see Alabama Realtors*, 141 S. Ct. at 2489 ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." (quoting *Utility Air Regulatory Group*, 573 U.S. at 324) (cleaned up)).

When Congress has granted authority for the Executive Branch to regulate contractor wages, it expressly protected the idea that different localities might have different wage environments. The Procurement Act does not give Defendants a license to annihilate that explicit and pervasive policy choice. Indeed, just as in *Alabama Realtors*, the Procurement Act's cryptic "efficiency" language "is a wafer-thin reed on which to rest such sweeping power." 141 S. Ct. at 2489.

II. DOL Abdicated Their Responsibility To Engage In Reasoned Decision-making Under the APA

A court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "When an agency changes its position, it must (1) display awareness that it is changing position, (2) show the new policy is permissible under the statute, (3) believe the new policy is better, and

(4) provide good reasons for the new policy." *See Center for Biological Diversity v. Haaland*, 998 F.3d 1061, 1067 (9th Cir. 2021) (cleaned up) (citation omitted). Furthermore, agencies must provide "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* (cleaned up). Courts should conduct a "searching and careful" analysis of the agency's decision-making process, and may not supply a reasoned basis for the agency's decision when one is not provided. *Id.* Review of agency action is "deferential," but the Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted).

As Appellants observe, the EO and Rule involve major changes in position for the agency, including:

- A massive increase in the applicable minimum wage from the inflation-indexed figure selected in 2014;
- A complete reversal of the Trump Administration's 2018 Rule exempting outdoor recreation from that minimum wage; and
- Elimination of the prior tip credit available under federal statutory law and all prior regulations.

None of these changes in position are explained at all. In fact, DOL *expressly disclaimed* any attempt to explain the Rule's policies, relying instead on the prescriptive nature of the EO as both tying the Department's hands and eradicating any obligation consider alternatives or explain its policy choices. The Department's refusal to supply a rationale for these changes was both *explicit and intentional*:

- "When read holistically, Executive Order 14026 clearly does not authorize the Department to essentially nullify the policy, premise, and essential coverage protections of the order, as suggested by ABC, by declining to extend the Executive order minimum wage to any worker covered by the DBA, FLSA, or SCA where such rate differs from the applicable minimum wages established under those laws." 86 Fed. Reg. at 67,129.

- "The Department notes, however, that it *does not have the discretion to deviate from the explicit terms of the Executive order*, including its gradual phase-out of the tip credit for covered workers who receive tips. *Id.* at 67,180 (emphasis added).

- "The Department *does not have the discretion to implement alternatives that would violate the text of the Executive order*, such as the

adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses." *Id.* at 67,216. *See also* App. Brief at 38-46 (emphasis added).

Nor does EO 14026 supply the explanation that DOL's Rule lacks; the EO simply asserts the new minimum wage, the withdrawal of the 2018 outdoors exemption, the removal of the tip credit, and other changes based on the bare justification that "[r]aising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 22,835, 22,835 (April 27, 2021). Even if this assertion were broadly true—it is not, as commentators to the Rule persuasively showed, and DOL ignored—this explanation falls far short of what would suffice under the APA because it simply regurgitates the 2014 justification and does not explain the numerous changes in position. *Compare with* EO 13838, 83 Fed. Reg. 25,341 (May 25, 2018); 83 Fed. Reg. at 25,341 (explaining why implementation of EO 13658 to outfitters and guides operating on federal land would, among other things, "threaten[] to raise significantly the

cost…prevent[] visitors from enjoying the great beauty of America's outdoors…[and] entail large negative effects").

Nor does the Department (or EO) make even the slightest effort to consider alternative increases in the contractor minimum wage—*e.g.*, to $13/hour (nearly a 30% increase in one year). Moreover, if DOL truly believed that increased minimum wages would *increase* productivity and efficiency, why not raise the minimum to $20 or even $25/hour? DOL does not even attempt to analyze these obvious alternatives whatsoever. That is particularly problematic as the blindingly obvious reasons that $15 was selected are political rather than policy-based, which is exactly—to the penny—what the Administration had proposed and Congress rejected. (Furthermore, the fact that the *actual* rationale for $15/hour is squarely contrary to the putative justification violates the APA as pretextual reasoning. *See Dep't of Commerce*, 139 S. Ct. at 2573 (decision resting on a "pretextual basis" "warrant[s] a remand")).

Refusal to consider alternatives or explain decisions is quintessential arbitrary and capricious agency action. The fact that DOL alleges it is bound by a highly prescriptive and specific EO is irrelevant, as the D.C. Circuit has explained in similar circumstances: "That the

Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). *See also Gomez v. Trump*, 485 F. Supp. 3d 145, 177 (D.D.C. 2020) ("APA review of an Executive Branch official's actions is thus not precluded merely because the official is carrying out an executive order."). DOL could have—and should have—provided an explanation for its decisions and rejected alternatives, even in the context of the directive from the President. They could have, at least, explained the President's justification in the decisions made in the EO and thus provided a basis for a substantive APA review of those decisions.

Moreover, the Department's premise that the EO ties their hands is simply wrong—and constitutes yet another APA violation. *See Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) ("An order may not stand if the agency has misconceived the law." (quotation marks omitted) (citation omitted)). Specifically, Section 4 of EO 14026 specifically instructs the department to issue regulations implementing the Order only "*to the extent permitted by law* and consistent with the

requirements of the Federal Property and Administrative Services Act," including providing as appropriate "exclusions from the requirements set forth in this order." 86 Fed. Reg. at 22,836 (emphasis added). Far from tying DOL's hands to violate the APA, the EO left the agency ample authority to comply with its APA obligations if it so wished. DOL simply didn't.

Defendants' failure to comply with the APA and provide a reasoned explanation for their decisions alone is reason to enjoin those decisions as unlawful. And it creates a risky precedent. As Appellants rightly point out, in *Regents*, the Attorney General had ordered the Acting Secretary of Homeland Security to rescind an executive policy, but the Supreme Court still reviewed the action under the arbitrary and capricious standard. *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1903, 1910-12 (2020) (DHS Secretary violated the APA because she "did not appear to appreciate the full scope of her discretion," and instead regarded herself as bound by Attorney General's determination); *id.* at 1912 (DHS Secretary violated APA by "treat[ing] the Attorney General's [directive] as sufficient to rescind both benefits and forbearance, without explanation."). But if the Supreme Court had instead determined that,

because DHS was bound by the determination of the Attorney General there was no obligation to explain DHS's decisions, the APA's requirements of reasoned decision-making would be utterly undone.

To protect States from this sort of unlawful and definitionally arbitrary agency action, this Court should require the DOL to follow the APA and adequately explain its decisions. DOL failed to do so here.

CONCLUSION

This Court should reverse the district court's denial of a preliminary injunction.

March 21, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 3,403 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2021 in 14-point Century Schoolbook type, which complies with Fed. R. App. P. 32(a)(5) and (6).

/s/ Drew C. Ensign

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of Month, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will served by the appellate CM/ECF system.

/s/ Drew C. Ensign