No. 22-1023

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUKE BRADFORD, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 1:21-cv-3283-PAB-STV
Hon. Philip A. Brimmer

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

Dated: April 22, 2022

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts to advocate for policies that benefit consumers, workers, and the general public. Public Citizen has long supported governmental measures to establish and vindicate the rights of American workers to participate in the economy on fair terms and with the assurance of guaranteed minimum standards, including the right to receive a living wage. Public Citizen submits this brief to address appellants' argument that the President lacks authority under the Federal Property and Administrative Services Act (Procurement Act) to direct executive-branch agencies to incorporate terms into their procurement and supply contracts that guarantee minimum workplace standards and wages for employees. Appellants' argument, if accepted, would hamstring the President's ability to

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amicus curiae or its counsel, contributed money intended to fund the brief's preparation or submission.

implement his judgment as to the conditions necessary to achieve an efficient and economical system of government procurement and supply, and would improperly force the President to prioritize immediate cost savings over long-term economic benefits and other important governmental interests.

SUMMARY OF ARGUMENT

The Procurement Act authorizes the President to prescribe policies that he considers necessary to provide for an economical and efficient system of procurement and supply. Courts have recognized that the Act's delegation of authority to the President is broad and enhances the President's inherent constitutional executive authority to set federal procurement policies.

The Act's capacious grant of authority is consistent with the President's constitutional role in administering government contracting. The Constitution recognizes the government's right to enter into contracts on terms that the government deems beneficial. Although Congress can, through legislation, dictate the terms of federal contracts, the President possesses discretion, within the parameters Congress has

set, to implement the government's contracting policies in the manner he believes best to carry out federal objectives.

Presidents have long exercised their discretion to ensure that federal contracts are channeled to contractors and subcontractors that are most likely to successfully perform those contracts, and to do so consistent with federal objectives. In so doing, Presidents have tied contracts to various workplace conditions. Before the Procurement Act's enactment in 1949, both President Theodore Roosevelt and President Franklin D. Roosevelt used executive orders to bar the use of prison labor and racial discrimination in federal contracting. Since then, Presidents have issued executive orders covering those issues, other forms of employment discrimination, veterans' employment, the use of undocumented workers, notification of labor rights, and sick leave. Those executive orders invoke the President's constitutional authority and his authority under federal statutes, including, at times, the Procurement Act. When the executive orders have been challenged, courts have deferred to the President's determinations that the conditions he imposed through the orders impact efficiency and economy in federal contracting and, accordingly, are a proper exercise of his authority.

President Biden's minimum-wage order is in line with historical practice, and his conclusion that higher minimum-wages for employees of federal contractors and subcontractors would inure to the government's benefit in the performance of federal contracts is entitled to respect. Appellants' argument for a narrow reading of the President's Procurement Act authority would be inconsistent with the view—expressed by presidents with a range of political leanings—that the President may permissibly impose conditions on the contractor/employee relationship because that relationship directly implicates the government's interest in the successful fulfillment of its contracts.

ARGUMENT

Congress enacted the Procurement Act "to provide the Federal Government with an economical and efficient system" for, among other things, "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. § 101. The Act confirms the President's authority to "prescribe policies and directives that the President considers necessary to carry out" the Act. *Id.* § 121(a), *previously codified at* 40 U.S.C. § 486(a) (2000). As this Court has recognized, Congress, by using this language, "chose to utilize a relatively broad delegation of authority" to the President. *City of*

Albuquerque v. U.S. Dep't of Interior, 379 F.3d 901, 914 (10th Cir. 2004). The Act thus "emphasiz[es] the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies" and reflects Congress's intent "that the President play a direct and active part in supervising the Government's management functions." *AFL-CIO v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979) (en banc).

The Procurement Act's capacious delegation of authority to the President has constitutional roots. Congress and the President both have important and complementary roles in setting the terms upon which the federal government will contract. While Congress has power to legislate the terms upon which the government can contract, the President has the constitutional authority to superintend government contracting within the parameters that Congress has set. Consistent with that division of responsibility, the Act is premised on the idea that "direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency." *Kahn*, 618 F.2d at 789; *see also* 95 Cong. Rec. 7441 (June 8, 1949) (Rep. Holifield) (explaining that the Act's "major purpose" is "to provide for a uniform system of property

management and supply" for the federal government by, among other things, "expressly authoriz[ing] the President, himself, to prescribe policies and directives" that "shall govern…all executive agencies in carrying out these property-management functions").

The government's brief explains why, as the district court concluded, President Biden's executive order providing for a minimum compensation level for the employees of federal contractors and subcontractors falls squarely within his statutory authority under the Procurement Act. This brief adds three points that address Appellants' argument that the Act's delegation of authority should be narrowly construed. First, this brief describes the constitutional framework that undergirds the President's authority to set the terms on which the government will enter into contracts. Second, the brief explains that President Biden's executive order is just the latest in a long line of executive orders that implicate the relationship between contractors and subcontractors and the employees whom they hire to perform work under a federal contract. Finally, the brief explains that, in accordance with constitutional design and historical usage, the terms "economical" and "efficient" in the Procurement Act should be interpreted consistent with

the President's statutory (and constitutional) duty to exercise "direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole." *Kahn*, 618 F.2d at 789.

I. The President's authority to impose conditions on federal contracts has both constitutional and statutory roots.

"Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Although the Constitution may constrain the government's contracting power in certain respects, *see*, *e.g.*, *Bd. of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 685 (1996) (restricting the government's ability to retaliate against contractors for their speech on matters of public concern), the general rule is that "the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies." *Perkins*, 310 U.S. at 127. Such "guide posts" do not represent an exercise of "regulatory power over private business or employment." *Id.* at 128. Rather, they involve the government's authority "to prescribe the

conditions upon which it will permit public work to be done on its behalf." *Atkin v. Kansas*, 191 U.S. 207, 222–23 (1903).

The Supreme Court has described the government's power to enter into contracts as "incident to the general right of sovereignty." *United States v. Tingey*, 30 U.S. (5 Pet.) 115, 128 (1831). "[T]he United States being a body politic, may, within the sphere of the constitutional powers confided in it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers." *Id*. The government's ability to "make a valid contract" thus does not necessarily depend on "the authority of any statute." *Jessup v. United States*, 106 U.S. 147, 152 (1882). Rather, as Chief Justice Marshall explained in 1823, "there is a power to contract in every case where it is necessary to the execution of a public duty," even if "there is no act of congress expressly authorizing the executive to make any contract." *United States v. Maurice*, 26 F. Cas. 1211, 1217 (Marshall, Circuit Justice, D. Va. 1823).

Thus, "since the Nation's founding," the exercise of the government's contracting power has been a shared endeavor between

"the legislative and executive departments." *Perkins*, 310 U.S. at 128. Although Congress can enact laws that require government contracts to include (or exclude) certain terms and conditions, the "traditional principle" is that, within the bounds Congress has established, "purchases necessary to the operation of our Government" are left "to administration by the executive branch of Government." *Id.* at 127. The federal government's "capacity … to contract" is thus "co-extensive with the duties and powers of government," and "[e]very contract which subserves to the performance of a duty, may be rightfully made." *Maurice*, 26 F. Cas. at 1217.

The First Congress recognized that the administration of government contracting requires the exercise of Article II power and that the Executive must retain an "adequate range of discretion" free from "vexatious and dilatory restraints." *Perkins*, 310 U.S. at 127. For instance, the First Congress authorized the Secretary of the Treasury to "provide by contracts, which shall be approved by the President of the United States, for building a lighthouse" on Chesapeake Bay. Act of Aug. 7, 1789, ch. 9, § 3, 1 Stat. 53, 54. That statute left to the executive's discretion the particular terms of the contracts, including terms "for the

salaries, wages, or hire of the person or persons appointed by the President" to act as caretaker. *Id*. The First Congress also created the office of the Postmaster General and delegated to him the authority to "form[] contracts for the transportation of the mail," "subject to the direction of the President." Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; *see also* Act of Feb. 20, 1792, ch. 7, § 2, 1 Stat. 232, 233 (authorizing contracts for post roads). Early statutes embody the traditional understanding that the President is ultimately responsible for establishing the terms of contracts that the federal government enters into to carry out federal policy.

II. Presidents have long taken executive action to impose conditions on contractors relating to the employer-employee relationship.

Presidents have been issuing executive orders that address the hiring and treatment of employees that work on federal contracts since well before the enactment of the Procurement Act. The executive orders have invoked the President's constitutional authority and, often, his authority under unnamed federal statutes. More recent executive orders—including the one at issue here—directly invoke the Procurement Act, as do the federal acquisition regulations (FAR) that

codify executive orders dealing with the contractor/employee relationship. *See* 48 C.F.R. Part 22 (authority section, citing 40 U.S.C. § 121(c) (Procurement Act)). The history of these executive orders shows that the establishment of the nation's contracting policies has been one of continuous interaction and dialogue between Congress and the executive branch—and an area where the courts have been loath to second-guess the President's judgment.

Prisoner labor. Since 1887, a federal statute has barred federal agencies from entering into contracts that involve the hiring of prisoners incarcerated for federal crimes. *See* Act of Feb. 23, 1887, ch. 213, 24 Stat. 411, *codified as amended at* 18 U.S.C. § 436. Although the statute dealt exclusively with federal convicts, President Roosevelt in 1905 issued an executive order requiring federal contracts to "contain a stipulation forbidding, in the performance of such contracts, the employment of persons undergoing sentences of imprisonment at hard labor" for violations of state, territorial, and municipal offenses. Exec. Order 325A (May 18, 1905), *reprinted in* S. Doc. No. 59-397, at 53 (1907). Pursuant to that executive order, the Department of Commerce and Labor required government officials to include in "all agreements involving the

employment of labor" a provision that "no person or persons shall be employed in the performance of this agreement who are undergoing sentences of imprisonment at hard labor" imposed by non-federal criminal courts. S. Doc. No. 59-397, at 53.

President Roosevelt's executive order remained in effect until 1973. In 1965, Congress had authorized a work-release program for federal prisoners. Act of Sept. 10, 1965, Pub. L. 89-176, 79 Stat. 674 (previously codified at 18 U.S.C. § 4082 (1970), *currently codified as amended at* 18 U.S.C. § 3622(c)(2)). In 1973, citing that federal work-release program, President Nixon superseded President Roosevelt's executive order with one that "would permit employment of non-Federal prison inmates in the performance of Federal contracts under terms and conditions that are comparable to those now applicable to inmates of Federal prisons." *See* Exec. Order 11,755 (Dec. 29, 1973), 39 Fed. Reg. 779 (Jan. 3, 1974). President Nixon issued his executive order solely pursuant to his inherent presidential authority. *Id.*; *see also* 48 C.F.R. §§ 22.201–.202 & 52.222-3 (codifying Executive Order 11,755 in the FAR).

Discrimination (other than age). Presidential efforts to bar employment discrimination in federal contracting began in 1941. Six

months prior to America's entry into World War II, President Franklin D. Roosevelt issued an executive order prohibiting defense contractors from discriminating on the basis of "race, creed, color, or national origin." Exec. Order 8802, § 2 (June 25, 1941), 6 Fed. Reg. 3109 (June 27, 1941). The executive order also established a Committee on Fair Employment Practice to investigate claims of discrimination and redress grievances. *Id*. § 3. In issuing his executive order, President Roosevelt invoked his authority "under the Constitution and the statutes," without identifying any statutes specifically authorizing his action. *Id*.

After the United States entered the war, President Roosevelt issued Executive Order 9001, authorizing the military to enter into contracts "for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war." Exec. Order 9001, § 2 (Dec. 27, 1941), 6 Fed. Reg. 6787 (Dec. 30, 1941). This time, the President cited his authorities as "President of the United States and Commander-in-Chief of the Army and Navy of the United States" and under the First War Powers Act, ch. 593, 55 Stat. 838 (1941). The First War Powers Act granted the President the power to "authorize any department or agency of the Government" "to enter into contracts," subject to "regulations

prescribed by the President for the protection of the interests of the Government," that would "facilitate the prosecution of the war." *Id.* § 201, 55 Stat. at 839. The First War Powers Act did not address employment discrimination by defense contractors. Nonetheless, Executive Order 9001 provided that "*[n]otwithstanding* anything in the [First War Powers] Act or this Executive Order, … all contracts shall be deemed to incorporate by reference a provision that the contractor and any subcontractor thereunder shall not … discriminate" on the basis of "race, creed, color or national origin." Exec. Order 9001, § 2, 6 Fed. Reg. at 6788 (emphasis added). The use of the introductory clause "notwithstanding" demonstrates that President Roosevelt did not consider the First War Powers Act to expressly authorize the nondiscrimination provision of his executive order.

In May 1943, President Roosevelt amended his 1941 executive order. *See* Exec. Order 9346 (May 27, 1943), 8 Fed. Reg. 7183 (May 29, 1943). This time, he again cited his authority as President and Commander-in-Chief and under "statutes," but did not cite the First War Powers Act. Executive Order 9346 "re-affirm[ed] the policy of the United States that there shall be no discrimination in the employment of any

person in war industries or in Government by reason of race, creed, color, or national origin." *Id.* Pursuant to that policy, the executive order required government contracts and subcontracts to contain an express provision barring such discrimination. *Id.* § 1. It also reconstituted the Committee on Fair Employment Practice, now authorizing it to "formulate policies" as well as "investigate complaints of discrimination forbidden" by the executive order. *Id.* §§ 4, 5, 8 Fed. Reg. at 7184. The following year, Congress effectively ratified the Committee's work by appropriating funds "necessary" for it "to carry out any functions lawfully vested in it by Executive Orders Numbered 8802 and 9346." National War Agency Appropriation Act, 1945, ch. 301, 58 Stat. 533, 536 (1944); *see also* First Supplemental Appropriations Act, 1945, ch. 660, 58 Stat. 853, 874 (1944).

Near the end of the war, Congress appropriated funds to terminate the Committee on Fair Employment Practice. *See* National War Agencies Appropriation Act, 1946, ch. 319, 59 Stat. 473, 473 (1945). In response, President Truman issued an executive order directing that the Committee's work continue until its termination. *See* Exec. Order 9664 (Dec. 18, 1945), 10 Fed. Reg. 15,301 (Dec. 22, 1945).

In 1951, however, President Truman issued a series of executive orders that required various government contracts to include non-discrimination clauses. Exec. Order 10,210, § 7 (Feb. 2, 1951), 16 Fed. Reg. 1049 (Feb. 6, 1951) (Departments of Defense and Commerce); Exec. Order 10,216 (Feb. 23, 1951), 16 Fed. Reg. 1815 (Feb. 27, 1951) (Department of Agriculture, Atomic Energy Commission, National Advisory Committee for Aeronautics, and Government Printing Office); Exec. Order 10,227 (Mar. 24, 1951), 16 Fed. Reg. 2675 (Mar. 27, 1951) (General Services Administration); Exec. Order 10,231 (Apr. 5, 1951), 16 Fed. Reg. 3025 (Apr. 7, 1951) (Tennessee Valley Authority); Exec. Order 10,243 (May 11, 1951), 16 Fed. Reg. 4419 (May 12, 1951) (Federal Civil Defense Administration); Exec. Order 10,281, § 203 (Aug. 28, 1951), 16 Fed. Reg. 8789, 8790 (Aug. 30, 1951) (Defense Materials Procurement Agency). He also established a Committee on Government Contract Compliance to strengthen and improve the government's non-discrimination policies. Exec. Order 10,308, § 2 (Dec. 3, 1951), 16 Fed. Reg. 12,303 (Dec. 6, 1951). The 1951 executive orders invoked President Truman's authority as President and Commander-in-Chief, and the First War Powers Act, as amended. *See* Act of Jan. 12, 1951, ch. 1230, 64 Stat.

1257 (amending First War Powers Act). In addition, Executive Orders 10,281 and 10,308 cited the Defense Production Act, ch. 932, 64 Stat. 798 (1950), which, like the First War Powers Act, did not specifically address nondiscrimination in government contracting.

Presidents Eisenhower and Kennedy carried forward and updated President Truman's executive orders barring discrimination based on race, creed, color, or national origin in federal contracting. *See* Exec. Order 10,479 (Aug. 13, 1953), 18 Fed. Reg. 4899 (Aug. 18, 1953) (creating Government Contract Committee to recommend policies and receive complaints of violations); Exec. Order 10,557 (Sept. 3, 1954), 19 Fed. Reg. 5655 (Sept. 8, 1954) (directing agencies to insert specified text of nondiscrimination clause in contracts); Exec. Order 10,925 (Mar. 6, 1961), 26 Fed. Reg. 1977 (Mar. 8, 1961) (imposing reporting requirements on contractors and subcontractors and creating the Committee on Equal Employment Opportunity); Exec. Order 11,114 (June 22, 1963), 28 Fed. Reg. 6485 (June 25, 1963) (extending nondiscrimination requirements to federally financed construction contracts). The authority for these

executive orders rested solely on the President's authority under the Constitution and unidentified federal statutes.[2]

In 1965, President Johnson issued Executive Order 11,246, which superseded prior executive orders on nondiscrimination in federal contracting and remains in effect, as amended, to this day. *See* Exec. Order, 11,246 (Sept. 24, 1965), 30 Fed. Reg. 12,319 (Sept. 28, 1965). Executive Order 11,246 rests on "the authority vested in [the President] as President of the United States by the Constitution and statutes of the United States." *Id.* Like prior executive orders, Executive Order 11,246 requires nondiscrimination provisions in federal contracts and imposed reporting requirements on federal contractors (and federally funded construction contracts). *Id.* §§ 202, 301, 30 Fed. Reg. at 12,320–21, 12,324. Both the Third and Fifth Circuits upheld the President's authority to issue Executive Order 11,246—in particular, the order's affirmative-action requirement—as a lawful exercise of presidential power. *See Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159,

[2] Executive Order 10,479 also cited 31 U.S.C. § 691 (1952), which authorized the use of appropriations for "committees, boards, and other interagency groups engaged in authorized activities of common interest."

171 (3d Cir. 1971); *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981) (reaffirming *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 465–68 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978)).

Two years after issuing Executive Order 11,246, President Johnson, invoking the same authorities, expanded Executive Order 11,246 to prohibit federal contractors from engaging in discrimination on the basis of sex, aligning the executive order with the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703–704, 78 Stat. 241, 255–56. *See* Exec. Order, 11,375 (Oct. 13, 1967), 32 Fed. Reg. 14,303 (Oct. 17, 1967). In 2014, President Obama further amended the executive order by prohibiting discharge of, or discrimination against, employees or applicants for employment for discussing compensation information with other employees or applicants, Exec. Order 13,665 (Apr. 8, 2014), 79 Fed. Reg. 20,749 (Apr. 11, 2014), and by expanding the prohibited bases of discrimination to encompass sexual orientation and gender identity, Exec. Order 13,672 (July 21, 2014), 79 Fed. Reg. 42,971 (July 23, 2014). President Obama's executive orders invoked his authority as President, as well as "the laws of the

United States of America, including" the Procurement Act. *Id.*; *see also* 48 C.F.R. §§ 22.800–.810 & 52.222-26 (codifying Executive Order 11,246 in the FAR).

Age discrimination. Three years before Congress enacted the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, President Johnson issued Executive Order 11,141 (Feb. 12, 1964), 29 Fed. Reg. 2477 (Feb. 15, 1964), which declared unjustified "discrimination in employment because of age" to be "inconsistent with" the "principle of equal employment opportunity." The executive order prohibits federal contractors and subcontractors from engaging in age discrimination or specifying a maximum age limit in solicitations for employees, except where based on a bona fide occupational qualification, retirement plan, or statutory requirement. *Id.* In issuing the executive order, President Johnson invoked his authority as president and under unidentified federal statutes. *See* 48 C.F.R. §§ 22.901–.902 (codifying Executive Order 11,141 in the FAR).

Veterans' Employment. In 1971, President Nixon issued an executive order to "facilitate the employment of returning veterans." Exec. Order 11,598 (June 16, 1971), 36 Fed. Reg. 11,711 (June 18, 1971).

In particular, the executive order required the Secretary of Labor to promulgate regulations that would require specified government contracts "to contain assurances that the contractor, and any subcontractor holding a contract directly under that contractor, shall, to the maximum extent feasible, list all of its suitable employment openings with the appropriate office of the State employment service system." *Id*. § 2. As authority for the executive order, the President cited only his "authority … as President of the United States." *Id*.

The following year, Congress enacted the Vietnam Era Veterans' Readjustment Assistance Act of 1972, Pub. L. No. 92-540, 86 Stat. 1074. The 1972 statute required federal contracts to contain a provision requiring contractors and subcontractors to "give special emphasis to the employment of qualified disabled veterans." *Id*. § 503(a), 86 Stat. at 1097 (enacting 38 U.S.C. § 2012 (1976)), *currently codified as amended at* 38 U.S.C. § 4212. Shortly thereafter, President Nixon superseded Executive Order 11,598 with Executive Order 11,701 (Jan. 24, 1973), 38 Fed. Reg. 2675 (Jan. 29, 1973), which invokes the statutory authority conferred by the 1972 statute. *See also* 48 C.F.R. §§ 22.1300–.1310; 52.222-35, -37, -38

(implementing Executive Order 11,701 along with the 1972 statute and other legislation).

Undocumented Workers. In 1996, President Clinton issued Executive Order 12,989, which provided that "contracting agencies should not contract with employers that have not complied with" provisions of the Immigration and Nationality Act "prohibiting the unlawful employment" of noncitizens. Exec. Order 12,989, § 1 (Feb. 13, 1996), 61 Fed. Reg. 6091 (Feb. 15, 1996). President Clinton invoked "the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 486(a)"—the Procurement Act.[3] With respect to the Procurement Act, President Clinton stated that "contractors that employ unauthorized alien workers are necessarily less stable and dependable procurement sources than contractors that do not hire such persons" and, "therefore, that adherence to the general policy of not contracting with providers that knowingly

[3] The executive order also cited the federal housekeeping statute, 5 U.S.C. § 301, which authorizes department heads to issue regulations to manage the work of their agencies. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979).

employ unauthorized alien workers will promote economy and efficiency in Federal procurement." 61 Fed. Reg. at 6091.

In 2008, President Bush, invoking the same sources of authority, amended President Clinton's executive order. *See* Exec. Order 13,465 (June 6, 2008), 73 Fed. Reg. 33,285 (June 11, 2008). President Bush determined that "[c]ontractors that adopt rigorous employment eligibility confirmation policies are much less likely to face immigration enforcement actions, because they are less likely to employ unauthorized workers, and they are therefore generally more efficient and dependable procurement sources than contractors that do not employ the best available measures to verify the work eligibility of their workforce." *Id.* Based on that finding, President Bush directed that executive-branch contracts require contractors to "use an electronic employment eligibility verification system" to verify the employment eligibility of all employees hired by the contractor during the contract term, as well as other persons "assigned by the contractor to perform work" on the contract. *Id.* § 3, 73 Fed. Reg. at 33,286.

Business interests challenged President Bush's authority to issue Executive Order 13,465. In *Chamber of Commerce v. Napolitano*, 648 F.

Supp. 2d 726 (D. Md. 2009), the district court held that the executive order and the regulations implementing it, *see* 48 C.F.R. §§ 22.1800–1803 & 52.222-54, "are consistent with the Procurement Act." 648 F. Supp. 2d at 738. The court explained that the Act does not require "[t]he President to base his findings on evidence included in a record" and stated that "the President and his Administration are in a better position than this Court to make" determinations about contracting practices that will "promote efficiency and economy in procurement." *Id*. Recognizing that, under the case law, the Act requires only a "reasonably close nexus" between the President's actions and the goals of the Procurement Act, the court explained that the court must uphold the President's action if his "explanation for how an Executive Order promotes efficiency and economy [is] reasonable and rational." *Id*.

Notification of Labor Rights. In 2001, President Bush issued an executive order requiring federal contractors and subcontractors to post notices at their worksites stating that employees "cannot be required to join a union or maintain membership in a union in order to retain a job" and "are entitled to an appropriate reduction" in fees if they object to paying for union activities unrelated to collective bargaining and other

labor-related matters. Executive Order 13,201, § 2 (Feb. 17, 2001), 66 Fed. Reg. 11,221 (Feb. 22, 2001). President Bush found that "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced" and that "[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Id.* § 1, 66 Fed. Reg. at 11,221. President Bush cited both his authority as president and under federal law, including the Procurement Act.

In *UAW-Labor Employment & Training Corp. v. Chao*, 325 F.3d 360 (D.C. Cir. 2003), the D.C. Circuit upheld Executive Order 13,201 as within the President's authority under the Procurement Act. *Id.* at 366. "[E]mphasiz[ing] the necessary flexibility and 'broad ranging authority' that [the court] understood the Act to give the President," *id.* (quoting *Kahn*, 618 F.2d at 789), the D.C. Circuit concluded that President Bush's findings presented "enough of a nexus" to the Act's goals of economy and efficiency to uphold the executive order as a valid exercise of his authority under the Act, *id.* at 367.

In 2009, President Obama revoked President Bush's executive order and, invoking the same sources of authority, issued Executive Order 13,496 (Jan. 30, 2009), 74 Fed. Reg. 6107 (Feb. 4, 2009). President Obama found that "industrial peace is most easily achieved and workers' productivity is enhanced when workers are well informed of their rights," which in turn minimizes "labor unrest" that may "interrupt[]" performance of government contracts. Accordingly, to "facilitate[] the efficient and economical completion of the Federal Government's contract," Executive Order 13,496 requires contractors and subcontractors to post notices of employee "rights under Federal labor laws." *Id.*; *see also* 48 C.F.R. §§ 22.1600–.1605 & 52.222-40 (codifying Executive Order 13,496 in the FAR).

Sick leave. In 2014, President Obama issued Executive Order 13,706 (Sept. 7, 2015), 80 Fed. Reg. 54,697 (Sept. 10, 2015). Again citing his authority as president and under federal law, including the Procurement Act, President Obama directed executive-branch contracts to incorporate a provision requiring contractors and subcontractors to provide paid sick leave to their employees. *Id.* § 2, 80 Fed. Reg. at 54,697. He found that "[p]roviding access to paid sick leave will improve the

health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers" and resulting in "savings and quality improvements [that] will lead to improved economy and efficiency in Government procurement." *Id.* § 1; *see also* 48 C.F.R. § 22.2100–.2110 & 52.222-62 (codifying Executive Order 13,706 in the FAR).

III. The executive order at issue is consistent with statutory authority.

The examples discussed above demonstrate that presidents have had a longstanding interest in the relationship between contractors and subcontractors and the individuals they hire, to ensure the successful performance of federal contracts. The minimum-wage executive order challenged in this case is in line with that history.

When President Obama required contractors and subcontractors to pay employees a minimum wage, he found that his action would increase the "morale and the productivity and quality of their work, lower[] turnover and its accompanying costs, and reduce[] supervisory costs." Exec. Order 13,658, § 1 (Feb. 12, 2014), 79 Fed. Reg. 9851 (Feb. 20, 2014). In the same vein, President Biden, in the order under review, found 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." Exec. Order 14,026, § 1 (Apr. 27, 2021), 86 Fed. Reg. 22,835 (Apr. 30, 2021). Both Presidents invoked their authority under the Constitution and federal law, including the Procurement Act, and both determined that their action would enhance "economy and efficiency" in federal procurement. *Id.*; Exec. Order 13,658, § 1, 79 Fed. Reg. at 9849.

The Procurement Act authorizes the President to make this judgment. As the D.C. Circuit has explained, "'[e]conomy' and 'efficiency' are not narrow terms; they encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Kahn*, 618 F.2d at 789. And the Act grants the President discretion to formulate the "policies and directives that *the President considers necessary*" to promote economy and efficiency in procurement. 40 U.S.C. § 121(a) (emphasis added). Thus, consistent with the President's constitutional role and historical practice, the Act uses language that respects, rather than constrains, the President's authority

to determine "[t]he manner in which [the] law shall be executed." *Maurice*, 26 F. Cas. at 1217.

Arguing for a narrow interpretation of the authority conferred by the Procurement Act, Appellants contend that the President is "limited to actions that he considers 'essential' or 'indispensable' to provide the 'prudent use' of government resources 'without wasting materials.'" Appellants Br. 23. Such a restrictive standard cannot be reconciled with presidential use of executive orders throughout history, which, as discussed above, reflects the fact that the nature and quality of the contractor/employee relationship directly implicate the government's interest in the successful fulfillment of its contracts, as well as in the achievement of other important governmental values.

Finally, Presidents throughout history have invoked their constitutional powers, statutory authority, or both as authority for executive orders directed at the contractor/employee relationship, and the few courts to have addressed the point have generally understood the President to have authority under its Article II powers. *See, e.g.*, *Contractors Ass'n of E. Pa.*, 442 F.2d at 171 (holding that "unless [Executive Order 11,246] is prohibited by some other congressional

enactment, its inclusion as a pre-condition for federal assistance was within the implied authority of the President," applying the framework established by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952)). A narrow reading of the President's Procurement Act authority would make it more likely that courts will be asked to delineate—if not in this case, then in future challenges to current or future executive orders—the extent of the President's Article II power to establish the terms on which the executive branch will enter into contracts. *See Chrysler Corp.*, 441 U.S. at 305–06 (alluding to the "general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority," apart from the Procurement Act). Interpreting the Procurement Act in a way that comports with the President's constitutional role and historical practice, by contrast, would mitigate the likelihood that courts will need to address the complex and subtle constitutional questions surrounding the President's role in superintending the work of the executive branch. *See Kahn*, 618 F.2d at 787 (explaining the President's constitutional authority was not presented because "the Government relies entirely

upon authority said to be delegated" by the Act). For that reason as well, Appellants' interpretation of the Procurement Act should be rejected.

CONCLUSION

This Court should affirm the judgment of the district court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Amicus Curiae Public Citizen in Support of Appellees and Affirmance:

(1) Complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 5751 words.

(2) Complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief is composed in a 14-point proportional typeface, Century Schoolbook, using Microsoft Word 365.

/s/ Nandan M. Joshi
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CERTIFICATE OF SERVICE

I hereby certify that, on April 22, 2022, this Brief for Amicus Curiae Public Citizen in Support of Appellees and Affirmance was served through the Court's ECF system on counsel for all parties.

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