No. 13-5158

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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UPMC BRADDOCK, UMPC McKEESPORT, and UPMC SOUTHSIDE,

*Appellants*,

v.

THOMAS E. PEREZ, in his official capacity as Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TRACIE C. BROWN, in her official capacity as District Director, United States Department of Labor OFCCP; and OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS.

*Appellees*.

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On Appeal from the United States District Court for the District of Columbia
No. 09-1210
Judge Paul Friedman

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# BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, NAACP LEGAL DEFENSE FUND AND NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES AS AMICI CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), the amici hereby state that:

1. The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has been involved in virtually every major effort to secure and defend women's legal rights, and has worked to expand employment opportunities for women and to ensure full enforcement of the laws against sex discrimination in the workplace. To that end, NWLC regularly files *amicus curiae* briefs before the United States Supreme Court, federal courts of appeals, and state courts in cases that raise issues of vital concern to the Nation's women workers.
2. The National Women's Law Center has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of National Women's Law Center.
3. The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a nonprofit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has fought to eradicate racial discrimination in the nation's

workplaces. LDF has a strong interest in vigorous enforcement of federal civil rights laws to fully achieve equal employment opportunity for all Americans. Robust federal enforcement is especially critical in the health care sector where LDF has long worked to support and provide equal treatment and high-quality medical services, care, and opportunity to African Americans.

4. The NAACP Legal Defense & Educational Fund, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of the NAACP Legal Defense & Educational Fund, Inc.
5. The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, access to quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment.
6. The National Partnership for Women & Families has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of the National Partnership for Women & Families.

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## STATEMENTS OF INTEREST

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving equal employment opportunity law in the Supreme Court and in federal circuit courts of appeals.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a nonprofit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has fought to eradicate racial discrimination in the nation's workplaces. LDF has a strong interest in vigorous enforcement of federal civil rights laws to fully achieve equal employment opportunity for all Americans. Robust federal enforcement is especially critical in the health care sector where LDF has long worked to support and provide equal treatment and high-quality medical services, care, and opportunity to African Americans.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, access to quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and race discrimination in education and employment.

The National Women's Law Center received the consent of all parties and files this brief pursuant to Fed. R. App. P. 29(a) and this Court's December 17, 2013 order.

## SUMMARY OF ARGUMENT[1]

Appellants ("the Hospitals") contend for the first time in their brief on appeal that the Executive Order and the Department's affirmative action regulations thereunder lack adequate authority and are thus invalid. To the contrary, the Department of Labor's program is grounded in the President's constitutional and statutory authority to provide for the efficient management of federal government programs. Executive Order 11246—and the Department's regulations thereunder—help ensure that government contractors employ diverse workforces by improving employment opportunities for women and people of color. Diverse workforces, in turn, are more productive and thus help improve the efficiency of federal projects. This is particularly true in the health care field, where workforce diversity is associated with reduced health care disparities and improved patient care in light of an increasingly diverse patient population. Despite efforts to address discrimination and improve diversity, however, discrimination in the health care workforce remains pervasive. The Department of Labor's application of the Executive Order and its underlying regulations to health care institutions doing business with the federal government thus furthers the federal government's vital interest in having its health care contracts support a health care workforce that is free from discrimination and that effectively serves this country's diverse population.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity—other than the amici curiae and its counsel—made a monetary contribution to the preparation or submission of this brief.

## ARGUMENT

### I. THE DEPARTMENT OF LABOR'S AFFIRMATIVE ACTION PROGRAM IS GROUNDED IN THE PRESIDENT'S CONSTITUTIONAL AND STATUTORY AUTHORITY TO PROVIDE FOR THE EFFICIENT MANAGEMENT OF GOVERNMENT PROGRAMS.

Executive Order 11246 ("the Executive Order" or "EO 11246") prohibits government contractors from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin, and also requires contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment. Exec. Order No. 11246, 3 C.F.R. 339-48 (1964-1965) *reprinted in* 42 U.S.C. § 2000e (2013). As detailed more fully by the Department of Labor's brief, as well as the amicus brief filed in this case by the Service Employees International Union, the President has broad authority in the area of federal contracting. Brief for Appellee, *UPMC Braddock v. Perez*, No. 13-5158 (D.C. Cir. Dec. 23, 2013); Brief for Service Employees International Union et al. as Amici Curiae Supporting Appellees, *UPMC Braddock v. Perez*, No. 13-5158 (D.C. Cir. appeal docketed June 4, 2013).

As courts have consistently recognized, the Department's program falls well within this authority. As just one example, the Third Circuit addressed a situation very similar to the instant case in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971). There, the contractors challenged the authority of the Department of Labor under EO 11246 to require bidders on federal construction contracts to submit affirmative action plans. *Id.* at 163. The court upheld the Department of Labor's requirements, finding specifically that discrimination was "likely to affect the cost and the progress of projects in which the federal government had both financial and completion

interests" and that the federal government has "a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects." *Id*. at 171. It thus held that the requirements for federal contractors under Executive Order 11246 were within the President's authority to "act for the protection of federal interests." *Id*.

The following sections explain in more detail the program's strong nexus to efficiency and effectiveness in federal contracting and confirm that the appellants' constitutional challenges, to the extent they are not waived, are meritless.

## II. EXECUTIVE ORDER 11246 HELPS ENSURE THAT GOVERNMENT CONTRACTORS EMPLOY DIVERSE WORKFORCES THAT FURTHER THE GOVERNMENT'S VITAL INTEREST IN EFFECTIVE AND EFFICIENT PROCUREMENT.

Executive Order 11246—and the Department's regulations thereunder—help ensure that government contractors employ diverse workforces by improving employment opportunities for women and people of color. Diverse workforces, in turn, are more productive in a number of important ways and are thus vital to ensuring the efficiency of federal projects.

### A. The Executive Order Program and Its Implementing Regulations Help Ensure that Government Contractors Employ Diverse Workforces.

President Johnson signed Executive Order 11246 in 1965 in response to pervasive and institutionalized barriers for women and racial and ethnic minorities in the workforce. Indeed, into the 1960s, "[w]hole industries and categories of employment were, in effect, all-white, all-male." George Stephanopoulos & Christopher Edley, Jr., *Affirmative Action Review* (1995), available at http://clinton4.nara.gov/WH/EOP/OP/html/aa/aa-lett.html; *see generally*

Desmond King, *Separate and Unequal: Black Americans and the U.S. Federal Government* (1995). Studies that assessed the effect of the Department's program on employment outcomes indicate that the makeup of the federal contractor workforce changed significantly in the years following the Executive Order. *See* Fidan Ana Kurtulus, *The Impact of Affirmative Action on the Employment of Minorities and Women Over Three Decades: 1973-2003* 4-5 (June 26, 2012) (unpublished manuscript) *available at* http://economics.lafayette.edu/files/2011/04/kurtulus.pdf (discussing studies that found a "positive affirmative action effect of federal contractor status on increasing the employment of black males" and faster growth in minority and female employment).

In addition, a 1983 study by the Citizens' Commission on Civil Rights found that the number of women in the federal contractor workforce rose dramatically compared with the general workforce between 1974 and 1980. Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. Rev. L. & Soc. Change 315, 328 (2007) (citing Citizens' Commission on Civil Rights, Affirmative Action to Open the Doors of Job Opportunity: A Policy of Fairness and Compassion That Has Worked 123-24 (1984)). After reviewing data from more than seventy-seven thousand federal contractors with over twenty million employees, the Commission's findings were dramatic: female employment by federal contractors increased by 15.2 percent between 1974 and 1980, while it rose by only 2.2 percent in non-federal contract settings. *Id.*

Another study of the contractor workforce similarly demonstrates that Executive Order 11246 contributed to a dramatic shift in employment for groups traditionally excluded between 1974 and 1980. Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. of Labor Econ. 439 (1984). After

examining a database tracking over sixty-eight thousand businesses with more than 16 million employees, the study found that both minority and female employment increased significantly faster in contractor than in noncontractor establishments over that six-year period: 12 percent faster for black females, 4 percent faster for black males, and 8 percent faster for other minority males. *Id.* at 451.

### B. Diverse Workforces Are More Productive and Thus Further the Government's Interest in Effective and Efficient Procurement.

As the preceding subsection explained, the Department's program has helped expand employment opportunities for women and people of color and has thus led to more diverse workforces. Diverse workforces, in turn, operate more efficiently and thus help ensure the productivity of federal projects. They perform better than more homogenous workforces on a variety of measures, such as enhanced innovation, team productivity, and quality decisionmaking. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Sociological Rev. 208, 219 (2009); J. Stuart Bunderson & Kathleen M. Sutcliffe, *Comparing Alternative Conceptualizations of Functional Diversity in Management Teams: Process and Performance Effects*, 45 Acad. Mgmt. J. 875, 875 (2002) [hereinafter *Diversity in Management Teams*]; Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 Acad. Mgmt. Rev. 402, 403 (1996) [hereinafter *Diversity in Organizational Groups*].

A body of social science research confirms that teams that bring together employees with a diverse range of perspectives and expertise (also called "functional diversity") improve business productivity on a range of measures. These teams are "more innovative, can develop clearer strategies, can respond more aggressively to competitive threats, and can be quicker to implement certain

types of organizational change than functionally homogeneous teams." *Diversity in Management Teams* at 875. For example, a study of teams in the cement industry over an 86-year period found sustained performance to be related to higher functional diversity. More specifically, the researchers concluded that organizations that survive dramatic environmental shifts have heterogeneous executive teams that display both stability and the capacity for change. Sara L. Keck & Michael L. Tushman, *Environmental and Organizational Context and Executive Team Structure*, 36 Academy of Mgmt. J. 1314, 1338 (1993).

Other research has found that teams with greater functional diversity make more cooperative choices, have greater information sharing, consider a greater range of perspectives, and generate higher-quality solutions than their more homogenous counterparts. *See Diversity in Organizational Groups* at 403 and 407; *Diversity in Management Teams* at 889. For example, a study of diverse teams in five technology companies found that more diverse teams communicated more frequently with individuals external to the team than less diverse teams—and the more their members communicated outside of the team, the higher ratings the team received from managers. Deborah Gladstein Ancona & David F. Caldwell, *Demography and Design: Predictors of New Product Team Performance,* 3 Organization Science 321, 328 (1992). Another study found that an increase in the number of women on a team significantly predicted the team's increased ability to solve difficult problems. Anita Williams Wooley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups,* 330 Science 686, 688 (October 29, 2010).

Moreover, as the racial and ethnic makeup of the United States changes rapidly and American businesses extend into ever-diversifying global markets, major American corporations express broad consensus about the importance of a workforce exposed to a diverse environment. *Grutter v. Bollinger*, 539 U.S. 306,

330 (2003) ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."). Such workers can anticipate a broader array of consumer needs, can develop and market products to more diverse audiences, are better equipped to work productively with a wider array of clients and partners, and "generate a more positive work environment by decreasing incidents of discrimination and stereotyping." Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013); *see also* Brief for Small Business Owners and Assoc. as Amici Curiae in Support of Respondents, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).

## III. BECAUSE DIVERSE HEALTH CARE WORKFORCES ARE ASSOCIATED WITH REDUCED HEALTH CARE DISPARITIES AND IMPROVED PATIENT CARE, THE FEDERAL GOVERNMENT HAS A SUBSTANTIAL INTEREST IN ENSURING THAT FEDERAL DOLLARS PROMOTE DIVERSITY AND DO NOT FINANCE WORKPLACE DISCRIMINATION.

### A. Diversity in the Health Care Workforce Is Associated with Reduced Health Disparities and Improved Patient Care for an Increasingly Diverse Patient Population.

The efficiency benefits of diverse workforces are particularly apparent in the health care field, where workforce diversity is associated with reduced health care disparities and improved patient care. Diversity in the health care workforce can thus help hospitals achieve their core purpose in providing quality patient care, especially in light of the challenges of caring for the country's diverse patient population that includes increasing numbers of patients with limited English

proficiency (LEP). Numerous sources highlight the importance of a diverse workforce as a key strategy for improving cultural competency, reducing language barriers, and addressing health care discrimination.

Many health disparities can be linked to bias and discrimination in the health care system. Racial and ethnic disparities exist in receipt of cancer diagnosis and treatment; treatment of HIV/AIDS; and diabetes, mental health, and cardiovascular care, among others. Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson, eds., Committee on Understanding and Eliminating Racial and Ethnic Disparities in Health Care, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* 5 (2003) [hereinafter *Unequal Treatment*]. In each of these areas, "African Americans, Hispanic Americans, and American Indians tend to receive less and lower quality health care than whites, resulting in higher mortality rates." The Sullivan Commission on Diversity in the Healthcare Workforce, *Missing Persons: Minorities in the Health Professions* i (Sept. 2004), *available at* http://www.aacn.nche.edu/media-relations/SullivanReport.pdf [hereinafter Sullivan Report]. For example, one study found that door-to-drug and door-to-treatment times were significantly longer for nonwhite cardiac patients than for white patients. Elizabeth H. Bradley et al., *Racial and Ethnic Differences in Time to Acute Reperfusion Therapy for Patients Hospitalized with Myocardial Infarction*, 292 J. Am. Med. Ass'n 1563 (2004). The study's authors concluded that differential treatment inside the hospital played a role in the disparity. *Id*. at 1572. Another recent study reported that African-American children who go to an emergency room with stomach pain are less likely than white children to receive pain medication and more likely to spend long hours in the emergency room. *See* Tiffani Johnson et al., *Association of Race and Ethnicity with Management of Abdominal Pain in the Emergency Department*, 132 Pediatrics 851 (2013).

Language barriers also contribute to health disparities and poor patient care.

There are approximately 25 million individuals in this country with LEP, of whom 84 percent are of Hispanic or Asian origin. U.S. Census Bureau, American Community Survey, Selected Social Characteristics in the United States: 2011 American Community Survey 1-Year Estimates (25,303,308 speak English less than "very well"); Kaiser Family Foundation, Overview of Health Coverage for Individuals with Limited English Proficiency, 1-2 (2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/ 2013/01/8343.pdf (noting that 66 percent of individuals with LEP are Hispanic and 18 percent are Asian). Individuals with LEP may be unfamiliar with and fearful of the health care system, thus delaying or forgoing crucial health services. *Unequal Treatment* at 640-41. Language barriers also increase risks to patient safety, through poor exchanges of important information, misunderstandings about a physician's instructions, or difficulty obtaining information. Sullivan Report at 21-23.

The federal government has a vital interest in contracting with health care institutions that are equipped to serve the interests of the growing population of patients with LEP. In a 2006 review of evidence regarding diversity in the health professions, the Department of Health and Human Services found that "non-English speaking patients experience better interpersonal care, greater medical comprehension, and greater likelihood of keeping follow-up appointments when they see a language-concordant practitioner, particularly in mental health care." Health Resources & Services Admin. Bur. of Health Professions, U.S. Dep't of Health & Human Services, *The Rationale for Diversity in the Health Professions: A Review of the Evidence* 2 (Oct. 2006), *available at* http://bhpr.hrsa.gov/healthworkforce/reports /diversityreviewevidence.pdf.

There is no question that discrimination plays a major role in minority patients' lack of access to quality treatment. "Racial inequity in health care delivery and in minority access to the health professions has lasted for centuries in

no small part due to systemic, or institutional, racism." Sullivan Report at 40. Addressing discrimination and improving diversity in the health care workforce are key strategies to improving patient care and reducing health disparities—goals the federal government has an important interest in advancing. A "health workforce that is culturally sensitive and focused on patient care" benefits not only minority patients, but can also "improve patient access, patient satisfaction, and improve quality of care for all patients. Sullivan Report at 3, 15.

### B. Ensuring Equal Opportunity Is Especially Important in the Health Care Industry, Where Many Health Care Workers Report That They Have Experienced Discrimination in the Workplace.

The federal government therefore has a vital interest in having its health care contracts support a health care workforce that is free from discrimination and that effectively serves this country's diverse patient population. To be sure, however, the health care workforce is not immune from the discrimination prohibited by Executive Order 11246. African-Americans are underrepresented in almost three quarters of health care occupations listed by the Bureau of Labor Statistics. U.S. Dep't of Labor, Bureau of Labor Statistics, Household Data Annual Averages, Table 11: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity (2012) (last accessed December 20, 2013) *available at* http://www.bls.gov/cps/cpsaat11.pdf (under "Healthcare practitioners and technical occupations"). Hispanics are underrepresented in every single health care occupation listed by the Bureau of Labor Statistics. *Id.*

Despite efforts to address discrimination and improve diversity, national surveys continue to reveal pervasive discrimination in the health care workforce. A 2006-2007 national survey, for example, showed that a substantial proportion of non-majority physicians report experiencing racial or ethnic discrimination at work. Marcella Nunez-Smith et al., *Race/Ethnicity and Workplace Discrimination:*

*Results of a National Survey of Physicians*, 24 J. Gen Intern Med. 1198, 1200 (Sept. 2009). Specifically, the survey found that compared to 7 percent of white physicians, 71 percent of black physicians, 44 percent of Asian physicians, 63 percent of "other" race physicians, and 27 percent of Hispanic/Latino(a) physicians reported experiencing discrimination sometimes, often, or very often during their medical career. *Id*.

Moreover, new research indicates a persistent and growing gap in earnings between male and female physicians over the last 20 years. Seth A. Seabury et al., *Trends in the Earnings of Male and Female Health Care Professionals in the United States, 1987 to 2010*, 173 JAMA Intern Med. 1748 (Sept. 2013). In 1987-1990 the gap in earnings between male and female physicians was substantial, with men earning $33,840 (20 percent) more than their female counterparts on average. But by 2006-2010, the gender gap had increased to $56,019 (25.3 percent). *Id*. Another study showed that this pay gap is not explained by gender differences in choice of specialties. Among general internists and pediatricians, for example, female physicians of all races/ethnicities had significantly lower incomes than their white male counterparts. William B. Weeks et al., *How Do Race and Sex Affect the Earnings of Primary Care Physicians?*, 28 Health Affairs 557 (2009). That study, which adjusted for multiple factors including work effort, physician characteristics, and practice characteristics, also found a trend toward a widening of the income gap over time. *Id*.

Female health care workers also report being treated differently from their male colleagues in the workplace, including facing pressure to conform to sex stereotypes and sexual harassment. *See, e.g.*, Liz Kowalczyk, *Female Surgeons Note Gains, Subtle Gender Bias*, Boston Globe (Feb. 25, 2013), *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2013/02/25/female-surgeons-say-explicit-gender-bias-rare-but-subtler-obstacles-still-exist-

boston/U5044WUVVCKbxlqX0OLTRI/story.html; Phyllis S. Carr et al., *Faculty Perceptions of Gender Discrimination and Sexual Harassment in Academic Medicine*, 132 Annals of Internal Med. 889 (2000) [hereinafter *Gender Discrimination*]. For example, nearly 30 percent of female medical faculty members reported experiencing serious forms of harassment—such as unwanted sexual advances or threats—compared to 3 percent of male faculty. *Gender Discrimination* at 893.

As women and people of color continue to confront discrimination in the health care field, the Department's program has a strong nexus to the federal government's vital interest in ensuring that it contracts with health care institutions that are free from discrimination and thus well-equipped to improve patient care.

Date: December 30, 2013

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on December 30, 2013, I caused the foregoing amicus brief to be electronically filed using the Court's CM/ECF system, which served a copy of the document on counsel of record in the case.

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation imposed by this Court in its order of December 17, 2013 because it contains 3417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)iii. 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 this brief has been prepared in a proportionally spaced typeface using Word with Times New Roman type in 14-point font size.