ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5158

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

UPMC BRADDOCK, UPMC 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 ESA-OFCCP; and OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

Appellees.

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

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae Service Employees International Union (SEIU) certifies as follows:

The SEIU is an unincorporated labor organization that represents and seeks to represent employees in healthcare, property services, and other industries, as well as employees of state and local governments. SEIU has no parent companies, and it is not affiliated with any publicly held corporations. SEIU's members consist of individual employees, none of whom have issued any shares or debt securities to the public.

/s/ Leon Dayan
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STATEMENT OF INTEREST

The Service Employees International Union ("SEIU") is a labor organization representing approximately two million workers. SEIU regularly advocates on behalf of working people on issues of concern to employees. SEIU is deeply committed to eradicating discrimination in the workplace, as is reflected in its Constitution's "Mission Statement," which sets forth SEIU's "special mission to bring economic and social justice to those most exploited in our community—especially to women and workers of color." Given SEIU's membership and mission, SEIU has a manifest interest in defending the validity of the longstanding affirmative action program administered by the Office of Federal Contract Compliance Programs ("OFCCP") pursuant to Executive Order 11,246 ("EO11246"). On December 17, 2013, this Court granted SEIU's motion for leave to file this *amicus* brief.[1]

ARGUMENT

In Part II of their brief, Appellants argue, for the first time in this case, that EO11246 and the OFCCP regulations adopted pursuant thereto are invalid for lack of statutory authority and that they raise serious constitutional concerns. As we show, EO11246 and the OFCCP regulations fall securely within the President's

[1] No part of this brief was authored by a party's counsel; and no party, party's counsel, or person other than SEIU, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

broad authority under the Federal Property and Administrative Services Act ("FPASA") and do not raise any serious constitutional questions.

I. The OFCCP Affirmative Action Program Is Authorized by FPASA

A. The President Has Broad Authority Under FPASA

FPASA authorizes the President to "prescribe such policies and directives…as he shall deem necessary to effectuate the provisions" of the Act to provide the government an "economical and efficient system for…procurement and supply." 40 U.S.C. §§ 471, 486(a) (now codified as amended at 40 U.S.C. §§ 101, 121). This Circuit has interpreted and applied FPASA's economy and efficiency standard multiple times over the past four decades, and consistently has "emphasized the necessary flexibility and broad-ranging authority" that FPASA confers on the President over federal contracting. *UAW-Labor Emp't & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (internal quotations omitted); *see also AFL-CIO v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc) ("Section 205(a) grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole."); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1330 (D.C. Cir. 1996) (FPASA "does vest broad discretion in the President.").

Executive action is within this broad authority if it has a "sufficiently close nexus" to FPASA's efficiency and economy goals. *Chao*, 325 F.3d at 366. The

standard to establish that nexus is "lenient." *Id.* at 367; *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d 726, 738 (D. Md. 2009) ("The Court understand[s] this close nexus requirement to mean little more than that President's explanation for how an Executive Order promotes efficiency and economy must be reasonable and rational.").

In *Chao*, this Court upheld an Executive Order requiring contractors and subcontractors to post notices about employees' rights not to join a union. 325 F.3d at 362. The government argued that the Order was authorized by FPASA because "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced," and that the "availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Id.* at 366. Although recognizing that (i) no evidence had been compiled to substantiate that theory, (ii) the "link may seem attenuated (especially since unions already have a duty to inform employees of these rights)," and (iii) "indeed one can with a straight face advance an argument claiming opposing effects or no effects at all," the Court nevertheless concluded under this Circuit's "lenient standards, there is enough of a nexus." *Id.* at 366-67.

Similarly, in *Kahn*, the Court upheld under FPASA an Executive Order denying contracts to bidders who do not comply with voluntary wage and price

standards, even though this may result in contracts "being diverted from low bidders who are not in compliance with the wage and price standards to higher bidders," and thereby *increase* the government's procurement costs. 618 F.2d at 792. Although acknowledging that possibility, the Court nevertheless upheld the Order, accepting the proffered explanation that "if the voluntary restraint program is effective in slowing inflation in the economy as a whole, the Government will face lower costs in the future than it would have otherwise." *Id.* at 793.

Applying this Court's FPASA jurisprudence, a federal district court rejected a challenge to executive action requiring certain contractors to use the government's E-Verify system for screening unauthorized workers. *Napolitano*, 648 F. Supp. 2d at 730-31. Like Appellants, the challengers argued there was "no record evidence supporting a relationship" to FPASA's efficiency and economy goals, particularly because the government failed to explain how E-Verify improved upon the Form I-9 process already required. *Id.* at 737. The court disagreed, finding no requirement that the President "base his finding on evidence included in a record," or that "President Bush…explain how E-Verify improves upon the Form I-9 process." *Id.* at 738. To conclude otherwise "would be substituting [the court's] policy determinations and fact finding ability for that of the President." *Id.*

B. The OFCCP Program Has The Requisite Nexus To FPASA's Efficiency And Economy Goals

President Kennedy's Executive Order 10,925—which is the predecessor to EO11246 and first introduced the affirmative action requirement—expressly referenced the government's interest in promoting "its economy, security, and national defense through the most *efficient and effective* utilization of all available manpower." EO10925, 26 Fed. Reg. 1977 (Mar. 8, 1961) (emphasis added). Based on "a review and analysis" of existing data "relating to government employment and compliance with existing non-discrimination contract provisions," the President determined that there was an "urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity." *Id.* Thus, in the President's judgment, the affirmative action requirement would enhance efficiency and economy in government contracting by broadening the pool of qualified applicants and removing any discriminatory barriers to employment.

This proffered nexus is certainly reasonable, as the Third Circuit found in rejecting the same challenge to the OFCCP program Appellants bring here. In *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), the court found the affirmative action requirement authorized by FPASA because "it is in the interest of the United States in *all* procurement to see that its suppliers are not over the long run increasing its costs and delaying its

programs by excluding from the labor pool available minority workmen." *Id.* at 170 (emphasis added); *see also id.* at 171 ("In direct procurement 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.").[2]

The Fifth Circuit similarly rejected a challenge to EO11246 and the OFCCP regulations, finding that EO11246 "was a proper exercise of congressionally delegated authority" and the regulations "embod[y] a longstanding, congressionally approved policy in government procurement." *See United States v. Miss. Power & Light Co.*, 638 F.2d 899, 905, 906 (5th Cir. 1981). Indeed, the

[2] Recognizing *Contractors Ass'n* rejects the very argument they advance, Appellants attempt to distinguish this case by mischaracterizing it in two important ways. First, Appellants contend the analysis is limited to "direct procurement," which Appellants interpret as only prime contractors and not subcontractors. Appellants Br. 52. But the court's reference to "direct procurement" was to distinguish between federal contracts and federally assisted construction projects—not between prime and subcontractors. 442 F.2d at 170-71. Moreover, the court found that the government's "vital interest" in ensuring "the largest possible pool of qualified manpower" was "identical" in both contexts. *Id.* at 171.

Second, Appellants contend that a finding of past discrimination was "critical to the Third Circuit's holding." Appellants Br. 52. But the court held that such a finding was "legally irrelevant." *Contractors Ass'n*, 442 F.2d at 175, 176 (EO11246 "does not impose a punishment for past misconduct. It exacts a covenant for present performance.").

court concluded that EO11246 "is executive action that falls within the strongest category of presidential authority." *Id.* at 906 n.1.[3]

Appellants make no attempt to dispute the efficiency and economy rationale for the affirmative action requirement. Rather, Appellants contend that the regulations exceed statutory authority because "there is no record evidence" that imposing these obligations on Appellants will result in increased "economy and efficiency in government contracting." Appellants Br. 53. This entirely misstates the applicable legal standard.

As *Kahn* and *Chao* make clear, the President need only provide a rational explanation that executive action promotes FPASA's efficiency and economy goals. Neither case found that "record evidence" proving increased efficiency and economy was required to uphold the executive order. Indeed, the Court specifically acknowledged the possibility that evidence could be marshaled to show the *opposite* result. *See Chao*, 325 F.3d at 366-67 (finding sufficient nexus even though President's explanation regarding efficiency and economy "may seem attenuated" and may just as easily result in "opposite effects or no effects at all").

Equally meritless is Appellants' contention that FPASA must "expressly provide[] for affirmative action" for women and minorities to authorize the

[3] The Eleventh Circuit is in accord. *See Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1515, 1516 (11th Cir. 1985) (EO11246 "has been found to be authorized by 40 U.S.C. § 486(a)").

OFCCP regulations. Appellants Br. 43. FPASA does not say anything about posting notices regarding employees' rights under federal labor laws or charging parking fees to federal employees, but that did not prevent this Court from upholding such Executive Orders under FPASA. *See Chao*, 325 F.3d at 362; *AFL-CIO v. Carmen*, 669 F.2d 815, 816 (D.C. Cir. 1981). What Congress did expressly provide in FPASA was a broad delegation of authority to the President to issue policies and directives "as he shall deem necessary" to promote efficiency and economy in federal procurement. 40 U.S.C. §§ 471, 486(a); *City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) ("Congress chose to utilize a relatively broad delegation of authority in [FPASA].").

Similarly unavailing is Appellants' contention that because Congress made express references to affirmative action in the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) with respect to disabled persons and veterans "but did not so provide in either Title VII or [FPASA]," with respect to minorities and women, this means Congress "did not intend routine affirmative action programs for the minorities and women addressed in EO11246." Appellants Br. 43-44. The only relevance of provisions in *other* federal statutes when assessing FPASA authority is to determine whether the executive action in question is *precluded* by another federal statute. *See, e.g., Reich*, 74 F.3d at 1337 (invalidating executive order as preempted by the National Labor Relations Act).

Nothing in Title VII, the Rehabilitation Act, or VEVRAA could be interpreted as *preempting* the OFCCP program for women and minorities, and Appellants do not suggest otherwise.

Moreover, programs like OFCCP's do not become "illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and efficiency, serves other, not impermissible, ends as well." *Carmen*, 669 F.2d at 821. Indeed, as this Court noted in a case involving EO11246, "Congress and the President have increasingly had recourse to the procurement power for nonprocurement objectives," including "as a device for the accomplishment, implementation, or even formulation of important national policies and goals." *Ne. Constr. Co. v. Romney*, 485 F.2d 752, 760 (D.C. Cir. 1973). These "social or economic objectives may be sufficiently related to procurement considerations in a broad sense and over the long run to validate use of the procurement power." *Id.*. at 760-61.

The specific example cited of such a program was the OFCCP affirmative action requirement. *Id.* at 761 n.19 (citing *Contractors Ass'n*, 442 F.2d at 170); *see also Reich*, 74 F.3d at 1333 (The "President's authority to pursue 'efficient and economic' procurement, to be sure, has been interpreted to permit such broad ranging Executive Orders as 11,246," even though such programs "certainly reach beyond any narrow concept of efficiency and economy in procurement."); *Kahn*,

618 F.2d at 789, 790 (finding it "useful" in its analysis "to consider how the procurement power has been exercised" and noting that "the most prominent use of the President's authority under the [Act] has been a series of anti-discrimination requirements for Government contractors"). *Accord*, *Carmen*, 669 F.2d at 82. So long as an FPASA-based executive order does not conflict with another federal statute, the President may "draw upon any secondary policy views that deal with government contractors' employment practices—policy views that are directed beyond the immediate quality and price of goods and services purchased." *Reich*, 74 F.3d at 1337.

In sum, the OFCCP affirmative action requirement is authorized by FPASA.

II. The OFCCP Program Does Not Raise Any Constitutional Concerns

Appellants argue that interpreting FPASA to authorize the OFCCP affirmative action regulations raise "serious constitutional doubts." Appellants Br. 53-57. The premise of Appellants' argument is that the regulations, on their face, require race- and gender-based employment decisions in the nature of a quota or preference system and thus trigger strict scrutiny under equal protection principles. *Id.* at 55. In reality, the regulations do not require any such thing, and thus raise no constitutional questions.

As implemented through the OFCCP regulations, 41 C.F.R. § 60-1 *et seq.*, EO11246's affirmative action requirement is essentially a self-analysis,

recordkeeping, and reporting obligation. *Id.* at §§ 60-2.10-60-2.17; OFCCP Notice No. 207: Numerical Goals under Executive Order 11246 (Dec. 13, 1995) ("OFCCP Notice"), at ¶ 4(a) ("Affirmative action programs (AAPs), as authorized by regulations implementing Executive Order 11246, consist essentially of procedures by which Federal contractors analyze their workforce and evaluate their employment practices for the purpose of identifying and correcting any obstacles to equal employment opportunity.").

As Judge Easterbrook explained, the quota-type affirmative action plan that Appellants suggest is at issue and the plan actually required by OFCCP are on opposite ends of the spectrum:

> Affirmative action plans may be arranged along a spectrum. On the one end are detailed hiring quotas designed to overcome past discrimination. On the other end are the sort of plans that all federal contractors must adopt, under President Johnson's Executive Order 11246, a directive enforced by the [OFCCP]. Plans of the latter kind promise to search intensively for minority candidates and to ensure equal opportunity by clearing away barriers to employment; they do not entail preferential treatment for any group in making offers of employment.

Hill v. Ross, 183 F.3d 586, 589 (7th Cir. 1999).

This is made clear by the text of the regulations, which expressly state that the numerical goals required in affirmative action plans neither create fixed percentages that must be met, nor permit hiring decisions on the basis of anything other than merit. *See* 41 C.F.R. § 60-2.16(e)(1)-(4). The regulations further

provide that no contractor will be deemed non-compliant for failure to meet these numerical goals. *Id.* at § 60-2.35; OFCCP Notice, at ¶ 4(g) ("Failure to meet goals is a not a violation of the Executive Order.").

Moreover, OFCCP has explained that its program "is not designed to be, nor may it properly or lawfully be interpreted as, permitting unlawful preferential treatment and quotas with respect to persons of any race, color, religion, sex, or national origin," and does not "require that any specific position be filled by a person of a particular race, gender, or ethnicity." *Id.* at ¶¶ 4(b), 4(d). Underscoring that point, OFCCP stated that if "a contractor has implemented quotas or preferences which are unlawful, it is OFCCP's policy and practice to take quick action to correct the matter, and in the same manner as if the contractor has violated the Executive Order in a different way." *Id.* at ¶ 5.

OFCCP later reiterated this position in responding to a commenter who argued that the OFCCP program mandated discriminatory hiring and thus must satisfy strict scrutiny:

> OFCCP does not require contractors to pursue a race- or gender-based hiring and promotion system….Contrary to the suggestion made by the commenter, goals are not a device to achieve proportional or equal results; [but] rather…[to] measure the effectiveness of affirmative action efforts to eradicate and prevent barriers to equal employment opportunity.

Government Contractors, Affirmative Action Requirements, 65 Fed. Reg. 68022-01, 68034 (Nov. 13, 2000); *see also United Space Alliance, LLC v. Solis*, 824 F.

Supp. 2d 68, 97-98 (D.D.C. 2011) (rejecting argument that OFCCP regulations have the improper purpose of encouraging reverse discrimination).

OFCCP's analysis fully accords with the caselaw, under which heightened scrutiny applies only to governmental actions that allocate burdens or benefits to individuals based on their race or gender, and *not* to actions that, without rewarding or punishing any individual based on race or gender, simply take notice of race and gender in the course of formulating policies designed to foster equal opportunity. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (opinion of Kennedy, J.) (citing as examples in the education arena that are constitutionally permissible "drawing attendance zones with general recognition of the demographics of neighborhoods"; "recruiting students and faculty in a targeted fashion"; and "tracking enrollments, performance, and other statistics by race," and adding that "it is unlikely that any of them would demand strict scrutiny").

Precisely because OFCCP's regulations neither require nor encourage employers to make employment decisions that discriminate against any individual, the Ninth Circuit has soundly rejected the same type of facial constitutional challenge that Appellants bring here. In *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), the contractors argued that complying with OFCCP's provisions required "preferential hiring and promotion on the basis

of race and sex," and thus would violate the Equal Protection clause. *Id.* at 1342. In a unanimous decision joined by now-Justice Kennedy, the court disagreed, stating that the contractors' "premise is false" in that nothing in the program "requires preferential treatment or discrimination on the basis of race or sex." *Id.* at 1343.

The court further explained that under OFCCP's program, the numerical goals "represent the contractor's *own judgment* as to the percentage of females and minority members that would be found in his work force if all available qualified persons applied for employment and if all selection processes operated in a completely nondiscriminatory manner." *Id.* (emphasis added). Accordingly, "it is entirely reasonable to assume that a contractor who finds a lower percentage of women or minority members in a particular job category in his work force may well be able to correct the deficiency simply by removing obstacles to fair and equal employment, without reliance upon racial preference or discrimination." *Id.*

There is certainly nothing *on the face* of the OFCCP regulations that require employers to make any decisions based on race or gender. And since, as we have noted, Appellants' challenge is a facial challenge, it cannot remotely succeed. Thus, Appellants' effort to invoke the doctrine of constitutional doubt must be rejected.

CONCLUSION

For the foregoing reasons, the OFCCP affirmative action regulations are a valid exercise of the President's authority under FPASA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Service Employees International Union as Amicus Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 3,215 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Leon Dayan
Leon Dayan

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Registered CM/ECF users will be served by the Notice of Docket Activity.

/s/ Leon Dayan
Leon Dayan