United States Senate

WASHINGTON, DC 20510

May 17, 2022

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20001

Re: Updating the Davis-Bacon Act and Related Regulations, [RIN 1235-AA40]

Dear Secretary Walsh,

We write in opposition to the Department of Labor's (DOL or "the Department") March 18, 2022 Notice of Proposed Rulemaking (NPRM) to amend regulations issued under the Davis-Bacon and Related Acts (Davis-Bacon or DBRA). By rescinding reforms of the 1981-1982 rulemaking, the proposal is misguided. The 1983 Final Rule revised the prevailing wage definition to allow open-shop contractors to bid on DBRA covered contracts on an equal footing with their unionized counterparts. The 1982 Final Rule also eliminated a number of regulatory impediments that discriminated against the ability of many small firms, including a number of minority-owned construction firms, to bid on federally subsidized construction projects. The current proposal, by reverting to regulations and policies last employed in the Carter Administration, represents a massive step backward. Further, it fails to adopt necessary reforms recommended by government watchdogs, only exacerbating deficiencies in wage survey and data collection, further inflating construction costs at great detriment to the taxpayer.

The Department claims the proposal addresses a number of enforcement challenges Davis-Bacon poses "while also providing greater clarity in the modern economy."[1] In reality, the proposal, by seeking to implement via regulatory fiat over 50 changes in a single rulemaking, will aggravate a deeply dysfunctional process for determining prevailing wages in civil subdivisions. Far from modernizing the DBRA, the proposal deliberately degenerates federal prevailing wage regulations back to the same dysfunctional state they were in prior to the Reagan Administration, when a wide array of stakeholders and government watchdogs were urging reform, resulting in the 1982 Rulemaking. By repealing the Reagan-era reforms and ignoring the urgent recommendations of government watchdogs to truly modernize the DBRA, the Administration is willfully promulgating fundamentally misguided policy that for decades has resulted in grossly inflated wages, contravening the original intent of Davis-Bacon.

[1] "Updating the Davis-Bacon Act and Related Acts Regulations", 87 Fed. Reg. 15, 698 (March 18, 2022).

The defects in the Davis-Bacon NPRM are numerous. In its present proposal, DOL ignores no less than four[2] General Accounting Office (GAO) reports identifying fundamental flaws in the Wage and Hour Division's (WHD) voluntary survey process and excoriating DOL for its reliance on small, random sample sizes for calculating prevailing wages. The Department fails to recognize the concluding recommendation of a 2019 audit by DOL's Office of the Inspector General (OIG)[3] urging the WHD to adopt data from the Bureau of Labor Statistics' Occupational Employment and Wage Survey. By ignoring these recommendations, DOL's pervasive failure to properly calculate and determine prevailing wages will continue unabated.

Moreover, returning to an antiquated and obsolete definition of a prevailing wage only scratches the surface of the NPRM's misguided regulatory policies. By rescinding a key element of the 1982 reform that prohibited cross-consideration of metropolitan and rural wages, the Department ensures that any wage calculation will over-count inflated urban wages as prevailing in smaller rural areas. By increasing recordkeeping requirements, expanding DOL's debarment and withholding powers and imposing Davis-Bacon prevailing wage obligations through "operation of law" regardless of whether prevailing wage language is contained within the contract, the Department places onerous paperwork burdens on contractors while violating basic tenets of procedural due process. Taken together, these regulatory burdens will only further deter many minority-owned, smaller construction firms with limited resources from bidding on federal projects. By attempting to broadly redefine civil subdivisions to include state highway districts and expand the term "site of work" to include material supply drivers and off-site construction, DOL contradicts not only the plain language of Davis-Bacon but also D.C. Circuit precedent. Additionally, by attempting to impose, via executive rulemaking, remedial make-whole relief for whistleblowers despite lacking express statutory authority to do so, DOL far exceeds its remit and violates separation of powers principles.

These criticisms of the NPRM are by no means exhaustive, but taken together, reflect serious concerns with the Department's misguided objectives and fundamental lack of transparency. That most of these "reforms" unilaterally benefit labor unions and their interests, despite unionized firms constituting scarcely thirteen percent of market share[4] in the modern construction workforce, is not lost upon us. This rulemaking, far from reforming Depression-era federal prevailing wage regulations to adapt to a modern age, represents a significant step

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[2] See, e.g., "Davis-Bacon Act Should Be Repealed", April 27, 1979; "Davis-Bacon Act: Process Changes Could Raise Confidence that Wage Rates Are Based on Accurate Data", May 31, 1996 [hereinafter 1996 GAO Report]; "Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement", January 11, 1999; "Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey", March 22, 2011[hereinafter 2011 report].

[3] Report to the Wage and Hour Division: Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Prevailing Wage Rates. Office of the Inspector General. March 29, 2019. [hereinafter 2019 IG Report]

[4] Bureau of Labor Statistics Economic News Release, "Union Members Summary." January 22, 2022. The report found that just 13.4 percent of wage and salary workers were members of unions in the U.S. private construction industry in 2020.

backward, and will only compound the waste, inefficiency, and dysfunction that has plagued the Department's oversight and implementation of federal prevailing wage mandates.

I. *The NPRM fails to adequately justify regulatory revisions to the definition of "prevailing wage" or explain DOL's restoration of the thirty percent rule.*

DOL's proposal is fatally flawed because it fails to justify restoration of the thirty percent rule, a measure of calculating the prevailing wage that has long been a source of controversy by nonpartisan government watchdogs for its ability to inflate construction costs. The Department also fails to support its contention that the Department's current use of weighted averages violates the DBRA's legislative intent with reasoned explanation, much less substantial evidence. From 1935 until the Reagan era-reforms in 1982, the Department used a three-step process to determine the prevailing wage. A wage was first deemed to be prevailing if it is paid to a majority of workers in that class, and if there was no single wage paid to a majority of workers, any wage paid to at least thirty percent of workers was deemed to be the prevailing wage.[5] Only if no single wage was paid to a thirty-percent plurality were the use of weighted averages permitted.

However, the NPRM neglects to note that, by the early 1960s, the use of the thirty percent rule as a predominant means of calculation was beginning to generate concern. In June 1962, J.E. Welch, the Deputy General Counsel of the Government Accountability Office (GAO), testified before a labor subcommittee that "the methods and procedures" adopted by DOL for administration of the DBRA "have not kept pace" with the requirements of the period.[6] Welch supplemented his testimony with extended documentation questioning DOL's administration of DBRA, and lamented the lack of "a precise delineation of elements to be ascertained and evaluated in wage determinations by the Secretary of Labor."[7] Between June 1962 and July 1971, GAO issued a series of eight reports to the Congress with a general theme that, in large part due to the thirty percent rule: (a) prevailing rates prescribed by the Department were significantly higher than wage rates prevailing in the local areas and (b) "the higher rates that resulted from the inappropriate wage determinations not only increased the costs borne by the Federal Government but also had an adverse and inflationary effect on the economic and labor conditions in the area of the project and in the country as a whole."[8]

Nearly two decades documenting the inefficiency and waste characterizing DOL's implementation of Davis-Bacon culminated in GAO's formal recommendation to repeal the DBRA in an April 1979 report to Congress.[9] The report was issued under the leadership of the then-Comptroller General of the GAO, Elmer Staats, a veteran, non-partisan public servant whose career began in 1939 as a staff member within the Executive Office of the President under

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[5] 29 C.F.R. § 1.2(a); Labor Department Regulation No. 503 § 2 (1935).
[6] Special Labor Subcommittee, *Administration of the Davis-Bacon Act*, 1962, p. 283.
[7] Id. at 288.
[8] "The Davis Bacon Act Should Be Repealed." Statement of Elmer B. Staats, Comptroller General of the United States, Before the Subcommittee on Labor Standards, House Committee on Education and Labor. June 14, 1979, pp. 1-2. [hereinafter Staats Testimony].
[9] Ibid.

Franklin D. Roosevelt and continued under Democratic and Republican Administrations.[10] The report identified the thirty percent rule as responsible for the calculation of "unrealistic wage rates."[11] The thirty percent rule's inflationary impact was detailed throughout, with the report concluding that "[i]n areas where unions have organized at least 30 percent of the construction workers, [the union's] wage scales have an excellent chance of becoming the prevailing rate, even though 70 percent of the rates paid to other workers may vary by small amounts."[12] The GAO report also observed that, as union pay scales set forth in collective bargaining agreements are uniform, whereas open-shop contractors generally recognize different skill categories and productivity when establishing compensation, the union's wage scales have a far greater prospect of becoming the prevailing rate.[13] As an illustration, the GAO report highlighted the wage rate of $12.40 an hour determined to be prevailing for painters in Carson City, NV on the basis of a wage survey of 11 projects in the area. However, the survey showed that only three of the eight painters were paid that rate, whereas the other five were paid hourly rates that differed in gradation. In issuing the $12.40 hour rate paid to only 37.5 percent of the painters as prevailing, the thirty percent rule gives no consideration to the lower rates paid to the other 62.5 percent of the painters.

In formal testimony before Congress shortly following the report's issuance, Staats also identified a number of flaws within the DBRA, namely that "the policies, practices and procedures developed by Labor for establishing wage rates under the act have only rarely implemented the legislative intent."[14] Comptroller General Staats also identified the thirty percent rule as inflationary, with its use resulting in significantly higher rates than what the majority of workers were receiving.[15] The predominance of higher fringe benefits in union agreements only exacerbated the disparity, with the level of fringe benefits higher for union employees than their nonunion counterparts.[16] When one considers that fringe benefits are paid along with the basic wage rate, no less an authority than the Council on Wage Price and Stability conceded in 1979 that fringe benefits are likely to be larger for union than for nonunion workers.[17] The NPRM's proposal to annualize fringe benefits will only exacerbate[18] this phenomenon and result in inflated wages.

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[10] Elmer B. Staats, born June 6, 1914. Fellow, Brookings Institution, 1938-1939. Staff Member, Executive Office of the President, Division of Administrative Management, Bureau of the Budget 1939-1943; War Agencies Section 1943-47; Chief, 1945-47. Assistant to the Director, U.S. Bureau of the Budget, 1947-1950; 1958-1959. Deputy Director, U.S. Bureau of the Budget, 1950-1953, 1959-1966. Executive Officer of the Operations Coordinating Board, U.S. National Security Council, 1954-1958. 5th Comptroller General of the United States, 1966-1981.
[11] Report to the Congress by the Comptroller General of the United States, "The Davis Bacon Act Should Be Repealed." April 27, 1979, 51-52. (hereinafter Staats Report).
[12] Staats Report, at 52.
[13] Ibid.
[14] Staats Testimony, at 6-7.
[15] Ibid. at 32.
[16] Ibid. (noting a study by the Massachusetts Institute of Technology that, on average both the level of benefits and the proportion of nonunion employees receiving fringe benefits "are much lower than those in the union sector.").
[17] Ibid.
[18] 87 Fed. Reg. at 15,703.

The rescission of the thirty percent rule in the 1982 rulemaking was thus the result of decades of nonpartisan GAO reports and independent civil servants asserting, with substantial evidence, that application of the thirty percent rule resulted in inflated wages. Inflated wages by definition are not prevailing, and run counter to Davis-Bacon's statutory command. The report and recommendations of Elmer Staats, a distinguished veteran of the civil service, is not mentioned at all within the text of the NPRM. Nor is Comptroller General Staats's 290-page report documenting DOL's chronic failure in administering the DBRA worthy of a mention, a report which served as a leading impetus of the 1982 reforms. Yet inexplicably, the text of the NPRM asserts that the thirty percent rule's rescission, and the Department's subsequent reliance on weighted averages "is inconsistent with the text and purpose of the [Davis-Bacon] Act."[19] Such a pronouncement ignores D.C. Circuit precedent upholding the rescission of the thirty percent rule and granting the Secretary of Labor wide discretion in calculating the prevailing wage.[20] The D.C. Circuit, in its opinion upholding most of the 1982 Rule's reforms, noted that the DBRA delegates to the Secretary the authority to determine which wages are prevailing "in the broadest terms imaginable."[21] Moreover, the court held that the DBRA's legislative history documents that the Secretary could establish the most practical method of determining the prevailing wage.[22] A bipartisan D.C. Circuit panel also held that the definition of prevailing as first a majority and then a weighted average "is within a common and reasonable reading of the term."[23]

The NPRM fails to justify why Comptroller Staats's assertion concerning the causal relationship between the thirty percent rule and its inflationary impact on wages is no longer applicable. DOL's assertion that a reliance on weighted averages is contrary to the text of the DBRA directly contradicts D.C. Circuit precedent stating precisely the opposite.

II. *The proposal ignores multiple GAO reports and an IG study documenting fundamental flaws within the WHD's voluntary survey process that has for decades tilted the playing field in favor of collectively bargained rates.*

The NPRM fails to acknowledge the endemic dysfunction of WHD's voluntary wage survey process documented over decades by numerous GAO reports and a recent Inspector General report. The NPRM's proposals that aim to remedy the WHD's chronic inability to update nonunion wages in a timely fashion, or even to conduct up-to-date surveys with proper verification, only compound the waste and inefficiency that has characterized DOL's administration of DBRA.

For nearly fifty years, numerous GAO reports have documented a variation of the same deficiency: a complete inability, nearly a century after the DBRA's implementation, "to develop

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[19] 87 Fed. Reg. at 15,704.
[20] See Building and Const. Trades' Dept., AFL-CIO v. Donovan, 712 F.2d 611, 616-617 (1983).
[21] Building and Const. Trades Dept., 712 F.2d at 616.Wh
[22] Ibid. (citing 74 CONG. REC. 6516 (remarks of Rep. Kopp) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.")).
[23] Ibid. at 616-617 (citing 75 CONG. REC. 12,365 (1932)(remarks of Rep. Connery, floor manager of the 1932 amendments)(endorsing an averaging method for determining the prevailing wage)).

an effective program to issue and maintain accurate wage determinations".[24] Comptroller General Staats's 1979 report reviewed a random sample of 73 prevailing wage determinations and found that surveys had not been made for 22 of the 50 projects and 13 of the 23 area determinations-nearly 50 percent of the 73 projects reviewed. In those 35 determinations where surveys were not made, DOL issued rates obtained from union-negotiated collective bargaining agreements. For wage determinations in effect in October 1976, no surveys were made for 57 percent of the determinations. In all areas covered by the wage determinations, union rates from collective bargaining agreements prevailed. DOL failed to determine in those wage determinations how many workers were paid the rates in the locality or the extent of nonunion wages paid to workers engaged in similar work in the area. The 1979 GAO report also uncovered chronic deficiencies in DOL's ability to obtain up-to-date wage data through the voluntary survey program. In several surveys in each of the then five regions, contractors could not be contacted or refused to provide data. Voluntary wage data that DOL did manage to obtain was limited at best, with DOL receiving completed surveys on only about 30 percent of construction projects nationwide.[25] DOL also failed to properly verify the vast majority of wage and classification data, with payrolls rarely obtained or reviewed.

Further, a May 1996 GAO report found DOL's voluntary wage survey process to "contain internal control weaknesses that contribute to [a] lack of confidence in the resulting wage determinations."[26] Those weaknesses included limitations in DOL's verification of wage and fringe benefit data, with surveys in Oklahoma and Tulsa City rife with inaccuracies, necessitating new wage determinations.[27] A March 2011 GAO report found chronically small sample sizes, with over 25 percent of wage determinations based on six or fewer workers.[28] The 2011 report documented the WHD's inability to conduct up-to-date surveys, resulting in aged nonunion rates that do not accurately reflect prevailing rates. The 2011 report found that union-negotiated rates prevailed in almost two-thirds of the published building, heavy and highway rates, despite unions' steadily declining market share in the construction industry.[29] Union rates were also automatically updated when new collective bargaining agreements were negotiated, with 75 percent of union rates 3 years old or less and only 36 percent of nonunion rates 3 years old or less due to the latter not being updated until DOL conducted a new survey.[30] Forty-six percent of nonunion prevailing wage rates were 10 or more years old, with one regional office having to update nonunion prevailing rates with a new survey because they no longer complied with the federal minimum wage. The report also found an inability on the part of DOL to calculate response rates or conduct non-response analyses.

Most recently, a 2019 Department of Labor Office of Inspector General (OIG) report illustrated the defects in the WHD's survey process persist to a disturbing degree. The OIG analyzed wage

[24] Staats Report at 2.
[25] Ibid. at 46.
[26] 1996 GAO Report at 2.
[27] Ibid. at 5.
[28] 2011 Report at 1.
[29] 1996 GAO Report at 18.
[30] Ibid.

rate age data within the WHD's Wage Determinations Generation System and found that, of the 4,385 wage rates that were between 21 and 40 years old, 4,353 were nonunion, while only 32 were union.[31] A federal agency's solicitation for a $140 million dollar contract in Texas included a wage determination with nonunion wage rates last updated in 1988.[32] Union wages prevailed for 48 percent of the 134,738 rates in WHD's Wage Determination Generation System, despite accounting for less than fourteen percent of the construction workforce. In seven sampled surveys within the states of Arkansas, Kansas and Nevada, the WHD was not able to collect wage data for a single construction worker in any of the 31 counties the published rates represented.[33] Of the more than 8,000 private sector contractors eligible to provide wage data, 53 percent did not respond to WHD's voluntary surveys.[34] Private sector contractors have proffered a number of reasons for not responding to voluntary surveys, from lacking administrative support staff to complete the complicated, incomprehensible forms to a fear of furnishing propriety data that could later be subject to audit.[35] When the OIG conducted an onsite verification for 49 selected contractors, a number of inaccuracies were found, including variances in reported and verified numbers of workers that "could not be explained." Twenty contractors were completely non-responsive, declining to participate in onsite reviews.[36]

To remedy these institutional defects, the 2019 OIG report urged the Department to use BLS Occupational Employment Survey (OES) Data to develop prevailing wage determinations.[37] OES Data is uniquely suited to remedy the institutional defects that define the WHD's voluntary survey process, as BLS first strives to make their surveys easy as possible to understand and complete, testing them with employers before they are placed in the field.[38] BLS also follows up with employers who do not initially respond to surveys, supplementing telephone calls with on-site visits. OES surveys have higher response rates of at least 78.4 percent, and adjust to correct for the absence of non-responsive employers, including weighting and imputation.[39] The use of weighting and imputation is essential to correcting small survey sizes and unrepresentative samples if one hopes to calculate prevailing wages that are even remotely accurate. Given that the Department has restored a regulatory barrier to the use of weighted averages, as discussed previously, DOL ensures that prevailing wages will not reflect reality.

Instead, the Department proposes methods, such as the utilization of the BLS Employment Cost Index, that only serves to perpetuate the *status quo*. Whereas OES program data collects data on wage and salaried workers for about 830 separate occupations[40], the Employment Cost Index

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[31] 2019 IG Report at 3, 5.
[32] Ibid.
[33] Ibid. at 11.
[34] Ibid. at 15.
[35] 2011 Report at 24-25.
[36] Ibid.
[37] Ibid. at 8.
[38] Polly A. Phipps and Carrie K. Jones, "Factors Affecting Response to the Occupational Employment Statistics," U.S. Department of Labor, Bureau of Labor Statistics, Office of Survey Methods Research, November 2007.
[39] U.S. Department of Labor, Bureau of Labor Statistics, BLS Handbook of Methods, Chapter 3.
[40] U.S. Department of Labor, Bureau of Labor Statistics, "Occupational Employment and Wage Survey Data". Overview.

merely accounts for the net increase or decrease in the cost of labor,[41] but does, not, as the DBRA commands, account for prevailing wages paid to "corresponding classes of laborers and mechanics".[42] The use of OES data would in all likelihood eliminate an impediment preventing small firms from bidding on projects. Numerous stakeholders have identified job classification rates missing from wage determinations as a deterrent to bidding on a project, as contractors do not know what to pay workers and federal contracting agencies cannot accurately estimate costs if job classification rates are missing. Many small contractors cannot afford the expense of requesting missing wages from DOL through a conformance process after the protracted difficulty of bidding on a project. The adoption of more comprehensive OES data would have ameliorated if not eliminated this impediment, but, as with all matters concerning this NPRM, the Department has chosen not to follow independent recommendations.

For similar reasons, permitting the WHD to adopt state and local prevailing wages as Davis-Bacon wages will only further perpetuate dysfunction, as state prevailing wage rates are often adopted from voluntary surveys containing the same flaws and statistical sampling errors as their federal counterparts, or are based on a collective bargaining agreement negotiated between an employer and a union. For example, New York's prevailing wage inflates state and local construction costs by 13 to 25 percent, depending on the region, with employer contributions required to backfill union pension and welfare fund liability shortfalls accounting for more than 10 percent of the total hourly compensation required by the prevailing wage law.[43] New York's state prevailing wage law has resulted in cost differentials for the taxpayer based on employee compensation alone. Many state prevailing wage laws, such as New York's, base their definition of prevailing rate of wage directly on compensation levels set in CBA, rather than voluntary surveys, allowing contract administrative costs and union work rules to further inflate wages, at great detriment to the taxpayer.[44]

III. *By permitting the cross-consideration of metropolitan and rural data, the Department undermines local wage structures and ensures rural wages will be inflated by metropolitan rates of compensation, further undermining the legislative purpose of the Davis-Bacon Act.*

In rescinding current language barring the cross-consideration of metropolitan and rural data, the rulemaking ensures wages will be inflated by union negotiated urban rates lacking both commonality and contiguousness with the rural locality. The importation of locality-distinct metropolitan wages will further upset the local wage structure. Both measures blatantly undermine the statutory purpose of the DBRA.

The importation of metropolitan wage data was identified by the Comptroller General in the 1979 report as one which directly contradicts Davis-Bacon's requirement that prevailing wages

[41] U.S. Department of Labor, Bureau of Labor Statistics. Economic News Release: Employment Cost Index Summary." April 29, 2022.
[42] 40 U.S.C. § 3142(b).
[43] Empire Center, "Prevailing Waste: New York's Costly Public Works Pay Mandate." April 24, 2017.
[44] NY Labor Law § 220.

be determined in the city, town, village, or other civil subdivision of the State in which the work is to be performed.[45] Previous decisions of the DOL's Wage Appeals Board (now the Administrative Review Board) have warned that the importation of wage rates from non-contiguous counties, cities, and municipalities violates the plain language of the DBRA by establishing new payment practices rather than reflecting local wages.[46] The 1979 GAO Report noted that "the application of rates from noncontiguous counties and the use of union rates in predominantly nonunion areas" was "not in accord with the act's intent, which was to maintain the local wage structure and not raise or lower wages on the basis of rates prevailing in other areas."[47] In that spirit, the 1979 GAO report warned that "metropolitan data generally should not be used to produce data for a rural county or vice versa."[48] In subsequent congressional testimony, Comptroller General Staats noted that, when inflated metropolitan wages negotiated by unions are imported into open-shop rural communities, local contractors would prefer not to bid on Government projects whose rates were higher than those in the locality rather than disturb existing wage structures. The importation of metropolitan wage data thus had the most adverse effect on local contractors-those the DBRA was originally intended to protect-by promoting the use of nonlocal contractors on Federal projects.[49]

The Department ignores the compelling reasons the 1982 Final Rule excluded urban counties from rural wage determinations, and in permitting the importation of metropolitan wage data, ensures that once again, small local contractors will be excluded from bidding on Federal projects. In upholding the 1982 Final Rule's rural-urban wage distinction, the D.C. Circuit noted that the exclusion of urban wage data "has not been shown to undermine the central purpose of the statute, which is to ensure that federal contractors pay the wages prevailing in the locality of the project."[50] The explanation offered by the Secretary for the 1982 regulation, that the "importation of higher urban wages to rural areas has disrupted relations in rural areas because employees have been unwilling to return to their usual pay scales after a Davis-Bacon project has been completed" was held by the D.C. Circuit to "make sense".[51] The D.C. Circuit also dismissed the union's argument that "higher urban wages were justified in rural areas because it is the urban workers who do the work", as, were that precept true, "the wage scales for the surrounding rural counties would reflect" a corresponding market increase in wages.[52] Unsurprisingly, the D.C. Circuit's opinion is omitted from the text of the NPRM. Instead, we are treated to the argument that cross-consideration of rural and metropolitan wage data is a justified good because rural and metropolitan subdivisions share "heterogeneity of commuting patterns" and "local labor markets".[53] This argument is one of many that was promoted by unions in the 1983 litigation, dismissed by the D.C. Circuit, and has now resurfaced within the text of the

[45] Staats Report at 50.
[46] Ibid. at 55 (citing Texas Paving & Utilities Rates, 77-WAB-19 at *2-*3 (Dec. 30, 1977)).
[47] Ibid. at 50.
[48] Ibid.
[49] Ibid. at 13.
[50] Building and Const. Trades Dept., 712 F.2d at 619.
[51] Ibid. at 618-19.
[52] Ibid.
[53] 87 Fed. Reg. at 15, 719.

NPRM. Moreover, were it a fact that rural and metropolitan subdivisions share common labor markets, wage scales would, as the D.C. Circuit quite aptly held, reflect a corresponding increase in wages.[54]

The NPRM's text also extols the use of Metropolitan Statistical Area (MSA) data that contains both urban and rural territories and population. The NPRM expresses a belief that the purposes of the DBRA would be best served by "[c]ombining rural and urban data at the State level" as a means of "geographic expansion".[55] The Department also believes that "the purposes of the Act are better served by using such combined statewide data to determine the prevailing wage, when the alternative could be to fail to publish a wage rate at all."[56] The WHD already combines data from counties in different labor markets, with the GAO reporting that 20 percent of key DBRA rates occur at the "super-group" level, and 40 percent of DBRA rates are based on statewide data.[57] In many cases, these counties have little economic connection to the county in which the work is performed. Not surprisingly, the groupings of these MSAs have resulted in vast wage differentials. In a Long Island MSA, for instance, the Davis-Bacon prevailing wage for electricians is $51.00 an hour-a 74 percent increase of $19.27 an hour, the actual prevailing wage BLS determined.[58] In a Washington, D.C. MSA, the Davis-Bacon prevailing wage for electricians on a construction project was determined to be $43.70 an hour-a 45 percent increase from $30.11 an hour, the actual prevailing wage BLS calculated.[59] The purpose of the DBRA is most certainly not served by such inflated wages.

In support of their argument of importing urban wages, the NPRM cites House debate from Congressman William Connery of Massachusetts, the Chairman of the House Labor Committee, purporting to bind the Secretary to adopting the prevailing wages of the nearest city for rural areas.[60] However the NPRM fails to acknowledge that when the same debate was cited by unions during the litigation, the D.C. Circuit found no indication "that Congress intended to bind the Secretary to the method suggested by Representative Connery" with the thrust of the debate indicating "the entire question was left for the Secretary" and Congressman Connery's suggestion "merely intend[ing] to show that some method for determining a wage could be found."[61] Also omitted from the NPRM's text was the finding that excluding urban data from rural data was a consistent practice dating from before the 1982 Rulemaking, with the Secretary's Operations Manual for Issuance of the Wage Determinations Under the DBRA instructing that "a metropolitan county should not be used to obtain data for a rural county (or vice [sic] versa)" as early as 1977.[62] President Carter's DOL also sought to formalize such a

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[54] Building and Const. Trades Dept., 712 F.2d at 618-19
[55] 87 Fed. Reg. at 15, 719.
[56] Ibid.
[57] 2011 Report, Figure 5.
[58] U.S. Dep't of Labor, Bureau of Labor Statistics. "Economic News Release." Table 6, September 2016.
[59] Ibid.
[60] 87 Fed. Reg. at 15, 719
[61] Building and Const. Trade's Dept., 712 F.2d at 618.
[62] Ibid. at 619.

prohibition in new regulations.[63] That the Department is now citing the same arguments proffered by unions and since rejected by a federal court as justification for upending local wage structures reveals the likely motive behind this regulatory change. The Department's characterization of the wage prohibition as existing only since the 1982 rulemaking is similarly disingenuous, with non-partisan experts having long since concluded that cross-consideration of metropolitan and urban wage data undermines the DBRA's legislative purpose.

IV. *By increasing already onerous recordkeeping requirements, expanding DOL's debarment and withholding powers, and rendering Davis-Bacon contract clauses and wage obligations effective "by operation of law," the Department violates basic standards of procedural due process and places an impermissible administrative burden on small to mid-size contractors, many of whom lack the administrative resources to keep up with paperwork burdens.*

The Department's proposal to increase a contractor's recordkeeping duties, expand DOL's debarment and withholding powers, and provide that Davis-Bacon prevailing wage obligations are effective by "operation of law" places an impermissible burden on the private sector, while relieving contracting agencies of any obligation to bargain in good faith.

The Department's proposal to discard the requirement that a violation of prevailing wage obligations be "aggravated or willful" in order to merit disbarment and instead lowering the burden of persuasion to a "disregard of obligations" will ensnare many small contractors into debarment proceedings.[64] Given the non-transparent and wasteful manner in which prevailing wages are calculated, as detailed previously in this comment, small to mid-size contractors who lack administrative resources to keep abreast of DOL's nightmarishly bureaucratic administration of DBRA will render themselves vulnerable to an ocean of legal liability as a result of the new debarment standard. This standard is akin to posting a "Do Not Apply" sign to small and mid-level contractors who are at greater vulnerability of unintentionally violating incomprehensible prevailing wage requirements. As an initial matter, this comment has established that DOL is frequently incapable of accurately calculating a prevailing wage, with survey methods that are, to put it generously, less than consistent. That a contractor could stand to be debarred from federal contracts covered by the DBRA-in essence nearly the entirety of federal procurement-due to a "disregard of obligations" that a nearly 50-page NPRM fails to explain will only serve as a greater obstacle to small firms bidding on DBRA covered contracts. The NPRM's observation that the "aggravated or willful" Related Acts standard has been "interpreted inconsistently"[65] over the decades is dubious, given the volatile manner in which DOL calculates prevailing wage rates. The NPRM merely defines a "disregard of obligations" as "purposeful inattention and gross negligence"[66] which, given the incompetent manner in which

[63] See 46 Fed. Reg. 4305, 4314 (1981)(final rule)(providing for exclusion of metropolitan counties except in "extraordinary circumstances"), stayed, 46 Fed. Reg. 11,253 (1981), and replaced 47 Fed. Reg. 23, 643 (1982).
[64] 87 Fed. Reg. at 15,755.
[65] Ibid. at 15,756.
[66] Ibid.

DOL has calculated prevailing wages, would render private construction firms subject to a wide panoply of liability. DOL also laments the inconsistent manner in which the "aggravated or willful" standard has been applied, but later concedes the ambiguous "disregard of obligations" burden would be considered in light "of all the facts involved".[67] Such a fact-specific, contextual analysis will lead to the same supposed "inconsistencies" the Department laments the previous standard as yielding. In truth, the Department wishes to more easily debar those private contractors who refuse to pay union wages grossly inflated above market value.

The Department's proposal to provide that labor standards contract clauses are effective "by operation of law" in circumstances where they have been "wrongly omitted from a covered contract" is no less insulting to private contractors. The proposed language would ensure that Davis-Bacon's burdensome regulations would be imposed on workers "notwithstanding any mistake by an executive branch official in an initial coverage decision or in an accidental omission of the labor standards contract clauses."[68] The proposal thus shamelessly attempts to shift the legal burdens of enforcement and compliance from the contracting agency to the contractor, limiting the pool of bidders to those who could afford to shoulder such inordinate administrative costs. When one considers the ambiguous and inchoate nature with which DOL defines a "prevailing wage", and that such obligations are applicable to federally subsidized as well as federal contracts under the DBRA, the administrative burdens on private sector contractors to determine which elements of the procurement contract are covered by prevailing wage obligations, calculate such wages, and be certain that the contract is DBRA covered would prove nightmarish in its sheer bureaucracy. Though the NPRM notes that contracting agencies would be required to compensate the contractor for any additional wages paid as a result of the calculation, in reality, procurement agencies often use the threat of refusing to award contract bids in the future as insurance against paying any additional wage fees in the present, leaving contractors shouldering the expense. That terms are to be adhered to regardless of the due diligence the procurement agency demonstrated, particularly in giving the contractor the courtesy of notice of the terms by which a bill of lading is to be adhered, robs the contractor of basic notice and procedural due process, and places boundless administrative and regulatory burdens on the contractor that, by statute, were meant to be placed on the procuring agencies.

To add insult to injury, the NPRM also proposes to burden contractors with additional recordkeeping requirements. In addition to weekly certified payroll data required by the Copeland Anti-Kickback Act of 1934, contractors are required to maintain all contracts and subcontracts, as well as bids, proposals, amendments, modifications, and extensions for those contracts and subcontracts. Failure to comply with recordkeeping requirements could result in the withholding of contract funds or debarment. The Department, through the promulgations of these recordkeeping requirements, demonstrates a fundamental ignorance of the expense and resources such recordkeeping requirements mandate. Such a requirement is illustrative of the Department's stated goal of serving the needs of labor unions above all else, even at the expense of fundamental principles of fairness and equity. It will further deter many small to mid-size

[67] Ibid.
[68] Ibid. at 15, 749.

construction firms, of whom a great majority are minority owned, from bidding on Federal Projects due to the expense involved. Such onerous paperwork burdens bring to mind the testimony from Samuel Carradine, the CEO of the National Association of Minority Contractors. In written testimony before the 103rd Congress, Samuel Carradine wrote that, "[r]ather than protecting local contractors from unfair competition, Davis-Bacon has practically fostered a closed group of large contractors who follow Federal construction work around the country to the exclusion of smaller, local contractors."[69] These additional paperwork and regulatory requirements will ensure that bidding on Federal projects remains exclusive to a "closed group of large contractors" with the resources to afford the exorbitant administrative costs a DBRA covered-contract would entail.

V. *In attempting to broadly redefine civil subdivisions to include state highway districts and expand the term "site of work" to include material supply drivers and off-site construction, the Department exceeds its statutory authority in the former and re-opens well-settled areas of the law in the latter.*

The NPRM, by proposing to expand the definitions of civil subdivision and "site of work" to include state highway districts in the former and drivers dropping off materials from material suppliers in the latter, exceeds the statutory mandate of the DBRA. The proposal's provisions to expand DBRA coverage to off-site construction where "significant portions" are constructed for specific use in a designated building or work also run counter to settled law.[70]

a. <u>The Department lacks statutory authority to designate state highway districts as civil subdivisions under the DBRA</u>.

The DBRA merely gave the Secretary of Labor power to set prevailing wages "in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there."[71] The juxtaposition of "civil subdivision of the State . . . or in the District of Columbia" clearly illustrates that Congress defined a "civil subdivision" to be a county, city, town or other municipality as the District of Columbia lacked all requisite subdivisions, hence its inclusion. Moreover, at the time of Davis-Bacon's passage, there was a widely accepted distinction between state highway districts and civil subdivisions. The former was merely responsible for the maintenance of the highway, whereas the latter was responsible for a wide array of civil functions, including administering and enforcing state laws, collecting taxes, assessing public properly, recording public documents, conducting elections and issuing licenses. The Department's abrupt *volte-face* in attempting to broadly define "civil subdivision" to include state highway districts runs counter to decades of agency practice.

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[69] "Repeal of the Davis-Bacon Act." 104th Congress, 1st Session. Report 104-80. May 12, 1995.
[70] 87 Fed. Reg. at 15, 729-31.
[71] 40 U.S.C. § 3142(b).

A basic canon of administrative law is that an agency's interpretation of its enabling statute is to be accorded deference if its interpretation is "reasonable."[72] However, *Chevron* deference is not warranted if an agency fails to follow correct procedures when issuing a regulation.[73] In order to fulfill a basic procedural requirement of administrative rulemaking, the agency must give adequate reasons for its decision, particularly when reversing decades of regulatory policy stakeholders have come to rely upon.[74] For decades, DOL regulations have defined an "area in determining wage rates" under the DBRA to "mean the city, town, village, county, or other civil subdivision of the State in which the work is to be performed."[75] However, the NPRM does not cite any legislative history, either from when Davis-Bacon was enacted in 1931 or amended in 1935, to support its assertion that Congress intended state highway districts to be civil subdivisions. The only authority the Department cites to support its assertion that state highway districts were considered civil subdivisions at the time the DBRA was enacted is a circuit court opinion issued 12 years before the Act's original passage in 1931.[76] The rulemaking omits key details from the case's holding, namely that highway districts were defined as governmental subdivisions only after Article 292 of the Louisiana Constitution expressly "provided for the division of parishes into road districts" by defining their taxing and bond-issuing capacity, and only after two enabling acts of the legislature rendered the constitutional provisions effective.[77]

One state highway district is not akin to the other, and not every state expressly grants a state highway division taxing and bond-issuing authority, nor gives such districts formal legal status as county subdivisions. Many states circumscribe the authority of state highway districts merely to maintenance of highways and roads. That the rest of the proposal is reduced to acknowledging that Congress distinguished "immediate localities" from "civil subdivisions" when defining the appropriate geographic area of wage determination under the Federal-Aid Highway Act of 1956 is telling. The Department lacks any statutory or reasoned support for expanding the definition of civil subdivision to state highway districts, as Congress has always differentiated the two. State highway districts lack both the attributes and broad legal remit of civil subdivisions. The attempt by the Department to re-designate state highway districts as such is arbitrary agency action.

b. <u>The Department's attempts to expand DBRA "site of work" coverage to include material supply drivers and off-site construction sites contradicts settled law.</u>

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[72] <u>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc</u>. 467 U.S. 837 (1984).
[73] <u>United States v. Mead</u> Corp., 533 U.S. 218 (2001).
[74] <u>Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto Ins. Co.</u>, 4463 U.S. 29, 43 (1983).
[75] 29 C.F.R. § 1.2.
[76] <u>Wight *v.* Police Jury of Par. of Avoyelles, La.</u>, 264 F. 705, 709 (5th Cir. 1919)
[77] <u>Ibid.</u> at 707.

The attempt by the Department to impermissibly expand the definition of "site of work" to include elements of off-site construction and material supply drivers is an overreach and ignores binding D.C. Circuit precedent. In Building and Const. Trade Dept. v. U.S. Dept. of Labor Wage Appeals Bd., the D.C. Circuit held that the phrase "mechanics and laborers employed directly upon the site of work" within the meaning of the Davis-Bacon Act "restricted coverage of the Act to employees working directly on the physical site of the building, and thus, [a] regulation extending coverage of the Act to truck drivers was invalid."[78] The D.C. Circuit held the critical phrase "employed directly upon the site of the work" to convey a geographical limitation, stating that, "only employees who work *on the site* are covered by the Act."[79] Judge Patricia Wald, an appointee of President Carter, found "no ambiguity in the text: 'site of work' clearly connotes to us a geographic limitation."[80] Lest there be any confusion, the court held that "the ordinary meaning of the statutory language is that the Act applies only to employees working directly on the physical site of the public building or public work under construction."[81] Judge Wald even noted that, when members of Congress discussed Davis-Bacon coverage in hearings and debates, "they invariably expressed an assumption the Act's coverage would be restricted to mechanics and laborers who work directly on the project site."[82] Judge Wald cited painters who painted building materials in the mills before those materials were brought to the construction site, or off-site workers who constructed component buildings in the steel mills for reconstruction on the site of the work.[83]

The court thus refused to defer to the Department's expansive site of work definition, holding that "Congress intended the ordinary meaning of its words". Davis-Bacon's statutory language "restricts coverage of the Act to employees who are working directly on the physical site of the public building or public work being constructed."[84] In addition, contrary to the Department's proposal, "[m]aterial delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act even if they are employed by the government contractor."[85] The Department's 1991 regulation was thus invalid "insofar as it includes off-site material delivery truck drivers in the Act's coverage". Yet again, the Department attempts to impermissibly expand the definition of "site of work" beyond that of the statutory text and legislative history. In doing so, the Department ignores binding authority and demonstrates a blatant disregard for taxpayer resources.

VI. *By granting itself vast enforcement authority to incorporate anti-retaliation measures into Davis-Bacon covered contracts and impose unlimited remedial make-whole*

[78] 932 F.2d 985 (1991).
[79] Ibid. at 989 (emphasis in the original).
[80] Ibid. at 990.
[81] Ibid.
[82] Ibid. at 990-91.
[83] Ibid. (citing S. 3847, 72d Cong., 1st Sess. (1932)).
[84] Ibid. at 992.
[85] Ibid.

> *relief via executive rulemaking, the Department exceeds its statutory authority and violates separation of powers principles*.

The Department's proposal to add broad anti-retaliation provisions to DBRA covered contracts and assume enforcement authority to impose remedial relief represents an assumption of power far beyond that which Congress intended. In presuming to implement such an expansive enforcement regime, the Department shows a blatant disregard for basic principles of the separation of powers.

The scope of the enforcement powers the Department proposes to assume is practically unlimited.[86] Regarding anti-retaliation measures, the Department presumes to define what constitutes protected activity much as a legislature codifies a statute, with whistleblower protection extended to the filing of complaints, initiation of proceedings, "otherwise asserting any right or protection"; cooperating in an investigation or other compliance action, testifying in proceedings; or informing any other person about their rights under the DBA or Related Acts.[87] The proposal concedes the scope of anti-retaliation measures are "intended to be broad" in order to effectuate the so-called "remedial purpose" of the DBRA.[88] The Department then proceeds to assume unlimited authority to impose remedial make-whole relief to "restore the worker subjected to the violation to the position, both economically and in terms of work or employment status . . .that the worker would have occupied had the violation never taken place."[89]Available remedies include, but are not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; interest on back pay or other monetary relief from the date of the loss; and appropriate equitable or other relief such as reinstatement or promotion.

The NPRM's characterization of the DBRA as remedial statutes, or, as the text states, statutes with "remedial purpose", is inaccurate. Black's Law Dictionary defines a "remedial statute" as "a law whose purpose is to correct an existing law that isn't working or has caused some harm and not good."[90] Remedial is further defined by Black's as "affording a remedy; giving the means of obtaining redress."[91] Davis-Bacon, as initially enacted in 1931, was merely "a brief and relatively simple statement of policy" granting the Department wide discretion to establish a wage threshold "not less than the locally prevailing wage to be paid" but largely deprived DOL of effective enforcement mechanism to achieve the statutory aim.[92] To further the policy purposes of the statute, contracting agencies were granted the authority to withhold "funds

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[86] 87 Fed. Reg. at 15, 747.
[87] Ibid.
[88] Ibid.
[89] Ibid. at 15,747-48.
[90] Black's Law Dictionary. Remedial Statute.
[91] Black's Law Dictionary. Remedial.
[92] The Secretary of Labor was curtailed from effective administration of the original Act in two significant respects: (1) his or her role emerged as one of conciliation rather than independent enforcement due to the Act's provision for postdetermination of prevailing wage rates; and (2) even assuming the Secretary's desire to curtail Davis-Bacon violations, the Act was without sanctions to impose against derelict government contractors. 40 U.S.C. §§ 276a-276a-5 (1976)).

sufficient" from contractors to pay underpaid workers, the Comptroller General was granted the ability to bar violating contractors from federal procurement for three years, and laborers were afforded a private right of action against a contractor, but only after Congress expressly amended the Davis-Bacon Act in 1935 to provide for such remedial action.[93]

Therefore, the DBRA is a statute with "remedial purpose" only in so far as Congress has expressly granted the Department the authority to remedy underpayment of wages.[94] An enforcement scheme such as that envisioned by the Department, whereby the WHD defines what constitutes protected whistleblower activity in the manner of a legislature and is granted power to force private actors to reinstate employees or pay them back wages implicates constitutional rights, and therefore, is reserved for Congress to impose as subject matter experts and elected representatives. To compare, the remit of the Equal Employment Opportunity Commission (EEOC), which is far more remedial in nature and substance, was only endowed with the ability to impose make-whole relief and pursue enforcement litigation after an express grant of authority by Congress.[95] The EEOC's power to sanction individuals who retaliate against subordinates filing charges of discrimination was also pursuant to a specific grant by Congress. The National Labor Relations Act also similarly empowers the National Labor Relations Board, under Section 10(j) of the Act, to pursue equitable such as reinstatement and back pay in federal court, as well as issue orders against employers requiring the same in agency proceedings.[96] Other examples are legion. The Occupational Safety and Health Administration enforces whistleblower protections arising under over 20 statutes-again only pursuant to a specific grant of congressional authority.[97] The Administrator of the WHD has the ability to bring actions in federal court to restrain violations of the Fair Labor Standards Act (FLSA) again only due to an express grant of such authority by Congress. Congress also provided for whistleblower protection expressly in the FLSA, rendering it unlawful for employers "to discharge or in any manner discriminate against any employee because such employee has filed any complaint" of wage and hour violations.[98]

The creation of a byzantine enforcement scheme proposed by the Department, complete with the agency, at its own willful discretion, defining what constitutes whistleblower protection and imposing such equitable relief as it chooses, is thus wholly inappropriate for an executive rulemaking absent an express grant of statutory authority. As Congress has previously seen fit to expend time and resources endowing administrative agencies with the prerogative to pursue equitable relief or enforce whistleblower protection, it strains credulity to think, as the Department assumes, that an agency can simply assume power for broad enforcement schemes absent an express grant of congressional authority. The Department's assertion that the mere

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[93] 40 U.S.C. § 276a(a) (1976))
[94] See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").
[95] The Equal Employment Act of 1972 amended Title VII of the Civil Rights Act of 1964 to grant the EEOC authority to pursue litigation in federal court, and impose remedial make-whole relief, including back-pay, after a finding of violation. See 42 U.S.C. § 2000e-6(a).
[96] National Labor Relations Board. 10(j) Injunctions.
[97] OSHA Fact Sheet: OSHA's Whistleblower Program.
[98] 29 U.S.C. § 215(a)(3).

"remedial character" of the DBRA justifies boundless regulatory authority to promulgate an unlimited enforcement scheme is chilling and unavailing. When the rights and liberties of private sector employers are implicated, regulatory agencies cannot pursue enforcement absent an express grant of congressional authority.[99]

VII. Conclusion

Though the above criticisms of the NPRM are by no means exhaustive, they represent deep concerns with the Department's proposal to "modernize" the DBRA. By restoring the thirty percent rule and ignoring numerous GAO and OIG reports that urge adoption of OES data and fundamental reform in the voluntary survey process, the Department ensures prevailing wages will be inflated at great detriment to the taxpayer. With the passage of the Infrastructure Investment and Jobs Act, the nation has an opportunity to restore antiquated infrastructure. With inflation already reducing the worth of the bill, the proposal contained within this NPRM will only further limit the number of infrastructure projects the federal government can pursue, greatly inflate the cost to the taxpayer of necessary infrastructure projects at rates far above market value, all while imposing boundless administrative and paperwork burdens on small to mid-size contractors. We therefore urge the Administration to refrain from pursuing this misguided proposal.

Sincerely,

Richard Burr
Ranking Member
U.S. Senate Committee on Health, Education, Labor and Pensions

Bill Cassidy

Tim Scott

Mitt Romney

Roger Marshall, M.D.

Tommy Tuberville

[99] See La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)(Brennan, J.)(Holding that "an agency literally has no power to act . . .unless and until Congress confers power upon it.").

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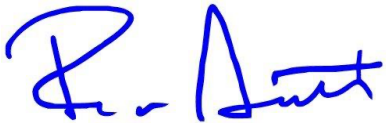

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