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FILED
United States Court of Appeals
Tenth Circuit

April 30, 2024

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DUKE BRADFORD; ARKANSAS VALLEY ADVENTURES, LLC, AKA AVA Rafting and Zipline; COLORADO RIVER OUTFITTERS ASSOCIATION, Plaintiffs - Appellants, v. U.S. DEPARTMENT OF LABOR; U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION; JOSEPH R. BIDEN, President of the United States; JULIE A. SU,*	No. 22-1023

* Pursuant to Fed. R. App. P. 43(c)(2), Julie A. Su is substituted for Martin J. Walsh, former U.S. Secretary of Labor.

U.S. Secretary of Labor; JESSICA LOOMAN, Acting Administrator,

Defendants - Appellees.

ECONOMIC POLICY INSTITUTE; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL ABILITY CENTER; NATIONAL WOMEN'S LAW CENTER; STATE OF ARIZONA; SERVICE EMPLOYEES INTERNATIONAL UNION; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI, STATE OF MONTANA; STATE OF NEBRASKA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; PUBLIC CITIZEN; SAFARI CLUB INTERNATIONAL; COMMUNICATIONS WORKERS OF AMERICA; STATE OF ILLINOIS; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; DISTRICT OF COLUMBIA; STATE OF MAINE; STATE

OF MARYLAND; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON,

Amici Curiae

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:21-CV-03283-PAB-STV)

Caleb Kruckenberg, Pacific Legal Foundation, Arlington, Virginia (Michael A. Poon, Pacific Legal Foundation, Sacramento, California, and Steven M. Simpson, Pacific Legal Foundation, Arlington, Virginia, with him on the briefs), for Plaintiffs-Appellants.

Daniel Winik, Attorney, U.S. Department of Justice, Civil Division, Washington, D.C. (Brian M. Boynton, Principal Deputy Assistant Attorney General; U.S. Department of Justice, Civil Division, Washington, D.C.; Cole Finegan, United States Attorney for the State of Colorado; and Mark B. Stern, Attorney, United States Department of Justice, Civil Division, Washington, D.C., with him on the brief), for Defendants-Appellees.

Drew C. Ensign, Deputy Solicitor General (Kris Mayes, Arizona Attorney General, with him on the amici brief), Office of the Attorney General for the State of Arizona, Phoenix, Arizona, filed on behalf of the States of Arizona, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, and South Carolina), for Amici Curiae.

Jeremy E. Clare and Regina Lennox, Safari Club International, Washington, D.C., filed an amicus brief on behalf of Safari Club International in support of Plaintiffs-Appellants.

Lucas C. Townsend, Gibson Dunn & Crutcher, Washington, D.C.; Dayna Zolle Hauser, Gibson Dunn & Crutcher, Denver, Colorado and Ryan Azad, Gibson, Dunn & Crutcher, San Francisco, California, filed an amicus brief on behalf of The National Ability Center in support of Plaintiffs-Appellants.

Nandan M. Joshi and Allison M. Zieve, Public Citizen Litigation Group, Washington, D.C., filed an amicus brief on behalf of Public Citizen in support of Defendants-Appellees.

Sean A. Lev and JoAnn Kintz, Democracy Forward Foundation, Washington, D.C., filed an amicus brief on behalf of National Employment Law Project, Communications Workers of American, Service Employees International Union, National Women's Law Center, and Economic Policy Institute in support of Defendants-Appellees.

Sarah A. Hunger, Deputy Solicitor General, Kwame Raoul, Attorney General and Jane Elinor Notz, Solicitor General, Office of the Attorney General for the State of Illinois, Chicago, Illinois, filed an amicus brief

on behalf of the States of Illinois, California, Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington in support of Defendants-Appellees.

Before **HOLMES**, Chief Judge, **EBEL**, and **EID**, Circuit Judges.

HOLMES, Chief Judge.

Plaintiffs-Appellants Duke Bradford, Arkansas Valley Adventure (AVA), and the Colorado River Outfitters Association (CROA) appeal from the District of Colorado's order denying their motion to preliminarily enjoin a Department of Labor (DOL) rule requiring federal contractors to pay their employees a $15.00 minimum hourly wage. The DOL promulgated the rule pursuant to a directive in Executive Order (EO) 14,026, which President Biden issued on April 27, 2021. EO 14,026 imposed the minimum wage requirement on most federal contractors, and it rescinded an exemption for recreational services outfitters that operate pursuant to permits on federal lands, which President Trump had adopted in EO 13,838. President Biden issued EO 14,026 pursuant to his authority under the Federal Property and Administrative Services Act ("FPASA"), 40 U.S.C. §§ 101–1315, which authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" FPASA and that are "consistent with" FPASA, 40 U.S.C. § 121(a). One purpose of FPASA is to "provide

the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services." 40 U.S.C. § 101(1).[1]

Appellants argue that the district court erred in concluding that FPASA authorizes the minimum wage rule as applied to recreational services permittees because the government does not procure any services from them or supply anything to them. They also argue that the DOL acted arbitrarily and capriciously in promulgating the minimum wage rule without exempting recreational service permittees.

Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we **affirm**. We first conclude that Appellants have not shown a substantial likelihood of success on the merits that the DOL's rule was issued without statutory authority. Specifically, the district court did not err in concluding that FPASA likely authorizes the minimum wage rule because the DOL's rule permissibly regulates the supply of nonpersonal services and advances the statutory objectives of economy and efficiency. Furthermore, we hold that Appellants have not shown a substantial likelihood of success on the merits that the DOL's rule is arbitrary and capricious. In sum, we conclude that the district court did not err in denying Appellants' motion for a preliminary injunction.

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[1] As discussed further *infra*, a "[n]onpersonal services contract means a contract under which the personnel rendering the services are not subject . . . to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101.

I

A

On February 12, 2014, President Obama issued Executive Order 13,658, *Establishing a Minimum Wage for Contractors*, pursuant to his authority under FPASA. *See* 79 Fed. Reg. 9851 (Feb. 12, 2014) (to be codified at 29 C.F.R. pt.10). FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Act and that are "consistent with" the Act. 40 U.S.C. § 121(a). The purpose of FPASA is to "provide the Federal Government with an economical and efficient system for," inter alia, "[p]rocuring and supplying property and nonpersonal services." 40 U.S.C. § 101(1).

EO 13,658 directed executive departments and agencies, including the DOL, to include a clause in certain "new contracts, contract-like instruments, and solicitations" specifying that the contractor will pay a minimum wage of $10.10 per hour. 79 Fed. Reg. at 9851. EO 13,658 reflected President Obama's determination that "[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs." *Id.*

The order directed the Secretary of the DOL (the "Secretary") to issue regulations implementing the order, and, pursuant to this authority, the order authorized the Secretary to define a "new contract or contract-like instrument." *Id.* at 9852–53.

Following notice and comment, the DOL promulgated a final rule implementing EO 13,658. *See Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634 (Oct. 7, 2014) (to be codified at 29 C.F.R. pt.

10). The rule defined a contract as "an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law," which includes "any . . . permits." 79 Fed. Reg. at 60,722. In response to public comments, the rule clarified that special use permits (SUPs) issued by the U.S. Forest Service (USFS), Commercial Use Authorizations (CUAs) issued by the National Park Service (NPS), and "outfitter and guide permit agreements" with the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (USFWS), all qualified as contracts under EO 13,658. *See id.* at 60,652, 60,655.

In 2018, pursuant to his authority under FPASA, President Trump issued EO 13,838, *Exemption From Executive Order 13658 for Recreational Services on Federal Lands*. *See* 83 Fed. Reg. 25,341 (May 25, 2018). EO 13,838 concluded that applying EO 13,658 to "outfitters and guides operating on Federal lands . . . does not promote economy and efficiency in making these services available to those" seeking to recreate on federal lands. *Id.* Because "[s]easonal recreational workers have irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate," EO 13,838 reasoned that a minimum wage "threatens to raise significantly the cost of guided" services and "would generally entail large negative effects on hours worked," thereby restricting access to recreation on Federal lands. *Id.* Therefore, EO 13,838 exempted from coverage under EO 13,658 "contracts or contract-like instruments entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal

lands." *Id.* However, the order specified that the "exemption shall not apply to lodging and food services associated with seasonal recreational services." *Id.* The DOL thereafter promulgated a final rule that implemented EO 13,838. *See Minimum Wage for Contractors*, 83 Fed. Reg. 48,537 (Sept. 26, 2018) (to be codified at 29 C.F.R. pt. 10).

On April 27, 2021, President Biden issued EO 14,026, *Increasing the Minimum Wage for Federal Contractors*, again pursuant to his authority under FPASA. *See* 86 Fed. Reg. 22,835 (Apr. 27, 2021) (to be codified at 29 C.F.R. pts. 10, 23). Set to begin on January 30, 2022, EO 14,026 raised the minimum wage specified under EO 13,658 to $15 per hour. *See id.* at 22,835–37. The order reflected President Biden's determination that "[r]aising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." *Id.* at 22,835.

EO 14,026 also revoked EO 13,838, thereby eliminating the exemption from the minimum wage requirement for seasonal recreational service permittees. *See id.* at 22,836–37. As with EO 13,658, a contract falls within the scope of EO 14,026 only if (1) workers' wages under the contract "are governed by the Fair Labor Standards Act [("FLSA")], the Service Contract Act [("SCA")], or the Davis-Bacon Act [("DBA")], and (2) the contract is, as relevant here, "for services covered by the [SCA]" or is "entered into with the Federal Government in connection with Federal property or lands and related to offering services for . . . the general public." *Id.* at 22,837.

Following notice and comment, the DOL promulgated a final rule that implemented EO 14,026. *See*

Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021) (to be codified at 29 C.F.R. pts. 10, 23). Responding to comments from "stakeholders in the outdoor recreational industries," the rule clarified that, based on the DOL's "understanding" of these businesses, the minimum wage requirement applies to special use permits issued by the Forest Service, "CUA[s] . . . with the NPS, and "outfitter and guide permit agreements with the BLM and USFWS." *Id.* at 67,147–48. "The principal purpose of these legal instruments," according to the DOL, "seems to be furnishing services through the use of service employees," in which case they are covered under the SCA and, thus, EO 14,026. *Id.* at 67,148. Alternatively, the DOL stated that Section 8(a)(i)(D) of EO 14,026 covers these instruments as agreements "with the Federal Government in connection with Federal property or lands and related to offering services for . . . the general public." *Id.* at 67,151.

The DOL's minimum wage rule also clarified that the FLSA's overtime pay requirement of at least one and one-half times an employee's normal rate, *see* 29 U.S.C. § 207(a), applies under EO 14,026 to "holders of CUAs issued by the NPS, and permits issued by the Forest Service, BLM and USFWS." 86 Fed. Reg. at 67,152.

Finally, in the rule, the DOL responded to comments asserting that, "unlike procurement contracts," licenses or permits for the provision of recreational services on federal lands "do not contain a mechanism by which the holder of the instrument can 'pass on' potential costs related to operation of the Executive order to contracting agencies," as well as comments asserting that the application of the minimum-wage

requirement to "outfitter and guide permits would result in . . . business[es] needing to reduce employee work hours, reduce services, or increase prices." *Id.* Specifically, in responding, the DOL "recognize[d] and acknowledge[d] that there may be particular challenges and constraints experienced by non-procurement contractors that do not exist under more traditional procurement contracts." *Id.* But it "anticipate[d] that the economy and efficiency benefits of" a higher minimum wage would "substantially offset any potential adverse economic effects" by "reduc[ing] absenteeism and turnover in the workplace, improv[ing] employee morale and productivity, reduc[ing] supervisory and training costs, . . . increas[ing] the quality of services provided to the Federal Government and the general public," and ultimately—by virtue of that increased quality—"attract[ing] more customers and result[ing] in increased sales." *Id.* at 67,152–53. Furthermore, the DOL reasoned that "[s]uch benefits may be realized even where the contractor has limited ability to transfer costs to the contracting agency or raise prices of the services that it offers." *Id.* at 67,153.

B

Plaintiff-Appellant AVA provides guided outdoor excursions in Colorado, and Plaintiff-Appellant Duke Bradford owns and operates AVA. Aplts.' App. at 13 ¶¶ 1, 3 (Compl., filed Dec. 7, 2021). AVA conducts some of its tours on federal land pursuant to two government permits. *Id.* at 13 ¶ 4. One is a "Special Recreation Permit" from BLM that authorizes fishing trips in Colorado. *Id.* Another is a special use permit from USFS for operations in the White River National Forest. *Id.* For overnight trips, AVA pays guides a trip salary rather than an hourly wage. *Id.* at 14 ¶ 6. If converted into an hourly rate, these salaries typically

exceed $15 per hour. *Id.*; *see also id.* at 53 ¶ 5 (Decl. of Duke Bradford, filed Dec. 9. 2021). Accordingly, AVA pays its guides more than the minimum wage, which, in Colorado, is $12.56 per hour. *Id.* at 14 ¶ 6; *see also id.* at 170, Tr. 34:5–13 (Test. of Duke Bradford, Jan. 6, 2022). However, many guides work more than 40 hours per week, and "AVA's wages typically do not exceed the $15/hour threshold when including time-and-a-half overtime wages." *Id.* at 14 ¶¶ 6–7. As such, AVA alleges that it would incur compliance costs and increased labor costs should EO 14,026 go into effect and it was accordingly "required to pay overtime, based on a $15/hour minimum wage." *Id.* at 14 ¶ 7; *see id.* at 155–58, Tr. 19:22–22:2.

CROA is a trade association that represents the interests of its members, which consist of approximately fifty river-guide outfitters, including AVA. *See id.* at 55 ¶¶ 3, 6 (Decl. of David Costlow, filed on Dec. 7, 2021); Aplts.' Opening Br. at 11. Most of CROA's members operate on federal lands under special use permits. *See id.* at 55 ¶ 3. Like AVA, CROA's members typically pay their guides a flat fee on a per-trip basis. *Id.* at 55 ¶ 5. CROA alleges that "[i]ncreasing the wages for guides to $15/hour and paying overtime based on that wage would dramatically alter the wage structure for many of CROA's members." *Id.* at 56 ¶ 7. CROA expects that the new minimum wage requirement will cause labor costs to increase for its members, which will cause members to raise prices and eliminate trips. *Id.* at 56 ¶¶ 7–8.

C

Appellants filed a Complaint in the U.S. District Court for the District of Colorado on December 7, 2021, in which they challenged the DOL's rule implementing EO 14,026 and sought declaratory relief. *Id.*

at 11–13. In Count I, they asserted that FPASA did not authorize the DOL's "rule," and therefore the rule violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(C), as "agency action . . . in excess of statutory . . . authority." *Id.* at 25–27 ¶¶ 51–59. In Count II, they asserted that the "rule" is "arbitrary and capricious," in violation of Section 706(2)(A). *Id.* at 27–28 ¶¶ 60–65. And, in Count III, they asserted that because FPASA did not authorize the "rule," it violated the separation of powers, and even if FPASA did authorize the rule, the statute unconstitutionally delegated legislative power to the President and the DOL. *Id.* at 28–29 ¶¶ 66–77. Appellants then filed a Motion for a Preliminary Injunction. *Id.* at 31 (Mot. for Prelim. Injunc., filed Dec. 9, 2021).

After holding an evidentiary hearing, the district court denied Appellants' motion. *Id.* at 90, 136–37 (Dist. Ct. Order, filed Jan. 24, 2022). It first concluded that Mr. Bradford and AVA had Article III standing, but that CROA did not.[2] *Id.* at 101–05. The court then

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[2] Appellees do not dispute that Mr. Bradford and AVA have standing. Because at least one appellant has standing, we may consider this appeal. *See Massachusetts v. Env't Prot. Agency*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."). Appellants nevertheless argue in a footnote that the district court erred in concluding that CROA does not have Article III standing. *See* Aplts.' Opening Br. at 13–14 n.1. However, "[a]rguments raised in a perfunctory manner, such as in a footnote, are waived." *United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc). And we have applied the waiver doctrine from *Hardman* where a plaintiff challenged in a footnote the district court's conclusion that the plaintiff lacked standing. *See Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 793 n.5 (10th Cir. 2009). Accordingly, we conclude that Appellants waived their challenge concerning CROA's standing on appeal.

denied the Appellants' motion because it concluded that Appellants failed to demonstrate a "likelihood of success on the merits" on each of their claims. *Id.* at 121, 130, 135–36. It did not reach any of the other factors governing preliminary injunctions. *Id.* at 135. Appellants filed a notice of interlocutory appeal on January 26, 2022, and on February 28, 2022, the district court denied their motion for an injunction pending appeal.

Appellants also filed a motion for an injunction pending appeal with this Court, which a two-judge panel granted on February 17, 2022. *See Bradford v. U.S. Dep't of Lab.*, No. 22-1023, at *1 (10th Cir., filed Feb. 17, 2022) (unpublished) [hereinafter "Motions Panel Order"]. Specifically, the motions panel enjoined the rule "in the context of contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands." *Id.* at 2. The rule had gone into effect on January 30, 2022, and, except as enjoined, remains in effect today.

II

Appellants raise two overarching arguments on appeal. First, Appellants claim that the district court erred in concluding that they are unlikely to succeed on the merits of their claim that the DOL's minimum wage rule exceeded the authority granted under FPASA. *See* Aplts.' Opening Br. at 16–38. Second, they argue that the district court erred in concluding that they are unlikely to succeed on the merits of their claim that the rule is arbitrary and capricious. *See id.* at 38–48. As such, Appellants claim that the district court erred in denying their motion for a preliminary injunction.

After carefully considering the briefs and the parties' oral arguments, we conclude that the district court correctly denied Appellants' motion for a preliminary injunction. In reaching that conclusion, we first hold that Appellants have not shown a likelihood of success on the merits that the DOL's rule was issued without statutory authority. More specifically, the district court did not err in concluding that FPASA likely authorizes the minimum wage rule because the DOL's rule permissibly regulates the supply of nonpersonal services and advances the statutory objectives of economy and efficiency. Furthermore, we hold that Appellants have not demonstrated a likelihood of success on the merits that the DOL's rule is arbitrary and capricious. Accordingly, we uphold the district court's order.

III

"We review the district court['s] denial of a preliminary injunction for an abuse of discretion." *Diné Citizens Against Ruining Our Env't v. Jewell,* 839 F.3d 1276, 1281 (10th Cir. 2016). "An abuse of discretion occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1223–24 (10th Cir. 2008) (quoting *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1065 (10th Cir. 2001)).

To obtain a preliminary injunction, a "plaintiff must establish . . . (1) a substantial likelihood of prevailing on the merits[,] (2) irreparable harm unless the injunction is issued[,] (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party[,] and (4) that the

injunction, if issued, will not adversely affect the public interest." *Diné*, 839 F.3d at 1281 (quoting *Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002)). "[B]ecause a preliminary injunction is an extraordinary remedy, the [movant's] right to relief must be clear and unequivocal." *Wilderness Workshop*, 531 F.3d at 1224 (alterations in original) (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)). We "may affirm a district court decision 'on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.'" *Dominion Video Satellite*, 269 F.3d at 1157 (quoting *United States v. Sandoval*, 29 F.3d 537, 542 n.6 (10th Cir. 1994)).

IV

A

Appellants first argue that FPASA "only empowers the President to control the 'procur[ement] and supply[]' of nonpersonal services by 'the Federal Government.'" Aplts.' Opening Br. at 18 (alterations in original) (quoting 40 U.S.C. § 101(1)). However, Appellants note that "the government does not supply the relevant recreational services" nor does it "procur[e] anything." *Id.* Thus, Appellants assert that "[i]t makes no sense to adopt DOL's view that the agency can regulate a company, like AVA, [which] neither procures nor supplies any nonpersonal services to the government, just because AVA later supplies nonpersonal services to its customers." *Id.* at 19. Appellants thus contend that the DOL's rule is not a permissible regulation under FPASA. In our view, however, Appellants' argument is contrary to the plain text of FPASA.

FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the Act and that are "consistent with" the Act. 40 U.S.C. § 121(a). "The purpose" of FPASA "is to provide the Federal Government with an economical and efficient system for . . . (1) *[p]rocuring and supplying property and nonpersonal services* . . . (2) [u]sing available property[,] (3) [d]isposing of surplus property [, and] (4) [r]ecords management." 40 U.S.C. § 101 (emphasis added). Thus, as our precedent makes clear, the Act authorizes the President to issue "policies and directives" that are consistent with the statute's purposes—including regulating the supply of nonpersonal services. *See City of Albuquerque v. U.S. Dep't of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) (concluding that "Congress chose to utilize a relatively broad delegation of authority in [FPASA]" but that Congress "did instruct the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property" (omission in original) (quoting 40 U.S.C. § 471 (2000), now codified as amended at 40 U.S.C. § 101)). Crucially, contrary to Appellants' assertions, § 101 of FPASA does not specify any particular entity that must receive the nonpersonal services to which it refers.

FPASA defines "nonpersonal services" as "contractual services designated by the Administrator of General Services, other than personal and professional services." 40 U.S.C. § 102(8). The Federal Acquisition Regulation (FAR), which heads of agencies—including the Administrator of General Services—promulgated pursuant to authority granted under FPASA, *see* 48 C.F.R. § 1.103(b); 40 U.S.C. § 121(c), explains the difference between "personal" and "nonpersonal" service

contracts. *See also Kentucky v. Biden*, 23 F.4th 585, 604 n.11 (6th Cir. 2022) (citing FAR to delineate between "personal" and "nonpersonal" services contracts). "A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." 48 C.F.R. § 37.104(a). By contrast, a "[n]onpersonal services contract means a contract under which the personnel rendering the services are not subject . . . to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101.

Here, Appellants "supply[]" services, 40 U.S.C. § 101(1), through the guided tours they offer. And the government's provision of federal permits to Appellants is a part of "an economical and efficient system" for supplying those nonpersonal services to the public. *Id.* Indeed, the DOL's understanding of the contractual arrangement is that outfitters enter into agreements with the BLM, and "[t]he principal purpose of these legal instruments" is for the government to "furnish[] services through the use of service employees." 86 Fed. Reg. at 67,148. Furthermore, the permits the government issues to the outfitters contain terms reflecting the government's "concern[] with the ways in which outfitters supply recreational services to the public," such as the need for outfitters to "use hardened trails within riparian areas" in order to avoid "damag[ing] the land." *Bradford v. U.S. Dep't of Lab.*, 582 F. Supp. 3d 819, 834 (D. Colo. Jan. 24, 2022); *see also* Aplees.' Suppl. App. at 4–5 (AVA Special Recreation Permit Stipulations, dated June 16, 2014).

Moreover, as Mr. Bradford testified, AVA's permit with BLM prohibits AVA from representing that BLM provides the guiding services customers receive from

AVA. *See* Aplts.' App. at 148–49, Tr. 12:6–13:5 (Test. of Duke Bradford, dated Jan. 6, 2022); id. at 261 (BLM Special Recreation Permit, dated July 26, 2012). Thus, in terms of the relationship between the government and AVA, the permit qualifies as a "nonpersonal services contract," as there is no direct employment relationship between BLM and AVA's guides. 48 C.F.R. § 37.101. And § 101 of FPASA does not specify any particular entities that must receive the "nonpersonal services" to which it refers, thereby covering—as a textual matter—services Appellants supply to the public. 40 U.S.C. § 101. Stated another way, there is no explicit requirement in § 101 that the government itself directly supply the property or services under FPASA.

Furthermore, Appellants' interpretation—*viz.*, that "supplying nonpersonal services" solely encompasses transactions in which a contractor provides services to the government—would render portions of FPASA superfluous. Aplts.' Opening Br. at 19. As Appellees argue, "[w]hen a contractor provides goods or services directly to the federal government, the government is 'procuring' those goods or services." Aplees.' Resp. Br. at 17. If we interpret the statute such that a contractor is "supplying" services to the government when the government is simultaneously "procuring" those services, "supply[]" retains no meaning independent of "procur[e]." 40 U.S.C. § 101(1). Indeed, doing so would violate the canon requiring "that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 213 (2018) (alteration

in original) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).[3]

Thus, contrary to Appellants' assertions, "supplying . . . nonpersonal services" appears to encompass transactions in which a contractor provides services to the public. 40 U.S.C. § 101. As such, Appellants—through the guided tours they offer to the public—"supply[]" "nonpersonal services" within the meaning of FPASA. *Id.* Consistent with the language of FPASA and our precedent, then, the President "may prescribe policies and directives" regulating the supply of these nonpersonal services. 40 U.S.C. §§ 101, 121(a).[4]

Accordingly, Appellants are unlikely to succeed on the merits in showing that the DOL's rule is not a permissible regulation under FPASA. Stated another

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[3] To respond to this superfluity problem, Appellants offer a hypothetical involving campground services. They contend that the government may "supply" services by providing access to a federal campground while simultaneously "procuring" contractual services from a campground host. Aplts.' Opening Br. at 19–20; Aplts.' Reply Br. at 11–12. But this example fails to account for the definition of "nonpersonal services." *See* 40 U.S.C. § 102(8). If the government is "supplying" services directly by providing access to the campground, they are not supplying "nonpersonal services" because the services are not "contractual," *id.*, as they are not provided by a contractor.

[4] Appellants contend that, if our interpretation were correct, it would be "difficult to imagine any economic transaction that falls outside the statute's reach." Aplts.' Opening Br. at 19. However, we note that the President's authority extends only to entities that contract with the federal government—*viz.*, the minimum wage rule applies to only those employees of a contracting entity who work on or in connection with a covered contract. *See* 86 Fed. Reg. at 22,835. As such, we are unpersuaded by Appellants' rhetoric that the authority exercised here would encompass all "economic transaction[s]." Aplts.' Opening Br. at 19.

way, there is a clear relationship between the statute conferring authority (i.e., FPASA) and the DOL's rule.

B

Next, Appellants contend that the "DOL's invocation of the Procurement Act cannot be justified." Aplts.' Opening Br. at 24. Specifically, Appellants assert that—under FPASA—the President's authority is "limited to actions that he considers 'essential' or 'indispensable' to provide the 'prudent use' of government resources 'without wasting materials.'" *Id.* at 23. Here, however, Appellants claim that the net result of the DOL's rule "will be more costs to the public, to nonprocurement firms, and to the government—the opposite of a permitted action under [FPASA]." *Id.* at 24. Yet Appellants' argument lacks merit.

FPASA authorizes only "policies and directives that the President considers necessary" to "provide . . . an economical and efficient system for" procurement and supply. 40 U.S.C. §§ 101(1), 121(a); *see also City of Albuquerque*, 379 F.3d at 914; *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003). To fall within the authority granted, orders issued under FPASA must have a "'sufficiently close nexus' to the values of [economy and efficiency]." *Chao*, 325 F.3d at 366 (quoting *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 788, 792 (D.C. Cir. 1979)); *City of Albuquerque*, 379 F.3d at 914 (concluding that an executive order under FPASA must be "sufficiently related" to "establish[ing] 'an economical and efficient system'" for procurement and supply (quoting 40 U.S.C. § 471 (2000), currently codified at 40 U.S.C. § 101)).

Contrary to Appellants' interpretation, however, "'[e]conomy' and 'efficiency' are not narrow terms."

Kahn, 618 F.2d at 789. "[T]hey encompass those factors like price, quality, suitability, and availability of goods or services that are involved in all acquisition decisions." *Id.* The standard is a "lenient" one, and courts have respected the President's judgment as to how a given executive order is likely to advance the statute's objectives. *Chao*, 325 F.3d at 367.

Here, the DOL's rule has a "sufficiently close nexus" to the values of economy and efficiency. *Id.* at 366 (quoting *Kahn*, 618 F.2d at 792). According to the government, the DOL's rule "promotes economy and efficiency" by "enhanc[ing] worker productivity and generat[ing] higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." 86 Fed. Reg. at 22,835. Thus, even if the rule could plausibly increase costs for the government and the public, enhanced worker productivity and higher quality work—standing alone—are sufficient justifications to invoke FPASA. In other words, the President could consider the DOL's minimum wage rule necessary to "provide . . . an economical and efficient system for" procurement and supply. 40 U.S.C. § 101.

Indeed, the D.C. Circuit's decision in *Chao* supports our conclusion. There, the court upheld an executive order requiring federal contractors to notify employees of their rights not to join a union, on the basis of President Bush's judgment that "[w]hen workers are better informed of their rights, . . . their productivity is enhanced." *Chao*, 325 F.3d at 366. *Chao* reached this conclusion even though "[t]he link may seem attenuated" and the order could have produced the "opposite effects or no effects at all." *Id.* at 366–67. Accordingly, here, like in *Chao*, President Biden could have determined that the DOL's rule advanced the

statutory values of economy and efficiency by enhancing worker productivity, even if the rule could theoretically produce the opposite effects or no effects at all.

Furthermore, we could also uphold the DOL's rule under Appellants' stringent interpretation of economy and efficiency—*viz.*, the President must "show a 'nexus between the wage and price standards and likely savings to the Government.'" Aplts.' Opening Br. at 22 (quoting *Kahn*, 618 F.2d at 793). Here, the DOL "anticipates that the economy and efficiency benefits of [EO] 14[,]026 will offset potential costs." 86 Fed. Reg. at 67,152. Specifically, it expects that "reduc[ing] absenteeism and turnover in the workplace, improv[ing] employee morale and productivity, [and] reduc[ing] supervisory and training costs" "will substantially offset any potential adverse economic effects." *Id.* at 67,153. This analysis also applies to "permittees, licensees, and CUA holders"—such as AVA and other CROA members. *Id.* Admittedly, DOL concedes that permittees have a "limited ability to transfer costs to the contracting agency or raise prices of the services that [they] offer[]," which "may result in reduced profits in certain instances." *Id.* at 67,153, 67,206. However, DOL makes clear that such reduced profits will only occur when "none of the beneficial effects"—such as reduced absenteeism and improved productivity—"discussed in [DOL's] analysis appl[ies]." *Id.* at 67,206. Thus, even under Appellants' interpretation, the DOL's rule has a sufficiently close nexus to the values of economy and efficiency.

Indeed, *Kahn*—i.e., the case that Appellants primarily rely upon to support their position—confirms our conclusion. There, the D.C. Circuit upheld an executive order issued under FPASA that required federal contractors to comply with certain wage and price

controls to curb inflation. *See Kahn*, 618 F.2d at 785–86. The court acknowledged that the order could cause the government to award contracts to higher bidders that complied with the controls over lower bidders that did not. *See id.* at 792–93. It nevertheless concluded that the order's controls would promote economy and efficiency by reducing the overall rate of inflation in government contracting, which would "likely have the direct and immediate effect of holding down the Government's procurement costs." *Id.* Similarly, here, the DOL's rule will cause the government to award federal permits to contractors that comply with the increased minimum wage requirements over those that do not. Yet we defer to DOL's determination that such wage controls could promote economy and efficiency by reducing costs in the long-term.

Accordingly, Appellants are unlikely to succeed on the merits in showing that the DOL's rule lacks a sufficiently close nexus to the statutory objectives of economy and efficiency.

C

Finally, Appellants request that we read FPASA narrowly and "construe any uncertainty in" their favor. Aplts.' Opening Br. at 27. Specifically, they claim that FPASA (1) should not be read to displace other statutory schemes governing contractor wages, (2) should be read narrowly given its major economic impact, and (3) should be construed to avoid a nondelegation problem. *See id.* at 27–38. We address each argument in turn.

1

First, Appellants contend that a narrowing construction is appropriate given that other federal statutes explicitly impose a minimum wage for federal

contractors—*viz.*, the Davis-Bacon Act (DBA), the Walsh-Healy Public Contracts Act (PCA), and the Service Contract Act (SCA). *See id.* at 29. More specifically, Appellants assert that Congress spoke directly in the DBA, PCA, and SCA "to the issue of whether federal contractors should be required to pay a minimum wage." *Id.* As such, they claim that "[i]t is 'implausible' that Congress meant to grant the President [through FPASA] the 'implicit power to create an alternative to the explicit and detailed [] scheme' that Congress set out in these statutes." *Id.* at 30 (quoting *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1226 (10th Cir. 2017)). We are unpersuaded.

Appellants primarily rely on *New Mexico v. Department of Interior* to support their argument. In *New Mexico*, we addressed whether a regulation promulgated by the U.S. Department of Interior (DOI) under the Indian Gaming Regulatory Act (IGRA) complied with the "explicit and detailed remedial scheme" outlined in the very same statute. 854 F.3d at 1226. The statutory scheme called for tribes and states to negotiate compacts permitting gaming on reservations, and it authorized tribes to sue states in federal court when states failed to negotiate in good faith. *See id.* at 1211. If the court found that a state failed to negotiate in good faith, the statute then authorized the court to issue injunctive relief, after which the statute authorized the DOI to issue gaming procedures. *See id.* at 1212. But after Congress enacted the IGRA, the Supreme Court "made clear that a state can invoke sovereign immunity in response to such a suit." *Id.* at 1211 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996)). In response to the Court's decision, DOI—pursuant to its alleged authority under

the IGRA—issued a rule that prescribed the applicable gaming procedures for when a district court dismissed a tribe's suit based on sovereign immunity. *See id.*

New Mexico held that the DOI rule was unlawful because it deviated "in fundamental ways" from the "remedial scheme" Congress enacted in the IGRA. *Id.* at 1225–28. Specifically, we found "implausible the Secretary's assertion of implicit power to create an alternative to the explicit and detailed remedial scheme that IGRA prescribes." *Id.* at 1226.

However, the present matter is distinguishable. In *New Mexico*, the agency claimed authority under a particular statute—the IGRA—to issue rules in an area where the very same statute created its own "explicit and detailed remedial scheme." *Id.* Accordingly, we found it "implausible" that the IGRA would grant the agency "implicit power to create an alternative" procedure where the statute set out its own in such detail. *Id.* However, the DOL has claimed no such authority here. Specifically, it has not issued minimum wage rules under the authority of statutes providing for their own statutory minimum wage schemes for federal contractors—i.e., the DBA, PCA, and SCA. Rather, it has issued minimum wage rules under a separate statute—FPASA—where the rules do not constitute an alternative regulatory scheme. Accordingly, *New Mexico* has virtually nothing to say about the propriety of the DOL's action here.

Furthermore, Appellants concede that the minimum wage rule issued pursuant to FPASA does not "conflict[]" with the DBA, PCA, and SCA, as those statutes set only minimum wage requirements—i.e., a floor below which wages are not allowed to fall. Aplts.' Reply Br. at 15. Stated another way, the DBA, PCA,

and SCA do not preclude the higher-wage requirement issued here. Thus, this is not a case where we must apply "the well-established principle that, when two statutes conflict, the 'specific governs the general.'" *R-S-C v. Sessions*, 869 F.3d 1176, 1184 (10th Cir. 2017) (emphasis added) (quoting *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012)).

Similarly, Appellants fail to support any claim that the later-enacted SCA (passed in 1965) displaces any authority to regulate contractor wages under FPASA (passed in 1949). "The later statute displaces the first only when the statute 'expressly contradict[s] the original act' or if such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1333 (D.C. Cir. 1996) (alterations and omission in original) (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)). Appellants make no such showing here.

Rather, Appellants contend that the issue is whether we should interpret FPASA to "broadly grant power over [federal contractor] wages" when it does not reference wages, and other statutes establish specific rules in this area. Aplts.' Reply Br. at 15. But Appellants do not cite to any provision in these statutes foreclosing the authority to set higher minimum wage requirements. And Congress frequently sets minimum requirements while expecting that other entities will adopt more stringent regulations. *See, e.g.*, *Union Elec. Co. v. Env't Prot. Agency*, 427 U.S. 246, 261–63 (1976) (holding that a provision of the Clean Air Act (CAA) authorized states to issue emissions regulations that are "more stringent" than national standards). Although states are often the actors that impose higher standards, the federal government does so too

in certain circumstances, as envisioned in the Fair Labor Standards Act. *See* 29 U.S.C. § 218(a) ("No provision of this chapter . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." (emphasis added)). Thus, contrary to Appellants' assertions, there is no indication here that Congress intended for any of the minimum wage statutes to preclude the payment of higher wages to employees working on or in connection with covered contracts. Accordingly, we are unwilling to apply a narrowing construction on this basis.

2

Next, Appellants contend that "the Procurement Act must be read narrowly given its major economic impact." Aplts.' Opening Br. at 32 (bold-face font omitted). Specifically, Appellants claim that the DOL's rule "'is economically significant,' since it would result in direct costs to employers of '$1.7 billion per year over 10 years.'" *Id.* at 32–33 (quoting 86 Fed. Reg. at 67,194) (emphasis omitted). Given its economic significance, Appellants contend that we "must meet DOL's rule 'with a measure of skepticism,' and look for a clear statement from Congress." *Id.* at 33 (quoting *Util. Air Regul. Grp. v. Env't Prot. Agency*, 573 U.S. 302, 304 (2014)). Appellants assert this is especially true given the DOL's "reed-thin" statutory argument. *Id.* We are unpersuaded.

Although courts generally "enforce plain and unambiguous statutory language according to its terms," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), "[w]here the statute at issue is one that confers authority upon an administrative agency," there are certain "'extraordinary cases' that

. . . provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 721 (2022) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). In such cases, "the agency must . . . point to 'clear congressional authorization'" for the proposed regulation. *Id.* at 723 (quoting *Util. Air*, 573 U.S. at 324).

In this vein, the so-called Major Questions Doctrine applies where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" or make "decisions of vast 'economic and political significance.'" *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159–60). In arguing that the Major Questions Doctrine applies, Appellants focus on the economic effects of the broader minimum wage rule, which covers both non-procurement and procurement contractors. For the purposes of deciding this appeal, we will assume—without deciding—that Appellants framing of the specific "question" implicating the Major Questions Doctrine is correct.[5] Nonetheless, their argument is unavailing for four reasons.

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[5] We note that Appellants' framing of the specific "question" implicating the Major Questions Doctrine may not be correct. In particular, the primary issue presented on appeal is whether FPASA grants authority to regulate non-procurement recreational service permittees, such as AVA and other CROA members. Yet, in arguing the Major Questions Doctrine applies, Appellants shift their focus to the economic effects of the broader minimum wage rule. This appears to be in tension with the Supreme Court's jurisprudence—which focuses on the effects of the challenged action to determine whether it presents a purportedly "major" question. *See Util. Air*, 573 U.S. at 312–314; *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231–

First, this is not a case in which the executive branch seeks to locate expansive authority in "modest words," "vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also West Virginia*, 597 U.S. at 724 (applying Major Questions Doctrine where the EPA claimed authority to "substantially restructure the American energy market" based on "an 'ancillary provision[]' of the [CAA]," which "was designed to function as a gap filler" (first alteration in original) (quoting *Whitman*, 531 U.S. at 468)). Instead, as discussed *supra*, FPASA authorizes the President to "prescribe policies and directives that the President considers necessary to carry out this subtitle," 40 U.S.C. § 121(a), which includes "provid[ing] the Federal Government with an economical and efficient system for . . . [p]rocuring and supplying property and nonpersonal services," 40 U.S.C. § 101(1). In employing such expansive language, "Congress chose to utilize a relatively broad delegation of authority in the Federal Property and Administrative Services Act of 1949." *City of Albuquerque*, 379 F.3d at 914. Accordingly, the DOL's interpretation of FPASA does not involve "hid[ing] elephants in mouseholes." *Whitman*, 531 U.S. at 468.

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32 (1994). If we were instead to frame the "major" question as DOL's authority to regulate *non-procurement permittees*, that would clearly not pose a question of "vast 'economic and political significance.'" *Util. Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160). However, because the Appellees do not challenge the Appellants' framing of the question, we will assume that Appellants' framing is correct for purposes of resolving this appeal. *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, ... we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

Second, *Utility Air* makes clear that the Supreme Court's concern is with an "enormous and transformative expansion in . . . regulatory authority without clear congressional authorization." 573 U.S. at 324. Here, however, EO 14,026 and the DOL's rule do not exercise the government's traditional "regulatory authority." *Id.* Instead, they invoke the government's proprietary authority. To be sure "[a]n exercise of proprietary authority can amount to a regulation if it seeks to regulate conduct unrelated to the government's proprietary interests." *Georgia v. President of the U.S.*, 46 F.4th 1283, 1314 n.3 (11th Cir. 2022) (Anderson, J., concurring in part and dissenting in part); *see also Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002) (holding that an executive order "establish[ed] no condition that can be characterized as 'regulatory'" because it did not "address . . . projects unrelated to those in which the Government has a proprietary interest"). But here, the DOL's rule relates to the government's proprietary interest in the "economical and efficient" procurement of services. 40 U.S.C. § 101(1).

"Like private individuals and businesses, the Government enjoys the unrestricted power . . . to determine those with whom it will deal." *Perkins v. Luken Steel Co.*, 310 U.S. 113, 127 (1940). Here, the challenged minimum-wage requirement does not apply to employers generally, or even to employees of covered employers who do not perform work on or in connection with federal contractors. Instead, the rule simply reflects the President's management decision that the federal government will do business with companies only on terms he regards as promoting economy and efficiency. More specifically, the President has determined that he will issue permits—granting access to

federal lands for the supply of guided tours—to outfitters that comply with the minimum wage rule, which he deems necessary to carry out the objectives of economy and efficiency. This exercise of proprietary authority is entirely within the bounds of the President's authority. *See NASA v. Nelson*, 562 U.S. 134, 148 (2011) (noting that when the government acts "in its capacity 'as proprietor' and manager of its 'internal operation,'" it "has a much freer hand" than when it "exercise[s] its sovereign power 'to regulate.'" (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961))).

Third, even assuming DOL is exercising significant regulatory authority, the Supreme Court has typically applied the Major Questions Doctrine where an "agency claim[ed] to discover" regulatory authority for the first time "in a long-extant statute." *Util. Air*, 573 U.S. at 324; *see id.* ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159)); *Biden v. Nebraska*, 600 U.S. ----, 143 S. Ct. 2355, 2372 (2023) ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act.").

By contrast, over the decades since it was enacted, presidents have issued numerous executive orders under FPASA that regulate federal contractors to promote economy and efficiency in procurement and supply. Most relevant here, presidents during the past three administrations have issued executive orders under FPASA that imposed minimum wage requirements for federal contractors. *See* EO 13,658 (Feb. 12, 2014), 79 Fed. Reg. 9851; EO 13,838 (May 25, 2018),

83 Fed. Reg. 25,341 (amending EO 13,658 to exempt recreational service workers without otherwise revoking the minimum wage requirement and determining that the minimum wage requirement still applied to "lodging and food services associated with seasonal recreational services"); EO 14,026 (Apr. 27, 2021), 86 Fed. Reg. 22,835 (imposing an increased minimum wage for federal contractors and rescinding the exemption for recreational service workers).

Furthermore, beyond the specific context of a minimum wage, presidents have issued—and courts have upheld—a wide range of orders under FPASA governing federal contractors and their workers, often without a direct connection to cost reduction. *See, e.g.*, *Chao*, 325 F.3d at 362, 366–67 (upholding 2001 executive order requiring federal contractors to notify employees of certain labor rights); *Kahn*, 618 F.2d at 796 (upholding 1978 executive order regulating contractor prices and wages); *Contractors Ass'n of E. Pa. v. Sec'y of Lab.*, 442 F.2d 159, 170–71 (3d Cir. 1971) (addressing 1969 executive order imposing affirmative action and non-discrimination requirements on certain federal contractors and concluding that FPASA authorized the order, partly because it helped prevent contractors from overcharging the government). These examples illustrate that unlike *West Virginia*, *Utility Air*, and *Brown & Williamson*, here the President did not "'claim[] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'" *West Virginia*, 597 U.S. at 724 (second alteration in original) (quoting *Util. Air*, 573 U.S. at 324). Instead, consistent with longstanding historical practice, the President issued

yet another executive order under FPASA that regulated federal contractors to promote economy and efficiency in procurement and supply.[6]

Moreover, this is not a case in which the agency issuing the minimum wage rule lacks "expertise" in the relevant area of policymaking. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated [a decision regarding the availability of tax credits for use on health insurance exchanges] to the IRS, which has no expertise in crafting health insurance policy of this sort."); *Gonzales v. Oregon*, 546 U.S. 243, 265–67 (2006). Clearly, DOL does not lack "expertise" in setting minimum wages for federal contractors. Indeed, Congress delegated this very responsibility to DOL in

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[6] *Kentucky* is distinguishable for similar reasons. There, the Sixth Circuit applied the Major Questions Doctrine in holding that FPASA did not authorize an executive order requiring employees of federal contractors to become vaccinated against COVID-19. *See Kentucky*, 23 F.4th at 589, 604, 606–08. Without a clear statement from Congress, *Kentucky* refused to interpret FPASA as authorizing the President "to effect major changes in the administration of public health," a "purpose never-before recognized." *Id.* at 607. But *Kentucky* explicitly distinguished orders pertaining to "wage and price controls," non-discrimination, and labor rights, which "ha[ve] a 'close nexus' to the ordinary hiring, firing, and management of labor." *Id.* at 607–08 (quoting *Kahn*, 618 F.2d at 792). The court reasoned that "none of those [rationales] comes even close to [mandating] a medical procedure for one-fifth (or more) of our workforce," which it deemed an unprecedented assertion of authority under FPASA. *Id.*

Here, however, three presidential administrations have imposed a minimum wage rule under FPASA, and the rule falls far closer than a vaccine mandate to the orders governing "management of labor," such as "wage and price controls," *id.* at 607, that administrations have imposed since Congress enacted FPASA. As such, we think the rationale underlying *Kentucky* is inapplicable here.

a related context. *See Int'l Bhd. of Elec. Workers, Loc. 113 v. T&H Servs.*, 8 F.4th 950, 953–54 (10th Cir. 2021) (discussing DOL's role in determining a prevailing wage under the Davis-Bacon Act). Thus, given that this case differs markedly from those in which the Supreme Court applied the Major Questions Doctrine, we decline to apply that doctrine here.

3

Finally, Appellants argue that we must read FPASA narrowly to avoid the constitutional question of whether the statute impermissibly delegates legislative authority. *See* Aplts.' Opening Br. at 34–38. More specifically, Appellants claim that "an interpretation of the Procurement Act that allowed the President to unilaterally displace existing minimum wage rules for employers who merely have a special use permit" would raise a nondelegation concern. *Id.* at 35 (emphasis omitted). We conclude that no such concerns arise here.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems," we must "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). Under the "nondelegation doctrine," which is "rooted in the principle of separation of powers that underlies our tripartite system of Government[,] . . . Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). We therefore must interpret FPASA in a manner that does not "raise serious" questions under the nondelegation doctrine. *DeBartolo*, 485 U.S. at 575.

"[A] delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy v. United States*, 588 U.S. ----, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Supreme Court "[has] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). It has struck down statutory provisions under the nondelegation doctrine "[o]nly twice in this country's history[,] . . . in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy*, 139 S. Ct. at 2129 (quoting *Mistretta*, 488 U.S. at 373 n.7); *see also United States v. Rickett*, 535 F. App'x 668, 674–75 (10th Cir. 2013) (explaining that "[b]etween 1789 and 1935—a period spanning 146 years of constitutional history—the Supreme Court 'never struck down a challenged statute on delegation grounds,'" and that it has done so only twice since, both times in 1935 (quoting *Mistretta*, 488 U.S. at 373)).[7] And the Court has approved at least arguably broad delegations requiring agencies to regulate in the "public interest," *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943), to set prices that in an agency administrator's "judgment will be generally fair and equitable," *Yakus v. United States*, 321 U.S. 414, 421–22, 427 (1944), and to set air quality standards that are "requisite to protect the public

[7] Recognizing that this unpublished decision is not binding on us, we rely on it for its persuasive value. *See, e.g.*, *United States v. Engles*, 779 F.3d 1161, 1162 n.1 (10th Cir. 2015).

health,'" *Whitman*, 531 U.S. at 472 (quoting 42 U.S.C. § 7409(b)(1)).

Appellants' nondelegation challenge is untenable under these precedents. For example, in *Whitman*, a provision of the CAA provided an intelligible principle by merely delegating authority to set air quality standards that, "in the judgment of the [EPA] Administrator" and in conformity with certain statutory criteria, "are *requisite* to protect the public health." 531 U.S. at 472 (emphasis added) (quoting 42 U.S.C. § 7409(b)(1)). The term "requisite" channeled agency discretion because the term authorized only actions taken to protect public health that are "sufficient, but not more than necessary." *Id.* at 473. Similarly, FPASA only authorizes executive orders that "the President considers *necessary*" to promote an "*economical*" and "*efficient*" system for procuring and supplying goods and services. *See City of Albuquerque*, 379 F.3d at 914 n.6. These italicized terms likewise channel executive discretion because they encompass only actions that the President considers necessary to increase productivity or quality of service in procurement and supply with little or no waste.

This analysis is also consistent with our precedent. In *City of Albuquerque*, a city brought a challenge under the Administrative Procedure Act arguing that the Department of Interior violated an executive order issued pursuant to FPASA by selecting office space in a manner that conflicted with procedures dictated under the order. *See* 379 F.3d at 904–05, 913. To establish prudential standing, the city had to demonstrate that it was "within the 'zone of interests' of a statute

supporting standing under the [APA]." *Id.* at 913.[8] Because neither the executive order nor FPASA provided an explicit right of action, the city needed to establish that the executive order had a "statutory foundation," in which case "it is given the effect of a congressional statute." *Id.* (quoting *City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997)).

We concluded that FPASA "provide[d] a sufficient statutory foundation for [the executive order]." *Id.* at 914. As we explained, "Congress may delegate responsibility to the executive branch so long as Congress provides an 'intelligible principle' to guide the exercise of the power." *Id.* (quoting *J.W. Hampton*, 276 U.S. at 409). We recognized that Congress used "a relatively broad delegation of authority in [FPASA]," but we explained that Congress "instruct[ed] the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property." *Id.* (quoting 40 U.S.C. § 471 (2000), currently codified at 40 U.S.C. § 101)). And we concluded that directions in the executive order "concerning the consideration of locations within [a] central business area are sufficiently related to [FPASA] to be a valid exercise of the Act's delegated authority." *Id.* In so holding, we recognized that FPASA provides an "intel-

[8] Since we decided *City of Albuquerque*, the Supreme Court has clarified that "the zone of interests test is not prudential in origin and is indeed not a standing inquiry at all." *Hill v. Warsewa*, 947 F.3d 1305, 1309 (10th Cir. 2020). However, this clarification has no material relevance to our analysis here of Appellants' nondelegation challenge.

ligible principle" by only authorizing actions that promote economy and efficiency in procurement and supply. *See id.* at 914–15.[9]

Thus, given the clear guidance of our precedent, we must conclude that the rule at issue here does not present any nondelegation concerns.

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Accordingly, for the foregoing reasons, we hold that Appellants have not shown a likelihood of success on the merits that the DOL's rule was issued without statutory authority. More specifically, the district court did not err in concluding that FPASA likely authorizes the minimum wage rule because the DOL's rule permissibly regulates the supply of nonpersonal services and advances the statutory objectives of economy and efficiency.

V

Next, Appellants challenge the DOL's minimum wage rule as arbitrary and capricious due to three purported defects in its rescission of the exemption for recreational services: *first*, because it failed to "consider[] alternatives" to rescinding the exemption; *sec-*

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[9] Appellants attempt to distinguish *City of Albuquerque*, claiming that we "upheld [FPASA] against a delegation challenge *because* the economy and efficiency limits meaningfully cabined the President's authority." Aplts.' Reply Br. at 21. But *City of Albuquerque* found no delegation concern with an executive order governing office-site selection that had no obvious connection to cost reduction. *See* 379 F.3d at 905, 914–15 (addressing order requiring agencies to prioritize central business districts in selecting office space, without any mention of reducing costs). Appellants do not explain why FPASA "meaningfully cabined the President's authority" in connection with that order but fails to do so in connection with the minimum wage rule. Aplts.' Reply Br. at 21.

ond, because it rescinded the exemption "without acknowledging the significant reliance interests at stake"; and *third*, because it failed to explain why it "disregarded its own prior conclusions" pertaining to the exemption. Aplts.' Opening Br. at 40. We reject each of these contentions in turn.

We must "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A rule is "arbitrary and capricious if the agency . . . relied on factors . . . Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). We may rely only on explanations "articulated by the agency itself." *Id.* at 50.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). But "when an agency rescinds a prior policy[,] its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. ----, 140 S. Ct. 1891, 1913 (2020) (second and third alteration in original) (quoting *State Farm*, 463 U.S. at 51). And the agency "must 'be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.'" *Id.* (quoting *Encino*, 579 U.S. at 221–22).

As a starting point, we note that the most fundamental difficulty with Appellants' argument is that the rescission of the 2018 exemption could not have been an arbitrary and capricious exercise of agency discretion because the agency had *no discretion* to act otherwise. Specifically, the agency was compelled by the 2021 executive order to rescind the 2018 executive order, which created the exemption. *See* 86 Fed. Reg. at 22,836–22,837. Indeed, as DOL explained, to maintain the exemption would have been "in clear derogation of both the letter and spirit" of the 2021 order. 86 Fed. Reg. at 67,154. And Appellants do not dispute that the 2021 order required DOL to eliminate the exemption for recreational service and equipment providers.[10]

As such, Appellants cannot be correct in stating that it was arbitrary and capricious for DOL not to consider alternatives to the rule it adopted or to acknowledge the significant reliance interests at stake. As noted above, the 2021 executive order specifically rescinded the 2018 exemption and thus left DOL no discretion to consider maintaining it. Thus, it would have been futile for DOL to have considered comments advocating alternatives that it lacked discretion to adopt. In other words, to consider and adopt any such alternatives would require DOL to defy an executive order—which would clearly constitute an arbitrary and capricious agency action. *See, e.g.*, *Delgadillo v. Astrue*, 601 F. Supp. 2d 1241, 1248 (D. Colo.

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[10] Appellants have not challenged the 2021 executive order, likely because they realize "the President is not an agency within the meaning of the" APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). As such, we cannot review—under APA standards—whether the 2021 executive order itself adequately justified the policy change that it effected.

2007) ("[A]n executive order dictates an agency's policy unless or until Congress enacts a statutory policy."); 5 U.S.C. § 706(2)(A) (requiring courts to set aside agency actions that are "not in accordance with law").

Furthermore, Appellants mistakenly rely on *Regents* for their position that the APA required the DOL to consider exempting recreational service permittees, and any reliance interests the previous exemption engendered among such permittees—notwithstanding an executive order that explicitly rescinded the exemption. *See* Aplts. Opening Br. at 42, 46–47. In *Regents*, the Supreme Court reviewed the rescission of the Deferred Action for Childhood Arrivals (DACA) program by the Acting Secretary of Homeland Security. 140 S. Ct. at 1901. The Court held that the Acting Secretary's decision was arbitrary and capricious because she "did not appear to appreciate the full scope of her discretion." *Id.* at 1911. In particular, the Court concluded, the Acting Secretary failed to "consider[]" alternative means of winding down the DACA program. *Id.* at 1915.

Here, however, the present matter differs from *Regents* in one critical respect. Specifically, unlike the Secretary in *Regents*, the DOL did not possess the relevant discretion; instead, Congress committed to the President himself, not to an agency, the determination of what "policies and directives" to "prescribe" for federal contracting. 40 U.S.C. § 121(a). Thus, *Regents* does not support Appellants' position. *See* 140 S. Ct. at 1910; *cf. id.* (emphasizing "an important constraint on [the Acting Secretary of DHS's] decisionmaking authority—she was *bound* by the Attorney General's legal determination").

Finally, Appellants contend that the DOL acted arbitrarily and capriciously in failing to explain why it "disregarded its own prior conclusions" as to the exemption for recreational services. Aplts.' Opening Br. at 40. Specifically, they claim the DOL failed to engage "with President Trump's findings that applying a minimum wage rule to outfitters and guides . . . would threaten 'to raise significantly the cost of guided hikes and tours on Federal lands' . . . and 'would [negatively affect] . . . hours worked by recreational service workers.'" *Id.* (quoting 83 Fed. Reg. at 25,341). They also claim the DOL did not "acknowledge its *own* prior findings" that exempting permittees could lower their cost of business, "which 'could incentivize small outfitters to enter the market,' 'incentivize existing outfitters to hire more guides' . . . and provide 'more affordable guided tours . . . [on] Federal lands.'" *Id.* at 40–41 (quoting 83 Fed. Reg. at 48,540).

Again, we question whether the DOL was required to provide such an explanation—given that it had no discretion to act otherwise. But, in any event, the rule explicitly addressed "comments regarding the financial impact of [EO 14,026]" on "seasonal recreational businesses." 86 Fed. Reg. at 67,152. These commenters represented that the minimum wage "would result in their business[es] needing to reduce employee work hours, reduce services, or increase prices," thereby restricting access to services on federal lands. *Id.* In response to these comments, the DOL "recognize[d] and acknowledge[d] that there may be particular challenges and constraints experienced by non-procurement contractors," including businesses offering services on federal lands pursuant to permits, "that do

not exist under more traditional procurement contracts." *Id.* One particular challenge the DOL recognized is that "[n]on-procurement . . . contractors cannot as directly pass [increased] costs" resulting from a higher minimum wage "along to the Federal Government in the form of an increased bid amount or similar charge for the next contract." *Id.* at 67,206.

Notwithstanding these challenges, the DOL "anticipate[d] that the economy and efficiency benefits of [EO] 14[,]026 will offset potential costs." *Id.* at 67,152. The DOL emphasized, in particular, "that increasing the minimum wage . . . can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory and training costs, and increase the quality of services provided to the Federal Government and the general public." *Id.* at 67,153. It also noted that "increased efficiency and quality of services" have the potential to "attract more customers and result in increased sales." *Id.* The DOL recognized that, "[i]n limited cases," an inability to pass labor-cost increases through to the Federal government "may result in reduced profits in certain instances," but only "assuming that none of the beneficial effects . . . discussed [*supra*] apply." *Id.* at 67,206. We conclude that the DOL's detailed explanation clearly satisfies (assuming that it must do so) the requirement that, when an agency changes its policy, it must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino*, 579 U.S. at 221 (quoting *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). As such, we conclude that Appellants have not shown a substantial likelihood of success on the merits that the DOL's rule is arbitrary and capricious.

VI

For the foregoing reasons, we **AFFIRM** the district court's order denying Appellants' motion for a preliminary injunction.[11]

[11] Without objecting to Safari Club's filing of its amicus brief, Appellees move to strike declarations filed with the brief because the declarations include evidence that was not submitted to the district court. *See* Aplees.' Resp. to Safari Club Int'l [hereinafter "Aplees.' Mtn. to Strike"] at 1 (citing *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008)). However, the declarations Appellees move to strike simply support points made in Safari Club's brief, and Appellees do not oppose the brief itself. Accordingly, we are hard pressed to see how Appellees are harmed by the filing of the declarations. Moreover, we accord no material significance to the declarations that goes beyond any that we attach to the averments of Safari Club's brief. Therefore, at least under these unique circumstances, we do not see any legal impediment to our consideration of the "extra-record evidence" attached to Safari Club's brief, insofar as it contains "matters relevant to the disposition of this case." *N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1175–76 (10th Cir. 2021). Accordingly, we **deny** Appellees' motion to strike.

No. 22-1023, *Bradford v. U.S. Dep't of Labor*

EID, J., dissenting.

Only Congress can wield legislative power. U.S. Const. art. I, § 1. Yet the law here, by lacking an intelligible principle, delegates just that to the President. The Federal Property and Administrative Services Act ("FPASA") grants the President nearly unfettered power to create any policy he considers necessary to carry out nonpersonal services under the guise of economy and efficiency. In granting this power, Congress did not (1) require the President to conduct any preliminary factfinding or to respond to a specified situation. Nor did Congress (2) provide the President a standard that sufficiently guides his broad discretion. Accordingly, I would hold that the FPASA runs afoul of the nondelegation doctrine. Because the majority holds otherwise, I respectfully dissent.[1]

I.

Under the nondelegation doctrine, Congress must cabin its delegation of legislative authority to the President with an "intelligible principle." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality) (citation omitted). The Supreme Court has identified

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[1] Because I would hold the FPASA unconstitutional under the nondelegation doctrine, I also respectfully decline to join the majority on whether the Department of Labor's conduct (1) exceeded the authority granted under the FPASA or (2) was arbitrary and capricious under the FPASA. *See* Maj. Op. at Parts IV–V. Given that I would hold that the FPASA is invalid in itself, I would go no further into how the Department of Labor used the invalid delegation of power. That said, I note that it would be hard to imagine any scenario where an agency rule exceeds the FPASA's vast grant of power after the President uses "econom[y]" and "efficien[cy]" as the justifications of executive action. 40 U.S.C. § 101(1).

an intelligible principle as falling into either of the "two buckets" identified in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935): "(1) whether the Congress has required any finding by the President in the exercise of the authority, and (2) whether the Congress has set up a standard for the President's action." *Allstates Refractory Contractors, LLC v. Su*, 79 F.4th 755, 773 (6th Cir. 2023) (Nalbandian, J., dissenting) (internal quotation marks and citation omitted), *petition for cert. filed*, (U.S. Jan. 30, 2024) (No. 23-819); *see id.* at 769–76 (explaining the original meaning of Article I and over two centuries of Supreme Court precedent on the nondelegation doctrine).

Under the first "bucket," a law must contain a situational or fact-finding requirement. *Panama Refin.*, 293 U.S. at 415 (considering "whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition"). In many cases, the Supreme Court has upheld laws if executive action can only come about as a response to certain situations. *See, e.g.*, *Opp Cotton Mills v. Adm'r of Wage & Hour Div. of Dep't of Lab.*, 312 U.S. 126, 145 (1941) (concerning a law conditioning the executive's ability to fix minimum wages on "basic facts to be ascertained administratively" and on "factors to be considered in arriving at these determinations"); *Radio Corp. of Am. v. United States*, 341 U.S. 412, 416 & n.5 (1951) (concerning a law requiring "a justifiable fact situation" before a commission could "promulgate standards for transmission of color television").

Under the second, a law must contain "a standard" limiting executive discretion. *Panama Refin.*, 293 U.S. at 415 (considering "whether the Congress has set up

a standard for the President's action"). Some laws delegate to the executive the ability to "fill up the details" in "general provisions." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825). Even so, the Supreme Court has required that Congress provide a "sufficiently definite and precise" standard that can "enable Congress, the courts and the public to ascertain whether the [Executive official] . . . has conformed to those standards." *Yakus v. United States*, 321 U.S. 414, 426 (1944); *see Opp Cotton Mills*, 312 U.S. at 144. Only then could a court be confident of what "general policy" a delegee "must pursue" and the "boundaries of [his] authority." *Gundy*, 139 S. Ct. at 2129 (plurality) (alteration in original) (citation omitted). Because if not—if "an absence of standards" makes it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed"—a nondelegation violation occurs. *Yakus*, 321 U.S. at 426.

Such permissible, testable standards have taken the form of mandatory "factors" that the executive must conform to in acting. *Mistretta v. United States*, 488 U.S. 361, 374–76 (1989) (concerning a law requiring the Sentencing Commission to consider "seven factors," a "specific tool" of the "guidelines system," "three goals," "four 'purposes,'" and "prohibited" factors (citation omitted)); *see, e.g.*, *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) (concerning a law requiring the executive to consider "criteria" before taking any action); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (same); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 204, 225–26 (1943) (same); *Yakus*, 321 U.S. at 419, 427 (same); *Touby v. United States*, 500 U.S. 160, 166–67 (1991) (same); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (same).

Lastly, the Supreme Court has noted that the more power a law delegates, the more the law must limit that delegation. Indeed, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475; *see Wayman*, 23 U.S. (10 Wheat.) at 43 ("To determine the character of the power given to the Courts by the Process Act, we must inquire into its extent."); *cf. Gundy*, 139 S. Ct. at 2125–30 (plurality) (stating that a narrow delegation that granted "only temporary authority" "was a stopgap, and nothing more"); *Yakus*, 321 U.S. at 419, 426 (involving "temporary wartime" measures).

The bottom line is that courts must examine statutes for an intelligible principle. That is because a law delegating power must have one to withstand Article I. As aptly summarized from "over two centuries worth of caselaw," looking for an intelligible principle in turn "requires a court to analyze a statute for two things: (1) a fact-finding or situation that provokes executive action or (2) standards that sufficiently guide executive discretion—keeping in mind that the amount of detail governing executive discretion must correspond to the breadth of delegated power." *Allstates Refractory Contractors, LLC*, 79 F.4th at 776 (Nalbandian, J., dissenting) (cleaned up).

II.

Neither this Court nor the Supreme Court have decided whether the FPASA violates the nondelegation doctrine. The FPASA provides that the President "may prescribe policies and directives that [he] considers necessary to carry out" the FPASA that are "consistent with" the FPASA. 40 U.S.C. § 121(a). Along those lines, a policy objective in the FPASA's purpose statement seeks to: "provide the Federal Government

with an *economical* and *efficient* system for . . . [p]rocuring and supplying property and nonpersonal services." *Id.* § 101(1) (emphases added).

That is it. That is all the FPASA gives us—no floor of what specific situations must arise, no ceiling on what the President may find economical or efficient to do. Instead, the FPASA gives the President nearly unfettered power to regulate any nonpersonal service via any contract-like instrument, not limited to a permit like in this case. And with that permit or other instrument in hand, the President may do whatever he finds necessary to regulate entire industries in the name of what he believes to be economical and efficient. Such a broad delegation without limits cannot stand under Article I. Yet that is exactly the type of delegation we deal with today.

I fully acknowledge that the Supreme Court's body of caselaw for what makes an intelligible principle is "not demanding." *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 442 (5th Cir. 2020) (Smith, J.) (quoting *Gundy*, 139 S. Ct. at 2129 (plurality)). But even under those standards, I would hold that the FPASA violates the nondelegation doctrine because it lacks an intelligible principle. That is because the FPASA provides no (1) fact-finding or situational requirement that prompts executive action. Nor does it provide a (2) standard that sufficiently guides the President's discretion on what he finds economically or efficiently necessary. Especially when considering the broad scope of power that the FPASA delegates—the ability to regulate *any* industry of someone who has a contract-like instrument with the federal government—Congress did not sufficiently limit executive discretion.

A.

My analysis on the first category of what makes an intelligible principle will be quick. That is because the FPASA does not require the President to conduct any factfinding or wait for any situation to occur before he "may prescribe policies and directives that [he] considers necessary." 40 U.S.C. § 121(a); *see Schechter Poultry*, 295 U.S. at 541–42; *Panama Refin.*, 293 U.S. at 417–18, 430. The FPASA provides no requirement to "obtain[] needed data," no need to determine "the facts justifying" any changes. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405 (1928); *see Opp Cotton Mills*, 312 U.S. at 145 (finding an intelligible principle because, in addition to requiring the executive to consider certain "factors," the law required "basic facts to be ascertained administratively"). Nor does the President need to wait till he can respond to "a justifiable fact situation." *Radio Corp. of Am.*, 341 U.S. at 416.

In contrast, he "may prescribe policies or directives" he "considers necessary to carry out" the "[p]rocuring and supplying" of "nonpersonal services" or other "related functions." 40 U.S.C. §§ 101(1), 121(a). *When* he "may" act lies solely within his own discretion, *id.* § 121(a), for he "may accept, modify, or reject them as he pleases." *Schechter Poultry*, 295 U.S. at 539. No threat to an "economical and efficient system" of any "function" related to "[p]rocuring and supplying . . . nonpersonal services" needs to arise before the President can do what he believes necessary. 40 U.S.C. § 101(1). And even if such a threat came about, the FPASA explains that the President "may," not shall, "prescribe policies and directives." *Id.* § 121(a). Thus, nothing requires the President to prescribe any policy or directive in response. *Id.*; *see* Antonin Scalia

& Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive[.]"). Thus, without anything occurring beforehand, the FPASA provides an open invite for the President to do whatever he "considers necessary" to regulate entire industries via a contract or a contract-like instrument, like the permit in this case. 40 U.S.C. § 121(a).

The FPASA then does not have an intelligible principle under the first category, as it does not contain a fact-finding or situation requirement.

B.

Nor does the FPASA contain a sufficient standard. Given the broad delegation of power at issue here, the FPASA does not contain standards that sufficiently limit the President's discretion. Indeed, we need only compare the statute here with those in other nondelegation cases to make that conclusion.

I start with what the FPASA does have: Only two provisions may possibly serve as the basis for a standard. To begin, there is the provision delegating authority to the President. Section 121(a) of the FPASA makes it clear that the "President may prescribe policies and directives that the President considers necessary to carry out" the FPASA that are also "consistent with" the FPASA. *Id.* And working in conjunction with that provision, the FPASA also has a purpose statement containing a broad policy objective—a goal to provide the Federal Government with an "economical" and "efficient" system for activities, which include "[p]rocuring and supplying . . . nonpersonal services." *Id.* § 101(1). Taken together, the President may do what he finds necessary to carry out the FPASA as

long as he thinks the federal government would have an economical or efficient system.

That is not a standard. If *Panama Refining* and *Schechter Poultry* stand for anything, it is that a "general outline of policy," *Panama Refin.*, 293 U.S. at 417, or "statement of [] general aims," *Schechter Poultry*, 295 U.S. at 541, cannot form an intelligible principle without additional limits. "[S]uch a preface of generalities as to permissible aims," without more, is a "delegation of legislative power [] unknown to our law," "utterly inconsistent with the constitutional prerogatives and duties of Congress." *Id.* at 537. And here, the FPASA provides nothing more.

Appellees argue that the President is bound by the FPASA's purpose statement, which states that he can only "provide the Federal Government with an economical and efficient system." 40 U.S.C. § 101. Importantly, *nowhere* in the FPASA does it require that the President *only* make regulations that are "economical and efficient" by some *objective* standard. *Id.* Indeed, the FPASA ensures that the President need only take his own *subjective* opinion into account. *Id.*

Again, the FPASA allows the President to take any measures "*that the President considers* necessary to carry out" the FPASA. *Id.* § 121(a) (emphasis added). This phrase places all discretion in the President's hands, requiring nothing and no one else to constrain what he "*considers* necessary." *Id.* (emphasis added). Along those lines, although the FPASA defines some terms, *see id.* § 102, the law does not define what "economical" and "efficient" mean, *id.* § 101. It instead leaves the defining to the President. *See id.* § 121(a).

What is worse, the FPASA also specifies that the "purpose" of the law "is to provide *the Federal Government*" with a "system." *Id.* § 101. Critically, the FPASA does not serve anyone or anything else but the federal government. What seems "economical" and "efficient" is not just left to the President's subjective opinion but is always in the federal government's best interest because the FPASA does not require the President to consider how river rafters, a state, or any private citizen may view what is "economical" and "efficient." *Id.* § 101. It only requires him to consider what he alone considers necessary to benefit himself or other parts of the federal government. *Id.* § 121(a).

Accordingly, the FPASA provides no objective "criterion" that the President "must conform to," *Sunshine Anthracite Coal Co.*, 310 U.S. at 397–98, no mandatory or prohibited "factors" that he must consider when creating a policy or directive, *Mistretta*, 488 U.S. at 375–76; *cf. Touby*, 500 U.S. at 167 (holding that the "multiple specific restrictions on the Attorney General's discretion . . . satisfy the constitutional requirements of the nondelegation doctrine"). The lack of some objective basis to turn to means that practically speaking, nothing limits the "breadth of the [President's] discretion" or narrows the "wide field of legislative possibilities" to which the FPASA can extend. *Schechter Poultry*, 295 U.S. at 538. Nothing requires him to use any basis for determining what he "may . . . consider[]" "economical" or "efficient." 40 U.S.C. §§ 101, 121(a); *see Panama Refining*, 293 U.S. at 431–32 ("To hold that he is free to select as he chooses from the many and various objects generally described in [a law's purpose statements], and then to act without making any finding with respect to any object that he does select, and the circumstances

properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.").

In a similar vein, simply looking to § 121(a), the policy or directive that the President takes need not actually be "necessary" by some *objective* means—means not otherwise specified in the FPASA. 40 U.S.C. § 121(a). The President need only subjectively "consider[]" a policy or directive "necessary." *Id.* Again, the language here places all decision-making in the President's hands.

The majority equates the FPASA's use of "necessary," *id.*, to the term "requisite" in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), and concludes that the use of a word like "necessary" creates an intelligible principle. I respectfully disagree with this proposition because the law at issue in *Whitman* remains inapposite for at least two reasons.

First, the phrasing of the FPASA makes the term "necessary" *give* rather than *limit* power. That is because, again, the FPASA does not require that the President's policies actually *be* necessary, only that he subjectively "*considers* [them] necessary" to do whatever he wants under the act. 40 U.S.C. § 121(a) (emphasis added).

In contrast, the relevant language in *Whitman* pointed to "a discrete set of pollutants and [was] *based on* published air quality criteria that reflect the latest scientific knowledge," under which the "EPA *must* establish uniform national standards *at a level that is requisite to* protect public health from the adverse effects of the pollutant in the ambient air." *Whitman*, 531 U.S. at 473 (citation omitted) (emphases added). Reading the phrases fully informs how to interpret the term "requisite." Unlike the term "necessary" here,

the term "requisite" is not based solely on some subjective opinion of the President, but rather on what "*is* requisite" or "sufficient, but not more than necessary" to protect public health from the adverse effects of pollutants. *Id.* (emphasis added).

Keeping that in mind, the FPASA and *Whitman*'s uses of "necessary" and "requisite" are diametrically opposed: the FPASA seeks to *give* power to the President to do more by what he "considers" necessary (i.e., to "carry out the act"), whereas the law in *Whitman* seeks to *limit* power by objective means (i.e., at some "level" designed "to protect public health" "based on published air quality criteria that reflect the latest scientific knowledge"). Otherwise said, because of the FPASA's subjectivity, the President does not have to do what "*is* requisite," *id.*, or what *is* "necessary" to cure or respond to any situation; he need only do what *he* "considers necessary." Whereas, *Whitman*'s use of "requisite" is tethered to some objective means specified in the law there.

Second, in any case, that the FPASA includes the word "necessary" is not enough in itself to create a standard. Against this point, the majority states that the Supreme Court has approved broad delegations requiring agencies to regulate in the "public interest," to set prices that in an agency administrator's "judgment will be generally fair and equitable," and to set air quality standards that are "requisite to protect the public health." Maj. Op. at 36 (citations omitted).

Importantly, I seek to clarify that although the Court has "over and over upheld even very broad delegations," *Gundy*, 139 S. Ct. at 2129 (plurality), "no Supreme Court case has found that the phrasing of a law"—such as the use of the word "necessary"— "alone creates an intelligible principle," *Allstates Refractory*

Contractors, LLC, 79 F.4th at 782–83 (Nalbandian, J., dissenting). To date, every law with a broad phrase that the Supreme Court has looked at had other things that provided sufficient guidance on the "boundaries of [delegated] authority." *Gundy*, 139 S. Ct. at 2129 (plurality) (citation omitted); *see Nat'l Broad. Co.*, 319 U.S. at 216 (involving a law that required factfinding "to correct the abuses disclosed by its investigation of chain broadcasting"); *Yakus*, 321 U.S. at 419, 427 (concerning a "temporary wartime measure" to fix prices while requiring the executive to consider factors such as "prices prevailing in a stated base period" and "fair and equitable" prices).

Even the law in *Whitman* had other limits on the delegation that made it fall in line with the Supreme Court's intelligible principle requirement. *See* 531 U.S. at 473 (requiring the EPA to "base[]" its policy "on published air quality criteria that reflect the latest scientific knowledge"). Thus, the fact that the FPASA has the word "necessary" does not itself end the conversation of whether we have a nondelegation problem.

In fact, we know that using a term like "necessary" is not sufficient just by looking at *Schechter Poultry*, which involved a law using nearly identical language to the FPASA. 295 U.S. at 523 & n.4 ("The President may . . . impose such conditions . . . *as the President in his discretion deems necessary* to effectuate the policy herein declared." (emphasis added)). Thus, the use of the term "necessary," with nothing else limiting the President but general policy objectives, "in no way limit[s] the authority" vested in him. *Id.* at 539. The FPASA should then meet the same fate as the incredibly similar law in *Schechter Poultry*: we should deem it unconstitutional.

Moreover, the only way that the FPASA limits the President is by his own accord, i.e., what he "considers necessary" as "consistent with" the FPASA. Certainly, the President can act within whatever subjective bounds he "considers necessary." 40 U.S.C. § 121(a). Indeed, he might follow an internalized golden rule from *Whitman*, that he can only issue policies "sufficient, but not more than necessary" to carry out the FPASA. 531 U.S. at 473.

But that "very choice" to do so is a form of discretion that the Supreme Court has already identified as a nondelegation no-no. *Id.* ("The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.").

In the end, the "absence of standards" over what exactly the President may consider necessary to do makes it "impossible . . . to ascertain whether the will of Congress has been obeyed." *Yakus*, 321 U.S. at 426. No "boundaries of . . . authority" exist. *Gundy*, 139 S. Ct. at 2129 (plurality) (quoting *Am. Power & Light Co.*, 329 U.S. at 105). In no way can we test what the President himself considers necessary. That the bounds of delegated authority are left unbound also explains why the majority cannot hold that the agency action here was unlawful under the FPASA or arbitrary or capricious. Truly, it is hard to see how any court would be able to strike down a law under the FPASA. As such, I would hold that a "delegation of legislative authority trenching on the principle of separation of powers has occurred." *Skinner v. Mid-Am.*

Pipeline Co., 490 U.S. 212, 218 (1989) (citation omitted).

Even if the FPASA did have some sort of testable standard (it does not), it would fail to sufficiently guide the President's discretion. Again, with great delegated power comes great specificity; that is, "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475; *see Allstates Refractory Contractors, LLC*, 79 F.4th at 787 (Nalbandian, J., dissenting) (collecting cases). And as here, when the grant of power can "affect the entire national economy," Congress "must provide substantial guidance." *Whitman*, 531 U.S. at 475.

This case poses a good example of just how far the President's authority under the FPASA can extend. Here, the Department of Labor set up a minimum-wage scheme over the river rafting industry, imposing additional requirements on river guides who are required to have a federal permit to operate their businesses in the first place. Minimum wages are one thing. Nothing stops the President from imposing whatever other requirements he "considers necessary" to complete his vision of "an economical and efficient system" for "nonpersonal services." 40 U.S.C. §§ 101(1), 121(a).

River rafters aside, nothing stops the President from regulating other types of federal permits in the guise of economy and efficiency. Indeed, permits for all sorts of activities with the federal government are all at risk, whether that be a permit for cutting down a single Christmas tree in a national forest, a one-night stay on a federal campsite, or even a visit to the

U.S. Capitol. Nothing stops the President; he may impose any conditions at any time as long as he considers the conditions necessary.

The FPASA essentially allows the President to come in and change the terms of any contract or contract-like instrument at any time based on his subjective belief of what he "considers necessary" to carry out the FPASA if he thinks it "consistent with" the law's broad policy objectives. *Id.* § 121(a). The FPASA does not only govern one industry, *see, e.g.*, *Nat'l Broad. Co.*, 319 U.S. at 214 (involving just the radio industry), nor does it provide only "temporary authority," *Gundy*, 139 S. Ct. at 2130 (plurality); *see Yakus*, 321 U.S. at 419. Rather, the delegation broadly effects *every* nonpersonal service with the federal government, which spans industries of all kinds—import and export, aviation, broadcasting, you name it.

Not to mention, "nonpersonal services" are but one subset of many "functions" over which the President can regulate. 40 U.S.C. § 101(1). The FPASA continues, stating that the President "may" similarly "prescribe policies and directives" for "related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies." *Id.* The President can no doubt abuse this language to regulate entire industries while claiming that he believes it "necessary" to carry out these broad "functions." *Id.* at §§ 101(1), 121(a).

***

Given that the FPASA delegates the President the freedom to do as he pleases, Congress needed to confine the President's authority in more detail. It did not. Consequently, not only does the FPASA not contain (1) a fact-finding or situational requirement to arise before executive action, but the FPASA also does not have (2) a sufficient standard that guides the President's broad delegation. Therefore, the law contains no intelligible principle and thus violates the nondelegation doctrine.

C.

Appellees make several arguments in response. To start, they argue that this Circuit's precedent "forecloses" any nondelegation concern. Aple. Br. at 36. And the majority takes the bait. Improperly, Appellees and the majority both point to this Court's decision in *City of Albuquerque v. U.S. Department of Interior*, 379 F.3d 901 (10th Cir. 2004), arguing that the case determined that the FPASA had an intelligible principle. Not so.

City of Albuquerque concerned whether the FPASA provided "sufficient statutory foundation" for the issuance of an executive order, which could then serve as a "basis for standing under the Administrative Procedure Act." *Id.* at 914–15. Even though the parties did not contest a nondelegation issue on appeal, this Court mentioned in passing that "Congress may delegate responsibility to the executive branch so long as Congress provides an 'intelligible principle.'" *Id.* at 914 (citation omitted). Next, this Court went on to say—while not coming down one way or another on the issue of a potential nondelegation violation—two things.

First, we stated that Congress "chose to utilize a relatively broad delegation of authority," instructing the President to establish "'an economical and efficient system for . . . the procurement and supply' of property." *Id.* (quoting 40 U.S.C. § 101). And that was all. To be clear, this Court did *not* say anything about the FPASA's constitutionality under Article I; this Court did not reach an issue not briefed on appeal. Second, given that broad delegation, this Court went on to say that the executive order was a "valid exercise of the [FPASA's] delegated authority," *id.*—a predictable outcome given how far-reaching the FPASA is.

In all, this Court does not afford precedential weight to an opinion's discussion that alludes to a constitutional doctrine (that was *not* before the Court) in the mix of determining another issue (that *was*). *See, e.g.*, *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (considering as dicta "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand" (citation omitted)). As such, whether the FPASA violates the nondelegation doctrine is a matter of first impression in this Circuit—a matter that I would answer in the affirmative.

Next, Appellees argue that the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality . . . to perform its function." Aple. Br. at 38 (quoting *Yakus*, 321 U.S. at 425). Rather, they assert that "in our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372.

Yes, that all holds true. But even so, Congress still has a responsibility to have an intelligible principle in its laws by, for instance, creating "sufficiently definite and precise" standards, *Yakus*, 321 U.S. at 426, that require or "prohibit[]" the President to base executive action on the consideration of specified "factors," *Mistretta*, 488 U.S. at 375–76 (citation omitted). And the FPASA did not provide a sufficient standard here besides allowing the President to prescribe policies by any means he "considers necessary." 40 U.S.C. § 121(a); *see supra* Part II.B.

Lastly, Appellees argue that even if more specific statutory guidance might be required in some circumstances, "it is not needed in a statute that addresses federal procurement of goods and services." Aple. Br. at 38. But the cases they cite do not lend them support. To begin, the law here does not merely tell the executive to "expend[]" federal funds for specified purposes. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937). Next, the FPASA does not just reiterate that the President has the authority to "make a valid contract" between the federal government and someone else. *Jessup v. United States*, 106 U.S. 147, 152 (1882) (collecting cases).

Here, the FPASA abdicates Congress's law-making function, leaving the President to "prescribe" any "polic[y]" or "directive[]"—whether it be a minimum wage scheme or any other regulation—that he (and he alone) "considers necessary." 40 U.S.C. § 121(a). Because of that, the FPASA diverges from "appropriations" laws that have "never seriously been questioned." *Clinton v. City of New York*, 524 U.S. 417, 467 (1998) (Scalia, J., concurring in part and dissenting in part).

And nothing in this regulatory authority "governing private conduct" "implicate[s] the president's inherent Article II authority." *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting); *see Allstates Refractory Contractors, LLC*, 79 F.4th at 787 n.15 (Nalbandian, J., dissenting) (collecting cases on "powers that would seem to fall in the [e]xecutive's job description, such as matters dealing with war and foreign exchange"). Try as they may, Appellees fail to show how "the broader body of law concerning the nondelegation doctrine" supports their position. *Contra* Aple. Br. at 38.

III.

For these reasons, I respectfully dissent.

Case 1:21-cv-03283-PAB-STV
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 21-cv-03283-PAB-STV

DUKE BRADFORD,
ARKANSAS VALLEY ADVENTURE, LLC, d/b/a AVA Rafting and Zipline, and
COLORADO RIVER OUTFITTERS ASSOCIATION,

Plaintiffs,

v.

U.S. DEPARTMENT OF LABOR,
U.S. DEPARTMENT OF LABOR, WAGE & HOUR DIVISION,
JOSEPH R. BIDEN, President of the United States,
MARTIN J. WALSH, U.S. Secretary of Labor, and
JESSICA LOOMAN, Acting Administrator,

Defendants.

ORDER

This matter is before the Court on plaintiffs' Motion for a Preliminary Injunction [Docket No. 7]. Defendants responded, Docket No. 21, and plaintiffs replied. Docket No. 22. The Court has jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331.

I. BACKGROUND

On February 12, 2014, President Obama issued an executive order establishing a minimum wage for federal contractors under the Federal Property and Administrative Services Act, 40 U.S.C. §§ 101, *et seq*. (the "Procurement Act" or "FPASA"). *See* Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014) ("E.O. 13658" or the "Obama Order"). E.O. 13658 applies, in relevant part, to (1) new "contract[s] or contract-like instrument[s] for services covered by the Service Contract Act" and those "with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public," if (2) "the wages of workers under such contract[s] or contract-like instrument[s] are governed by the Fair Labor Standards Act [("FLSA")], the Service Contract Act [("SCA")], or the Davis-Bacon Act [("DBA")]." *Id.* at 9,853. The Department of Labor ("DOL") implemented E.O. 13658 through notice-and-comment rule-making, establishing a $10.10 per hour minimum wage plus overtime in excess of 40 hours in a workweek for federal contractors. *See Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634 (Oct. 7, 2014) (29 C.F.R. pt. 10) (the "Obama Rule"). Pursuant to the Obama Rule, a "[c]ontract or contract-like instrument" includes "licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form." *Id.* at 60,722. The Obama Rule defines a "[n]ew contract" as "a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015," or a contract entered into before

then that is "renewed," "extended," or "amended pursuant to a modification that is outside the scope of the contract" on or after January 1, 2015. *Id.*

On May 25, 2018, President Trump issued an executive order, also under the Procurement Act, exempting "seasonal recreational services" workers, including those providing "river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps." *See* Exec. Order 13,838, 83 Fed. Reg. 25,341, 25,341 ("E.O. 13838" or the "Trump Order"). E.O. 13838 states, in part,

> These individuals often conduct multiday recreational tours through Federal lands, and may be required to work substantial overtime hours. The implementation of Executive Order 13658 threatens to raise significantly the cost of guided hikes and tours on Federal lands, preventing many visitors from enjoying the great beauty of America's outdoors. Seasonal recreational workers have irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate, among other distinguishing characteristics. As a consequence, a minimum wage increase would generally entail large negative effects on hours worked by recreational service workers. Thus, applying Executive Order 13658 to these service contracts does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands.

Id. DOL implemented E.O. 13838 on September 26, 2018 without notice and comment. *See Minimum Wage for Contractors; Updating Regulations to Reflect Executive Order 13838*, 83 Fed. Reg. 48,537 (Sept. 26,

2018) (29 C.F.R. pt. 10) (the "Trump Rule"); 83 Fed. Reg. at 48,538 (DOL "promulgates this final rule without notice or an opportunity for public comment because this action is limited to implementing E.O. 13838.").

On April 27, 2021, President Biden revoked President Trump's E.O. 13838 exempting outfitters, reinstated much of President Obama's E.O. 13658, and increased the minimum wage from $10.10 per hour in President Obama's rule to $15.00 per hour. *See Increasing the Minimum Wage for Federal Contractors*, Exec. Order. No. 14,026, 86 Fed. Reg. 22,835 (Apr. 27, 2021) ("E.O. 14026" or the "Biden Order"). E.O. 14026 applies to "new contracts; new contract-like instruments; new solicitations; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments . . . where the relevant contract or contract-like instrument will be entered into, . . . extended or renewed, or . . . exercised" by January 30, 2022. *Id.* at 22,837.

On November 24, 2021, DOL implemented the Biden Order after notice and comment with the final rule *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 24, 2021) (to be codified at 29 C.F.R. pts. 10, 23) (the "Biden Rule"). DOL explained,

> The use of the term "contract-like instrument" in Executive Order 14026 reflects that the order is intended to cover all arrangements of a contractual nature, including those arrangements that may not be universally regarded as a "contract" in other contexts, such as special use permits issued by the Forest Service, Com-

> mercial Use Authorizations issued by the National Park Service, and outfitter and guide permits issued by the Bureau of Land Management and the U.S. Fish and Wildlife Service.

Id. at 67,134. The Biden Rule states that DOL's "understanding" is that outfitters enter into commercial use authorization ("CUA") agreements with the National Park Service, and outfitter and guide permit agreements with the Bureau of Land Management ("BLM") and U.S. Fish and Wildlife Service ("USFWS"), respectively. *Id.* at 67,148. "The principal purpose of these legal instruments," according to DOL, "seems to be furnishing services through the use of service employees." *Id.* "If this is true," DOL states, the SCA "and thus [E.O.14026] may generally cover the CUA and outfitter and guide permit agreements that contractors enter into with the NPS, BLM, and USFWS, respectively." *Id.*

The Biden Rule mandates overtime pay for compensable work beyond 40 hours per workweek at $22.50 per hour, which is one and one-half times the minimum wage. *Id.* at 67,176. In rescinding President Trump's exemption for recreational service workers, the Biden Rule states that, with respect to contracts entered into between January 1, 2015 and January 29, 2022, contracting agencies shall "take steps . . . to exercise any applicable authority to insert the Executive Order 13658 contract clause" into the existing contracts "and to ensure that those contracts comply with the requirements of Executive Order 13658 on or after January 30, 2022." *Id.* at 67,155. With respect to new contracts entered into on or after January 30, 2022, the Biden Rule states that E.O. 14026 will apply. *Id.*

On December 7, 2021, plaintiffs filed this lawsuit. Docket No. 1. Plaintiffs bring three claims: (1) the Biden Rule exceeded President Biden's authority in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C) ("APA"); (2) the Biden Rule is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A); and (3) President Biden violated the Constitution's separation of powers and non-delegation doctrines by exercising legislative power without clear congressional authorization. *Id.* at 15–19, ¶¶ 51–77.

On December 9, 2021, plaintiffs filed a motion for a preliminary injunction to enjoin the enforcement of the Biden Rule before it takes effect on January 30, 2022, pending a final judgment in this litigation. Docket No. 7 at 20. On January 6, 2022, the Court held a hearing on plaintiffs' motion. The Court heard testimony from plaintiffs' witnesses Duke Bradford, owner of Arkansas Valley Adventure, LLC ("AVA"), and David Costlow, executive director of the Colorado River Outfitters Association ("CROA").[1] AVA has provided outdoor excursions in central Colorado since 1998.

AVA offers, either itself or in partnership with other companies, activities including rafting, ziplining, fishing, horseback riding, stand-up paddle boarding, and all-terrain vehicle tours. AVA also offers train rides, cabin and campsite rentals, gear rentals, and other services. Most of AVA's activities last part of a day or a full day. However, some AVA trips are multi-day, overnight trips. AVA operates on both federal and

[1] Plaintiffs submitted three exhibits, a declaration from Mr. Bradford, a declaration from Mr. Costlow, and a permit discussed below. Plaintiffs did not move for the admission of the declarations, and the Court does not consider them in resolving plaintiffs' motion.

non-federal land. Approximately 30% of AVA's revenue is from activities that take place on federal land, and less than 10% of AVA's revenue is from overnight trips on federal land.

AVA's business is seasonal. It employs approximately 250 to 350 guides and other employees between mid-May and September. AVA also employs 15 year-round employees, who handle marketing and other operations. On federal land, AVA operates under two permits. One permit is a "Special Recreation Permit" from BLM that authorizes, among other things, float fishing trips; shuttle services of vehicles, equipment, and clients; rental services of equipment; and rafting on the Eagle River from Squaw Creek to the Colorado River confluence in the State of Colorado (the "Eagle River Permit"). *See* Exh. 1.[2] The Eagle River Permit was issued on April 1, 2012 and expires on March 30, 2022. Exh. 1 at 2. The Eagle River Permit requires AVA to pay BLM the greater of either $100 per year or 3% of AVA's gross revenue from the activities listed on the permit. *Id.* Pursuant to the Eagle River Permit, AVA may not represent that its activities are conducted by BLM. *Id.* at 3. The Eagle River Permit also includes 16 "special stipulations," which require, among other things, that AVA coordinate with other outfitters to decrease congestion on boat ramps and in parking areas, take precautions to

[2] Two versions of the Eagle River Permit were admitted into evidence, plaintiffs' Exhibit A and defendants' Exhibit 1. The parties agree that the two exhibits are identical except that Exhibit 1 contains additional pages, including "special stipulations," which are not included in Exhibit A. *See* Exh. 1 at 4–5. The Court will therefore cite to Exhibit 1, as it is the more complete version of the same permit.

minimize the spread of invasive species, follow established fish handling protocols, ensure that guests and crew wear life jackets, prohibit guides from possessing alcohol, alert BLM about Native American discoveries, and use existing hardened trails within riparian areas. Exh. 1 at 4. AVA is in the process of renewing the Eagle River Permit in advance of the upcoming rafting season. AVA also has a second permit, which expires in a couple of years, issued by the United States Forest Service ("Forest Service"), for operation on the Blue River in the State of Colorado.

AVA's two-night/three-day trips, which are its longest advertised trips, cost customers approximately $1000, and, for such trips, AVA pays guides a "trip salary," which is standard in the rafting industry, of between $400 and $500, depending on the guide's experience level, the hours worked, and the state and federal minimum wage requirements. Guides typically work eight to ten hours of compensable time each day during a multi-day trip. Mr. Bradford testified that AVA complies with the FLSA and pays its guides more than minimum wage, which, in Colorado, is $12.56 per hour. If considered as an hourly wage for compensable time, guides' trip salaries exceed $15.00 per hour, and an experienced guide may earn $200 per day on an overnight trip. Approximately 100 AVA guides lead overnight trips, and 40 to 60 guides work more than 40 compensable hours each week. Many guides lead multiple trips and work five or six days each workweek. Although Mr. Bradford testified that AVA complies with wage and hour laws, AVA does not pay overtime, and no guide earns $22.50 or more per hour. Mr. Bradford is aware of the FLSA exemption that permits some employees of private es-

tablishments that operate on national parks and forests to work 56 rather than 40 hours before receiving overtime pay,[3] and he is aware that non-duty time, for instance sleep time, is not compensable.

Before expiration of the Eagle River Permit, AVA will have to determine, based on the wages that it will pay guides for the upcoming season, how many guides it needs to hire, what trips it will offer, and the price of those trips. Although these determinations will not require modification of the Eagle River Permit before its expiration, AVA will seek to hire guides and to market trips before then to prepare for the coming season.

AVA expects that it will expend resources to comply with the Biden Rule, including legal fees and increased labor costs. Mr. Bradford anticipates that he will have to stop offering overnight trips if the Biden Rule takes effect because such trips would be too expensive for customers. He will also move to a four-day workweek, which will require hiring more staff to accommodate the remaining days. Instead of paying

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[3] Defendants refer to this exemption as "FLSA section 13(b)(29)." The Court presumes defendants are referring to 29 U.S.C. § 213(b)(29), which states that the FLSA's standard overtime provisions do not apply to

> any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

guides a trip salary, Mr. Bradford will transition guides to an hourly wage. Because AVA guides live in AVA housing, and AVA will need to hire more guides in order to comply with the Biden Rule, AVA's housing costs will rise. Mr. Bradford is not certain whether the Biden Rule would ultimately affect AVA's profits because he stated that AVA can diversify the activities that it offers. However, AVA competes with outfitters that do not operate on federal lands that would not be subject to the Biden Rule. Those operators may continue to offer overnight trips because their costs will not increase under the Biden Rule. As a result, Mr. Bradford is concerned about losing guides, who may wish to work more than four days each week, to outfitters who do not operate on federal land.

Plaintiff CROA looks after the interests of its 50 member outfitters. CROA members operate primarily in Colorado, but also in Arizona, Utah, and Wyoming. CROA members primarily provide white-water rafting trips, but also provide float fishing and flyfishing trips. At least 90% of CROA members operate on federal lands; however, Mr. Costlow is not certain of what percent of CROA members' operations are on federal lands. Seven or eight CROA members provide overnight trips on federal lands, ranging from two-day trips to 16-day trips. CROA members pay their guides the applicable minimum wages in the states that the members operate, and many pay guides in excess of $15.00 per hour when a trip salary is calculated that way. Mr. Costlow testified that the earliest point a CROA member will need to change the status of a permit is February, when an outfitter intends to buy part of an "operation" from another CROA member and either the purchaser or seller requested to "transfer" a permit in February.

CROA members will expend resources to comply with the Biden Rule, including hiring lawyers to review the Rule and ensuring that subcontractor contracts, such as contracts with food and transportation providers, comply with the Rule. CROA members may have to modify payroll and accounting services as well. Mr. Costlow could not testify how many members, if any, already pay their guides at least $15.00 per hour, but he believes that many do. Mr. Costlow's knowledge about CROA members is from speaking with them. Neither he nor anyone at CROA reviews members' financials or other information, and the only requirement for an outfitter to join CROA is having a Colorado river operator's license. CROA does not offer legal advice to members, and Mr. Costlow did not specify how CROA looks after its members' interests.

Mr. Costlow's understanding is that the Biden Order and Biden Rule eliminate the FLSA's 56-hour exemption. He also believes that every hour on a multi-day trip is compensatory and that, once a guide has been on a trip for 40 hours, the guide must be paid overtime, including for sleep time. However, Mr. Costlow stated that the industry and his members have not "interpreted" minimum wage laws to require overtime pay for hours worked in excess of the threshold under state law. Rather, CROA members follow the industry standard "trip salary" model.

Mr. Costlow does not know CROA members' profit margins, yet he believes many members will have difficulty absorbing any increased costs due to the Biden Rule. In order to ensure harmony in a company, members will need to increase all employees' wages as the lowest-paid employees' hourly wages increase to $15.00.

II. LEGAL STANDARD

A. Preliminary Injunction

A preliminary injunction is not meant to "remedy past harm but to protect plaintiffs from irreparable injury that will surely result without [its] issuance" and "preserve the relative positions of the parties until a trial on the merits can be held." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258, 1267 (10th Cir. 2005); *see also Hale v. Ashcroft*, 683 F. Supp. 2d 1189, 1197 (D. Colo. 2009) ("injunctive relief can only be obtained for current or prospective injury and cannot be conditioned on a past injury that has already been remedied"). "[C]ourts generally will refuse to grant injunctive relief unless plaintiff demonstrates that there is no adequate legal remedy." Charles Alan Wright, et al., 11A *Fed. Prac. & Proc. Civ.* § 2944 (4th ed. 2020).

To obtain a preliminary injunction, a plaintiff must demonstrate four factors by a preponderance of the evidence: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). "[B]ecause a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

III. ANALYSIS

A. Standing

The party seeking redress bears the burden of establishing standing. *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 544 (10th Cir. 2016) (citing

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). To carry this burden, plaintiffs must show "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 543 (internal quotation marks and alteration marks omitted); *Lujan*, 504 U.S. at 560–61. Organizations with members can establish standing either in their own right or on behalf of their members. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

In their response to plaintiffs' preliminary injunction motion, defendants argue that, "[o]n the evidentiary record as it currently stands, it is impossible to determine when [p]laintiffs will be subject to the requirements" of E.O. 14026 and, accordingly, defendants argue, plaintiffs "have not established that they face imminent harm and thus have Article III standing." Docket No. 21 at 8–9 n.4.

1. Duke Bradford and AVA

The Court finds that Mr. Bradford and AVA have Article III standing. As to the injury-in-fact requirement, Mr. Bradford and AVA's Eagle River Permit expires on March 30, 2022, and AVA will be subject to the Biden Rule for any new contract or permit that it enters into or receives after January 30, 2022. At minimum, Mr. Bradford and AVA have established that complying with the Biden Rule through the renewed Eagle River Permit will require that AVA pay at least some of its employees a higher hourly wage than it currently pays. Although defendants have argued that the financial burden may not be as great as Mr. Bradford and AVA believe, because AVA pays most of its guides more than $15.00 per hour and most overnight trips are fewer than 40 hours of compensable time, the

Court finds that Mr. Bradford and AVA have met their burden. First, the evidence establishes that guides often work five or six days each week and lead as many trips as possible. Thus, even if a three-day overnight trip would result in only 30 hours of work, which is below the overtime threshold, guides who work five or six days each week may exceed 40 hours of compensable time in a workweek.[4]

The Supreme Court has held that, "[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes."). Moreover, Mr. Bradford and AVA have already begun the process of renewing the Eagle River Permit. Thus, their injury is not speculative or hypothetical, and, given that they have begun the renewal process and that the renewed Eagle River Permit will be subject to the Biden Rule, Mr. Bradford and AVA's future harm is "certainly impending." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that "fears of hypothetical future harm that is not certainly impending" are insufficient to create Article III standing); *Lujan*, 504 U.S. at 564 n.2 (while "'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for

[4] No party provided argument on the applicability of 29 U.S.C. § 213(b)(29), the FLSA's 56-hour overtime threshold for certain work, and, therefore, the Court declines to consider that issue.

Article III purposes—that the injury is 'certainly impending.'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Mr. Bradford and AVA's economic harms are also causally connected to the Biden Rule, as AVA would not have to raise wages or incur other related costs but for the rule, and a favorable decision for them, namely, a decision striking down the Biden Rule, would redress their injury. *See Colo. Outfitters Ass'n*, 823 F.3d at 544 (citing *Lujan*, 504 U.S. at 561). Mr. Bradford and AVA, therefore, have Article III standing.

"In addition to Article III standing requirements," a plaintiff "must (i) identify some final agency action and (ii) demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Catron County Bd. of Comm'rs v. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996)). The prudential standing inquiry asks whether plaintiffs "fall[] within the class of plaintiffs whom Congress has authorized to sue," or, in other words, whether plaintiffs have a cause of action under the statute. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Standing under the APA is unavailable if a statute precludes judicial review of the agency action. *City of Albuquerque v. Dep't of Interior*, 379 F.3d 901, 915–16 (10th Cir. 2004) (citing 5 U.S.C. § 701(a)(1)). The Procurement Act does not "explicitly den[y] standing or a private right of action to any plaintiffs." *Id.* at 916. Nor does the Biden Order or Rule. In the Tenth Circuit, however, prudential standing is "not a jurisdictional limitation and may be waived." *The Wilderness Society v. Kane Cnty.*, 632 F.3d 1162, 1168 n.1 (10th Cir. 2011); *Finstuen v.*

Crutcher, 496 F.3d 1139, 1147 (10th Cir. 2007). Because defendants do not address prudential standing, the issue has been waived, and the Court does not address it.

2. CROA

An organization has standing to sue on its own to challenge action that causes it direct injury, and the inquiry is "the same inquiry as in the case of an individual." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Organizations may assert standing in their own right when, for instance, a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals, such as when the organization faces a drain on its resources or when the defendant's actions "have perceptively impaired" the organization's ability to carry out its mission. *Id.* An association also has "standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). This doctrine is known as "associational standing."

There is no indication that the Biden Rule will impair CROA in fulfilling an essential purpose or goal of its mission or that the Biden Rule will harm CROA's financial resources. Mr. Costlow did not testify how CROA advocates for its members' interests, and there is no evidence on how or whether CROA itself expends any resources, as Mr. Costlow did not testify that CROA provides advice or counsel to its members in

any way, such that CROA's ability to carry out its mission would be affected by the Biden Rule. CROA, therefore, does not have organizational standing. *See Havens Realty*, 455 U.S. at 378.

Moreover, plaintiffs have not shown CROA's associational standing. The testimony from plaintiffs about a CROA member being potentially harmed by the Biden Rule was limited to Mr. Costlow's statement that an outfitter intends to buy part of an "operation" from another CROA member and that either the purchaser or seller requested to "transfer" a permit in February. Although Mr. Costlow did not specify which party to the transaction will have to transfer the permit, Mr. Costlow's testimony indicates that the permit falls under the ambit of the Biden Rule, and Mr. Costlow and the CROA member understand that transferring the permit would constitute a "new" contract under the Biden Rule such that the purchaser would be subject to the rule's minimum wage provisions. However, Mr. Costlow did not testify whether the purchaser or seller already meets the wage and hour requirements in the Biden Rule, which many CROA members do. Plaintiffs, therefore, have not shown that a CROA member will suffer even "[a] dollar of economic harm." *See Carpenters Indus. Council*, 854 F.3d at 5; *Czyzewski*, 137 S. Ct. at 983. Moreover, given that the transaction between the two outfitters has not been consummated and that there is no evidence or argument on the effect of a permit transfer, plaintiffs have not shown anything more than speculative or hypothetical injury. *See Clapper*, 568 U.S. at 416.

Because plaintiffs have not established CROA's standing, the Court will confine the remainder of its preliminary injunction analysis to plaintiffs Bradford and AVA.

B. Likelihood of Success on the Merits

As previously mentioned, plaintiffs bring three claims: (1) the Biden Rule exceeded President Biden's authority in violation of the APA, 5 U.S.C. § 706(2)(C) ("APA"); (2) the Biden Rule is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A); and (3) President Biden violated the Constitution's separation of powers and non-delegation doctrines. Docket No. 1 at 15–19, ¶¶ 51–77. The Court considers plaintiffs' likelihood of success for each claim.

1. Whether the Biden Rule Exceeds President Biden's Authority

In their complaint, plaintiffs argue that the Biden Rule was issued in excess of President Biden's authority under the Procurement Act. Docket No. 1 at 15–17, ¶¶ 51–59. Similarly, in their preliminary injunction motion, plaintiffs contend that the Procurement Act does not provide a basis for the Biden Rule. Docket No. 7 at 6–16.

The purpose of the Procurement Act is "to provide the Federal Government with an economical and efficient system" for (1) "[p]rocuring and supplying property and nonpersonal services," (2) "[u]sing available property," (3) "[d]isposing of surplus property," and (4) "[r]ecords management." 40 U.S.C. § 101. The Procurement Act permits the President to "prescribe policies and directives that the President considers necessary to carry out" the Act, and policies must be consistent with the Act. *Id.* at § 121(a).

Plaintiffs first argue that the Procurement Act does not permit the President to "use or dispose of *federal lands*." Docket No. 7 at 6. They argue that the Biden Rule is not authorized because the Procurement Act defines "property" to exclude land in the "public

domain" and "land reserved or dedicated for national forest or national park purposes." Docket No. 7 at 6–7 (quoting *id.* at § 102(9)). Thus, according to plaintiffs, because the other "activities" in the Act, such as records management, do not apply, President Biden has no authority under the Procurement Act over activities on the federal lands where plaintiffs operate. *Id.* E.O. 14026 states that it applies to contracts "related to offering services for Federal employees, their dependents, or the general public," *see* 86 Fed. Reg. at 22,837, and the Biden Rule explains that, "for purposes of the minimum wage requirements of [E.O. 14026], the term contract included contracts covered by the SCA, contracts covered by the DBA, concessions contracts not otherwise subject to the SCA, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public, as provided in" E.O. 14026. *Id.* at 67,133. Although the Procurement Act defines "property" narrowly, as plaintiffs note, *see* 40 U.S.C. § 102(9), plaintiff's argument is not persuasive because the Procurement Act also covers "supplying . . . nonpersonal services," *see* 40 U.S.C. § 101(1), which, as the Court discusses below, courts historically construe broadly. *See, e.g.*, *AFL-CIO v. Kahn*, 618 F.2d 784, 790, 787–92 (D.C. Cir. 1979) (en banc) (detailing presidents' use of the Procurement Act).

Plaintiffs next argue that, "[c]ertainly[,] the government's provision of permits is not the 'supply[of] non personal services,'" and plaintiffs' use of federal lands "has nothing at all to do with procurement." Docket No. 7 at 7 (quoting 40 U.S.C. § 102). Although plaintiffs are correct that outfitters are not procure-

ment contractors, *see* 86 Fed. Reg. at 67,152 (describing outfitters as "non-procurement contractors"), plaintiffs provide no additional argument or support beyond their say-so that outfitters operating on federal lands pursuant to permits or licenses like plaintiffs do not supply nonpersonal services.

The Procurement Act defines "nonpersonal services" as "contractual services . . . other than personal and professional services." 40 U.S.C. § 102(8). Courts interpreting "nonpersonal services" in the Procurement Act have considered the phrase as it is defined in the context of the Federal Acquisition Regulations. *See, e.g.*, *Kentucky v. Biden*, --- F.4th ----, 2022 WL 43178, at *15 n.11 (6th Cir. Jan. 5, 2022) (comparing 48 C.F.R. § 37.104(a) ("A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel."), with 48 C.F.R. § 37.101 ("Nonpersonal services contract means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.")). The court in *Kentucky* emphasized that the term "nonpersonal services" "implies the federal government's lack of the heightened degree of 'supervision and control' it might exercise over its own employees." *Id.* Here, Mr. Bradford testified that, as stated in Eagle River Permit, *see* Exh. 1 at 3, AVA is not permitted to imply that BLM has any supervision over AVA or that BLM provides services through AVA. Mr. Bradford stressed that BLM does not tell AVA how to "run rapids" or whether AVA can move a rock in a river. To be sure, AVA must abide by certain stipulations, *see id.* at 4–5, but the fact that a

party to a contract must comply with certain obligations pursuant to that contract does not mean that the party is under the control or supervision of the other party. The Eagle River Permit does not subject AVA to the supervision and control of the government. Plaintiffs have not shown, therefore, that outfitting and guiding are not nonpersonal services.

Moreover, the Court agrees with defendants that plaintiffs' argument that they "don't supply any services (or goods) to the government, and the government doesn't supply any services (or goods) to them," *see* Docket No. 7 at 8, is not persuasive because the Procurement Act provides an economical and efficient system for, among other things, "[p]rocuring *and supplying* . . . nonpersonal services." 40 U.S.C. § 101(1) (emphasis added). Defendants argue that the government, here, the Forest Service and BLM, contract with outfitters to supply recreational services to the public. Docket No. 21 at 11. As the stipulations in the Eagle River Permit show, the government is concerned with the ways in which outfitters supply recreational services to the public. *See* Exh. 1 at 4–5. For instance, if outfitters do not use hardened trails within riparian areas, they may damage the land leading to costly remediation. Plaintiffs have not shown that the government does not contract with them and other outfitters to supply services on federal lands.

Next, plaintiffs argue that the Biden Rule exceeds President Biden's authority because it is not "necessary for economical and efficient procurement policy." Docket No. 7 at 8–11. Plaintiffs' argument is not persuasive. First, the Procurement Act does not require that the policy or directive must be necessary for economical and efficient procurement, but rather only that the President considers the policy or directive to

be necessary. *See* 40 U.S.C. § 121(a) ("The President may prescribe policies and directives that the President considers necessary to carry out this subtitle."). Second, historical precedent shows that plaintiffs are mistaken in their view of what constitutes "economical and efficient procurement policy." The Procurement Act "provide[s] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services," "[u]sing available property," "[d]isposing of surplus property," and "[r]ecords management." 40 U.S.C. § 101. Courts have interpreted this language to mean that a president's policy or directive issued under the Procurement Act must have a "sufficiently close nexus to the values of providing the government an economical and efficient system for . . . procurement and supply." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (citation and internal quotation omitted). Courts have not viewed "economy" and "efficiency" narrowly; "economy" and "efficiency" "encompass those factors like price, quality, suitability, and availability of goods or services." *See Kahn*, 618 F.2d at 789. As a result, courts have held that the Procurement Act "grants the President particularly direct and broad-ranging authority over those larger . . . issues that involve the Government as a whole." *Id.*; *see also City of Albuquerque*, 379 F.3d at 914 ("Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act]. However, Congress did instruct the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property."). Courts have recognized the "necessary flexibility and broad-ranging authority" granted to the President under the Act, and courts will find a nexus even

where the connection seems attenuated or where arguments may be advanced that the order will have the opposite effect than it intends. *Chao*, 325 F.3d at 366 (quotation omitted).

In *Chao*, President Bush used the Procurement Act to require federal contractors to post notices at their facilities informing employees that they could not be forced to join a union or to pay mandatory dues unrelated to representational activities. *Id.* at 362. President Bush explained the economies and efficiencies as follows: "When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. 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 (quoting 66 Fed. Reg. 11,221, 11,221). Although the court noted that the "link may seem attenuated" between the rule and economy and efficiency to the government and that "one can with a straight face advance an argument claiming opposite effects or no effects at all," the court ultimately held that President Bush had shown "enough of a nexus" to the requirements of economy and efficiency under the Procurement Act. *Id.* at 366–67.[5]

[5] Although plaintiffs argued at the hearing that *Chao* is an outlier, the Sixth Circuit in *Kentucky* noted that the "requirement" in *Chao* "has a 'close nexus'" to the government's management of labor. 2022 WL 43178, at *14 (finding that "instances in which the federal government said federal contractors . . . had to hang posters advising employees that they could not be forced to join a union" "has a 'close nexus' to the ordinary hiring, firing, and management of labor").

Decades before *Chao*, the D.C. Circuit, en banc, upheld President Carter's minimum wage executive order issued under the Procurement Act. *See Kahn*, 618 F.2d at 796. The court in *Kahn* explained that the Procurement Act "was designed to centralize [g]overnment property management and to introduce into the public procurement process the same flexibility that characterizes such transactions in the private sector." *Id.* at 787. The court noted that the language in the act permitting the President to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act" was "open-ended." *Id.* at 788 (quoting 40 U.S.C. § 486(a), now codified at 40 U.S.C. § 121(a)). The court explained that Congress, in enacting the law, emphasized "the leadership role of the President in setting [g]overnment-wide procurement policy on matters common to all agencies" and "intended that the President play a direct and active part in supervising the [g]overnment's management functions." *Id.*

The court in *Kahn* detailed the sorts of presidential directives that courts have upheld under the Act. In 1961, for instance, President Kennedy used the Procurement Act to direct contractors to hire minority workers. *Id.* at 791.[6] According to *Kahn*, presidents

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[6] Plaintiffs argued at the hearing and in their reply brief that the President "does not have, for example, the power to order federal subcontractors to prevent racial discrimination and take affirmative action in hiring." Docket No. 22 at 4 (citing *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981)). The Court finds *Liberty Mutual*'s persuasiveness minimal given the numerous anti-discrimination measures described in *Kahn* that have been upheld and the Sixth Circuit's recent statement that

used the Procurement Act—and only the Procurement Act—for authority to enact anti-discrimination requirements for government contractors between 1953 and 1964. *Id.* at 790–91. Later, "President Johnson directed by Executive Order that federal contractors not 'discriminate (against persons) because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.'" *Id.* at 790 (quoting 3 C.F.R. § 179). In 1967, the General Services Administrator issued a regulation under the Procurement Act requiring goods used in procurement and supplies to be produced in the United States. *Id.* In 1973, President Nixon used the Procurement Act to exclude certain state prisoners from employment on federal contract work. *Id.* The *Chao* court, citing *Kahn*, described the standard of showing the economy and efficiency nexus as "lenient." *Chao*, 325 F.3d at 367.

In determining the limits of an agency's congressional mandate, courts may look to historical practice. *See, e.g.*, *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, No. 21A244, 21A447, 2022 WL 120952, at *4 (U.S. Jan. 13, 2022) ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind . . . . This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach."); *Kentucky*, 2022 WL 43178, at *15 n.11

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anti-discrimination orders have a "close nexus" to the management of labor. *See Kentucky*, 2022 WL 43178, at *14 (finding that governments' requirement that federal contractors "could not discriminate" has a "'close nexus' to the ordinary hiring, firing, and management of labor").

("It is telling that none of the history from 1949 to present supplied by the government involves the imposition of a medical procedure upon the federal-contractor workforce under the rationale of 'reducing absenteeism.' The dearth of analogous historical examples is strong evidence that [the Procurement Act] does not contain such a power." (citing *In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 284 (6th Cir. 2021) (Sutton, C.J., dissenting) ("A 'lack of historical precedent' tends to be the most 'telling indication' that no authority exists.")).

There is, of course, recent precedent of presidents using the Procurement Act to regulate contractor minimum wages. Just as President Biden did, President Obama and President Trump relied on their Procurement Act authority to issue their executive orders. President Obama's order begins, "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act . . . and in order to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers . . . ." 79 Fed. Reg. at 9,851. President Trump's order begins, "[b]y the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act . . . and in order to ensure that the Federal Government can economically and efficiently provide the services that allow visitors of all means to enjoy the natural beauty of Federal parks and other Federal lands . . . ." 83 Fed. Reg. at 25,341.

President Obama and President Trump invoked the Procurement Act as the proper vehicle for the Executive to regulate minimum wages paid to federal contractors, including outfitters and guides operating on federal land. President Obama stated that regulating federal contractor minimum wages is, at least in the context of the Procurement Act, related to economical and efficient government contracting. Similarly, President Trump stated that regulating outfitter and guide wages on federal land is related to the government's provision of services to allow the public to enjoy federal land. The rules implementing President Obama's and President Trump's orders confirm their administrations' understanding that the Procurement Act provided sufficient authority for their actions. *See, e.g.*, 79 Fed. Reg. at 60,636 ("The President issued [E.O.13658] pursuant to his authority under 'the Constitution and the laws of the United States,' expressly including the . . . Procurement Act . . . . The Procurement Act authorizes the President to 'prescribe policies and directives that the President considers necessary to carry out' the statutory purposes of ensuring 'economical and efficient' government procurement and administration of government property." (first quoting 29 Fed. Reg. at 9,851, then quoting 40 U.S.C. §§ 101, 121(a)); 83 Fed. Reg. at 48,538 ("The President issued E.O. 13838 pursuant to his authority under the Constitution and the [Procurement Act]. The Procurement Act authorizes the President to 'prescribe policies and directives that [the President] considers necessary to carry out' the statutory purposes of ensuring 'economical and efficient' government procurement and administration of government property." (quoting 40 U.S.C. §§ 101, 121(a))). President Trump's order also states, "applying [E.O.13658] to [recreational]

service contracts does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands. That rationale, however, does not apply with the same force to lodging and food services associated with seasonal recreational services, which generally involve more regular work schedules and normal amounts of overtime work. Executive Order 13658 therefore should continue to apply to lodging and food services associated with seasonal recreational services." 83 Fed. Reg. at 25,341. President Obama's and President Trump's executive orders and rules are historical precedent for President Biden using the Procurement Act similarly.

The Court finds that the Biden Rule meets the "lenient" economy and efficiency nexus. *See Chao*, 325 F.3d at 367; *Kahn*, 618 at 790–92. The Biden Order states that President Biden's goal is to "promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers." 86 Fed. Reg. at 22,835. The Order also states that "ensuring that [f]ederal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in [f]ederal procurement" because raising the minimum "enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." *Id.* President Biden's statement of economy and efficiency is similar to President Bush's in *Chao*, which was held to be sufficient. *See Chao*, 325 F.3d at 366 (President Bush's statement was that, "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a

workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." (quoting 66 Fed. Reg. at 11,221)).

Moreover, DOL "anticipates that the economy and efficiency benefits of [E.O. 14026] will offset potential costs, including for the holders of [recreational service permits and licenses]." 86 Fed. Reg. at 67,152. DOL found that "several factors . . . will substantially offset any potential adverse economic effects on their businesses arising from application of" E.O. 14026. *Id.* at 67,153. DOL concluded that "increasing the minimum wage of [outfitters and guides] can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory and training costs, and increase the quality of services provided to the Federal Government and the general public." *Id.* DOL also noted "the potential that increased efficiency and quality of services will attract more customers and result in increased sales. Such benefits may be realized even where the contractor has limited ability to transfer costs to the contracting agency or raise prices of the services that it offers." *Id.*

Plaintiffs argue that the Biden Rule will actually result in more costs to non-procurement contractors who are unable to pass along the costs to the government in higher priced bids, which plaintiffs argue is the opposite of the Procurement Act's goal. Docket No. 7 at 9–10. DOL has disputed this, concluding that "there is no evidence to suggest that the[] benefits" of "improved government services, increased morale and productivity, reduced turnover, reduced absenteeism, increased equity, and reduced poverty and income . . . would not apply to the outfitters and guide industry as well" as to other federal contract workers. 86 Fed.

Reg. at 67,212. The relevant savings is not to individual contractors or contractors as a whole, but rather to the government. *Kahn*, 618 F.2d at 793 (emphasizing "the importance . . . of the nexus between [President Carter's] wage and price standards and the likely savings to the [*g*]*overnment*" (emphasis added)). Regardless, even if the portion of the rule concerning outfitters and guides does not result in savings to the government, plaintiffs, who seek to enjoin enforcement of the entire rule, have not shown that the remainder of the rule, which concerns procurement and non-procurement contractors across industries, will not yield savings to the government through the benefits that DOL enumerated.

In their motion, plaintiffs make three alternative arguments that President Biden exceeded his authority under the Procurement Act. Docket No. 7 at 11–16. Plaintiffs contend that the Procurement Act: (1) "must not be read to displace congressional action concerning federal contractors"; (2) "must be read to avoid major questions"; and (3) "must be read to avoid a nondelegation problem." *Id.* Defendants address only plaintiffs' third argument because plaintiffs' first and second claims do not appear in their complaint. Docket No. 21 at 15 n.7 (citing *Hoeck v. Miklich*, No. 13-cv-00206-PAB-KLM, 2015 WL 4979843, at *2 (D. Colo. Aug. 20, 2015) (noting that a "[p]laintiff's complaint defines the claims at issue," and a plaintiff "may not expand the scope of the complaint through a motion for injunctive relief")); *cf. Occupy Denver v. City & Cnty. of Denver*, No. 11-cv-03048-REB-MJW, 2011 WL 6096501, at *3 (Dec. 7, 2011) (not proper or equitable for plaintiff to expand the scope of claims

through evidence not specified in complaint). Regardless, plaintiffs' arguments are not convincing.[7]

In support of their first argument, which is that the Biden Rule displaces congressional action on federal contractors, plaintiffs contend that Congress has already directly addressed federal minimum wage in the FLSA, and federal contractor minimum wage in the SCA, DBA, and Walsh-Healey Public Contract Act of 1936 (the "PCA"). Docket No. 7 at 12. Plaintiffs insist that "Congress's longstanding rules governing federal contractor wages cannot be read as a free pass for the agency to legislate wherever the statutes end." *Id.* at 13. The Court is not convinced that the three statutes plaintiffs cite, which are at least 50 years old, constitute the entirety of federal contractor minimum wage requirements and leave no room for agency rulemaking. The Biden Rule does not conflict with the statutes to which plaintiffs cite and, therefore, it is not clear how the Biden Rule displaces any of them. Moreover, plaintiffs do not explain why the SCA, DBA, and PCA, which "establish 'minimum' wage . . . floors," would be inconsistent with DOL's efforts "to establish a higher minimum wage rate," as DOL explained. *See* 86 Fed. Reg. at 67,129 (E.O. 14026 "clearly does not authorize [DOL] to essentially nullify the policy, premise, and essential coverage protections of the order . . . by declining to extend the Executive order minimum wage to any worker covered by the DBA, FLSA, or SCA where such rate differs from the applicable minimum wages established under those laws. Indeed, in order to effectuate the purposes of

[7] The Court will consider the parties' non-delegation doctrine arguments below.

[E.O.14026], it must apply to workers who would otherwise be subject to lower minimum wage requirements under the DBA, FLSA, and/or SCA.").

Plaintiffs' second argument is that the Procurement Act must be read to avoid "major questions." Docket No. 7 at 14. "The Supreme Court has said in a few cases that sometimes an agency's exercise of regulatory authority can be of such 'extraordinary' significance that a court should hesitate before concluding that Congress intended to house such sweeping authority in an ambiguous statutory provision." *Am. Lung Ass'n v. E.P.A.*, 985 F.3d 914, 959 (D.C. Cir. 2021) (citing *King v. Burwell*, 576 U.S. 473, 485–486 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 262, 266–267 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Utility Air Regul. Group v. EPA (UARG)*, 573 U.S. 302, 324 (2014); *MCI Telecommc'ns v. AT&T*, 512 U.S. 218, 231 (1994)). "Where there are special reasons for doubt, the doctrine asks whether it is implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." *Id.* (citing *UARG*, 573 U.S. at 324 (considering whether the challenged rule would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization")); *Brown & Williamson*, 529 U.S. at 161 (holding that the FDA could not regulate tobacco because it was "plain that Congress ha[d] not given the FDA the authority that it s[ought] to exercise") (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, ma-

jor questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

First, the "major questions" doctrine does not apply to this case because plaintiffs have identified no "special reasons for doubt" or that the Procurement Act is "an ambiguous statutory provision." *See Am. Lung Ass'n*, 985 F.3d at 959. Plaintiffs argue that courts cannot "assume that Congress has assigned to the Executive Branch questions of 'deep economic and political significance' unless Congress has done so 'expressly,'" which it has not done here. Docket No. 7 at 14 (quoting *King*, 576 U.S. at 486). Plaintiffs cite DOL's finding that the Biden Rule is "economically significant," *see* 86 Fed. Reg. at 67,194 (indicating that "economically significant" rules or "significant regulatory action" has an annual effect on the economy of at least $100 million), because the rule will affect 327,300 employees, and because wage increases will amount to $1.7 billion per year over 10 years. *Id.* Although the Biden rule may meet that definition, the economic effect is far below the range that the Office of Management and Budget quantifies to have a measurable effect, in macroeconomic terms, on the gross domestic product. *See* 86 Fed. Reg. 67,224 (regulations have no measurable effect below 0.25% of the GDP, which is $52.3 billion). Moreover, the Supreme Court's decision in *King* also shows how different this case is from *King*. The relevant question in *King* was whether courts should defer to the Internal Revenue Service ("IRS") in the rule implementing the tax credit provision of the Affordable Care Act. The Court held that the IRS was not entitled to deference because the issue "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for

millions of people." *King*, 576 U.S. at 485. The Court found it "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* at 486 (emphasis in original). The Biden Rule on minimum wages, on the other hand, is not "unusual agency action" or a rule of "extraordinary" significance such that the Court should "hesitate before concluding that Congress intended to house such sweeping authority in an ambiguous statutory provision." *See Am. Lung Ass'n.*, 985 F.3d at 959. It also does not "significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1850 (2020)). Rather, the Biden Rule would have a small economic impact and is clearly within DOL's area of expertise.

In light of the caselaw upholding a diverse array of presidential actions under the Procurement Act, *see, e.g.*, *Kahn*, 618 F.2d at 789–92 (collecting cases), the President's broad-ranging authority under the Act, *id.* at 789; *City of Albuquerque*, 379 F.3d at 914, the consistent views of Presidents Obama, Trump, and Biden that regulating the minimum wages of guides and outfitters is permitted under the Act, and the Act's lenient standard, *Chao* 325 F.3d at 367, the Court finds that plaintiffs have not shown a likelihood of success that President Biden's minimum wage directive was issued without statutory authority.

2. Whether the Biden Rule is Arbitrary and Capricious

Plaintiffs' second claim is that the Biden Rule violates the APA because it is arbitrary and capricious. Docket No. 1 at 17–18, ¶¶ 60–65. Plaintiffs allege that

DOL rescinded the Trump Rule "without acknowledging the significant reliance interests at stake or explaining why it has disregarded its own evidence, and while refusing to consider alternatives to the rule." *Id.* at 18, ¶ 63; Docket No. 7 at 16–18.

Under the APA, a court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Nat'l Ass'n of Clean Air Agencies v. E.P.A.*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). The Court "determine[s] only whether the [agency] examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Supreme Court has called this a "narrow" standard of review. *Id.* (quoting *State Farm*, 463 U.S. at 43); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) *Blanca Tel. Co. v. F.C.C.*, 991 F.3d 1097, 1110 (10th Cir. 2021). "An agency's decision need not be 'a model of analytic precision to survive a challenge' under this standard," *United Airlines, Inc. v. Transp. Sec. Admin.*, 20 F.4th 57, 62 (D.C. Cir. 2021) (quoting *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995)), and the Court "will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). "Judicial review under [the arbitrary and capricious] standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *F.C.C. v. Prometheus Radio Proj.*, 141 S. Ct. 1150, 1158 (2021).

The Tenth Circuit has held that the "arbitrary or capricious" standard requires an agency's action to be supported by "'substantial evidence in the administrative record,' meaning 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *N.M. Farm & Livestock Bureau v. Dep't of Interior*, 952 F.3d 1216, 1226 (10th Cir. 2020) (quoting *Colo. Wild, Heartwood v. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). "This is something more than a mere scintilla but something less than the weight of the evidence." *Foust v. Lujan*, 942 F.2d 712, 714 (10th Cir. 1991); *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1152 (10th Cir. 2016). "Evidence is generally substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion." *Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir. 1997); *Heartwood*, 435 F.3d at 1213. The review is "[h]ighly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1228 (citing *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 698 (D.C. Cir. 2003)); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1283 (D.C. Cir. 2019) ("Our review is, as always, highly deferential and presumes the validity of agency action." (quotation and citation omitted)). The agency may rely on comments submitted during the notice and comment period as justification for the rule, so long as the submissions are examined critically. *See Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 516 (D.C. Cir. 2020) (citing *Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1125 (D.C. Cir. 1984)).

"[T]he burden of proof rests with the party challenging" the agency action. *WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017) (quoting *Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014)). Plaintiffs argue that the Biden Rule is arbitrary and capricious "because the rule rescinded DOL's prior exception for non-procurement firms like [p]laintiffs without acknowledging the significant reliance interests at stake, explaining why it has disregarded its own prior conclusions, or considering alternatives to the rule." Docket No. 7 at 17.

The Supreme Court has stressed that there is "no basis in the Administrative Procedure Act or in [the Court's] opinions for a requirement that all agency change be subjected to more searching review." *Fox Television*, 556 U.S. at 514. The Court has "neither held nor implied that every action representing a policy change be justified by reasons more substantial than those required to adopt a policy in the first instance." *Id.* However, "[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Id.* at 515 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). An agency must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy'" when it does change its policy. *Renewable Fuels Ass'n v. E.P.A.*, 948 F.3d 1206, 1255 (10th Cir. 2020) (quoting *Fox Television*, 556 U.S. at 515), *rev'd on other grounds sub nom. HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021).

Plaintiffs cannot show that DOL changed the policy *sub silento*, given that the Biden Rule includes an entire section on rescission of the Trump Rule. *See* 86

Fed. Reg. at 67,154–55. The agency thus acknowledged the policy change rescinding President Trump's order and rule, and it did not "simply disregard" President Trump's directives. *See Fox Television*, 556 U.S. at 515. Thus, plaintiffs are mistaken in their claim that the Biden Rule "blows past [DOL's] own prior rulemaking" and that DOL promulgated the Biden Rule with "mere *silence*." *See* Docket No. 7 at 17.

Moreover, DOL "show[s] that there are good reasons for the new policy," *see Fox Television*, 556 U.S. at 515, even if plaintiffs or the Court may disagree with those reasons. *See Prometheus Radio*, 141 S. Ct. at 1158 (noting that courts should not substitute their policy judgments for the agency's). DOL "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute," *see Fox Television*, 556 U.S. at 515, which the Court has found the Biden Rule to be, "that there are good reasons for it," *see id.*, which DOL has enumerated, including attracting higher quality workers to provide higher quality services, improved morale and productivity through increased employee retention, reduced turnover, reduced absenteeism, and reduced poverty and income inequality, *see* 86 Fed. Reg. at 67,212–15, "and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *See Fox Television*, 556 U.S. at 515. The Biden Rule, by explicitly rescinding the Trump Rule, "adequately indicates" that President Biden and DOL believe the Biden Rule to be better.

Plaintiffs argue that, because the Biden Rule "rests upon factual findings that contradict those which underlay its prior policy," a "more detailed justification" is required. Docket No. 7 at 16 (quoting *Fox*

Television, 556 U.S. at 515). Assuming that the Biden and Trump rules rely upon contradictory factual findings—i.e., President Biden's Administration determined that increased minimum wage for outfitters would have salutary effects, while President Trump's Administration concluded the opposite—plaintiffs have not shown why DOL's substantial justification for the Biden Rule is not sufficiently detailed. DOL concluded, contrary to President Trump's finding, that "there is no evidence to suggest that the[] benefits" of "increased morale and productivity and decreased turnover," which "tend to be general rather than industry specific," "would not apply to the outfitters and guide industry as well" as to other federal contract workers. 86 Fed. Reg. at 67,212. DOL reached this conclusion after considering both approving and disapproving comments for President Biden's rescission of President Trump's order. *See id.* at 67,151–52. DOL acknowledged that non-procurement contractors, such as plaintiffs and other outfitters, "may [face] particular challenges and constraints . . . that do not exist under more traditional procurement contract" and considered comments that E.O. 14026 will "significantly increase the labor costs of entities performing overnight and/or multi-day excursions in national parks, where overtime costs will be substantial and are unavoidable." *Id.* at 67,152. DOL explained that such comments were not persuasive because the comments "generally do not account for several factors that [DOL] expects will substantially offset any potential adverse economic effects on their businesses arising from application of the" Biden Order. *Id.* at 67,152–53 ("In particular, these commenters do not seem to consider that increasing the minimum wage of their workers can reduce absenteeism and turnover

in the workplace, improve employee morale and productivity, reduce supervisory and training costs, and increase the quality of services provided to the [f]ederal [g]overnment and the general public. These commenters similarly do not account for the potential that increased efficiency and quality of services will attract more customers and result in increased sales. Such benefits may be realized even where the contractor has limited ability to transfer costs to the contracting agency or raise prices of the services that it offers."). Thus, DOL carefully considered these positive and negative comments in issuing the final rule, and the Court finds that the agency provided a sufficiently detailed explanation for departing from President Trump's rule. *See Nat'l Ass'n of Regul. Util. Comm'rs*, 737 F.2d at 1125 (noting that an agency may rely on comments submitted during the notice and comment period as justification for the rule, so long as the submissions are examined critically).

Plaintiffs argue that the Biden Rule is arbitrary and capricious because DOL did not "consider . . . alternatives." Docket No. 7 at 16–17 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) (noting that *State Farm*, one of the "leading modern administrative law cases," "teaches that when an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' 'that are within the ambit of the existing [policy].'" (quoting *State Farm*, 463 U.S. at 51)). Plaintiffs argue that the statements in the Biden Rule that DOL had "no authority to exempt small businesses from the minimum wage requirements of the order," 86 Fed. Reg. at 67,223, and that DOL "notes that[,] due to the prescriptive nature of [E.O. 14026], [DOL] does not have the discretion to implement alternatives that

would violate the text of [E.O. 14026], such as the adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses," *id.* at 67,216, indicate that DOL did not consider alternatives. Plaintiffs are not entirely correct, however, as DOL did consider several alternatives. First, DOL considered defining the term "United States" to exclude contracts performed outside of the 50 states and the District of Columbia. *Id.* at 67,216–17. Second, DOL considered excluding contractors who perform less than 20% of their workweek performing "in connection" with covered contracts. DOL rejected these alternatives. *Id.* It is correct, however, that DOL did not consider excluding outfitters, which DOL believed it did not have authority to consider, in light of President Biden's clear direction. Plaintiffs do not argue that DOL had authority to contradict the President's direction or that President Biden's decision to rescind President Trump's exemption is reviewable under the APA. Nor could they. Because the President is not an "agency" for purposes of the APA, his actions generally are not subject to review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 799–801 (1992) (holding that, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the President's actions are not subject to the APA's requirements and that the determinative consideration is whether "the President's authority to direct the [agency] in making policy judgments" is curtailed in any way or whether the President is "required to adhere to the policy decisions" of the agency). Moreover, courts have held that, where an agency acts "solely on behalf of the President" and exercises "purely presidential prerogatives," rather than acting pursuant to a congressional delegation of power or to

an executive order issued to carry out a congressional mandate, the presidential direction is not reviewable under the APA. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Dep't of State*, 658 F. Supp. 2d 105, 109, 113 (D.D.C. 2009) (State Department decision to issue a presidential permit was unreviewable presidential action because Department was acting on behalf of the President and in accordance with his directives); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 99 (D.D.C. 2016) (actions involving the exercise of discretionary authority vested in the President by law are not reviewable under the APA), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017), *op. amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018). Here, there is no question that a president may rescind his, or his predecessors', executive orders, and a court may not review such discretionary action. *Cf. Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (noting that the Supreme Court "has directly addressed the nature of review of discretionary Presidential decisionmaking, . . . has highlighted the separation of powers concerns that inhere in such circumstances and has cautioned that these concerns bar review for abuse of discretion altogether").

Plaintiffs' final argument is that DOL failed to acknowledge the "significant reliance interests" at stake. Docket No. 7 at 16–17. It is true that, where a policy change impacts "longstanding polic[y that] may have 'engendered serious reliance interests,'" the agency enacting the change generally must take those interests into account. *Regents*, 140 S. Ct. at 1913. However, given that the Obama Rule imposing a $10.10 hourly minimum wage applied to outfitters from 2015 to 2018 and the Trump Rule has exempted outfitters since just September 26, 2018, the Court

does not find it likely that President Trump's exemption was a "longstanding policy" or that there has been "serious reliance interest" on it. Moreover, Mr. Bradford testified that AVA has always paid its employees Colorado minimum wage. While the Trump Rule has been in effect, the Colorado's minimum wage has always exceeded the federal contractor minimum wage that President Trump preserved from the Obama Rule, and minimum wage has increased annually. *See Minimum Wage History*, Colo. Dep't of Labor & Emp., http://cdle.colorado.gov/wage-and-hour-law/minimum-wage (last visited Jan. 23, 2022). Thus, AVA has not shown how it has relied on the Trump or Obama rules when AVA apparently has always paid higher wages than provided in those rules.

Moreover, the hourly wage increase between the Trump and Biden Rules is not the sudden, unexplained "goalpost-moving" that courts have found arbitrary and capricious. *See, e.g.*, *Qwest v. F.C.C.*, 689 F.3d 1214, 1228 (10th Cir. 2012) (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)(noting that "[s]udden and unexplained change [in an agency's position], or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion" (quoting 5 U.S.C. § 706(2)(A)); *Hatch v. Fed. Energy Regul. Comm'n*, 654 F.2d 825, 834–35 (D.C. Cir. 1981) (holding that an agency's sudden shift in the nature of proof required of the regulated party was not sufficiently explained and necessitated remand); *Pub. Serv. Co. of Ind., Inc. v. Fed. Energy Regul. Comm'n*, 584 F.2d 1084, 1087–88 (D.C. Cir. 1978) (holding that an agency's sudden, unexplained shift in the kind of data that a regulated party was required to submit was arbitrary); *Verizon Tel. Cos. v. F.C.C.*, 570 F.3d 294, 304

(D.C. Cir. 2009). ("[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past."); *Fed. Energy Regul. Comm'n v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984) ("The Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case. Agencies must implement their rules and regulations in a consistent, evenhanded manner.")). Finally, President Biden issued E.O. 14026 on April 27, 2021. 86 Fed. Reg. at 22,835. DOL issued its proposed rule on July 22, 2021. 86 Fed. Reg. at 38,816. DOL promulgated the final Biden Rule on November 24, 2021. 86 Fed. Reg. at 67,126. Far from being a "sudden and unexplained" change, AVA and others have known that the Trump Rule could be rescinded for nearly nine months and, as discussed previously, President Biden and DOL have explained the policy change.

Because DOL "has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made,'" *see United States Air Tour Ass'n*, 298 F.3d at 1005 (quoting *State Farm*, 463 U.S. at 43), and has "articulate[d] a satisfactory explanation for its action," *see Fox Television*, 556 U.S. at 513, plaintiffs have not shown a likelihood that they ultimately will establish that the Biden Rule is arbitrary and capricious.

3. Whether President Biden Violated the Separation of Powers or Non-Delegation Doctrine

Plaintiffs' final claim in their complaint is that, because "Congress did not bestow the President with the

authority to issue a federal minimum wage requirement for entities like Plaintiffs, who do not have procurement contracts with the government," the President has violated the non-delegation doctrine through the Biden Rule. Docket No. 1 at 19, ¶ 73. Alternatively, plaintiffs allege, if Congress did "bestow such authority on the President, it would be an unlawful delegation of legislative authority" because, "if the [Biden Rule] were authorized by the Procurement Act, the Act unconstitutionally delegates legislative power to the President and DOL." *Id.*, ¶¶ 74, 76.

"The Constitution provides that '[a]ll legislative Powers herein granted shall be vested in a Congress of the United States' . . . and [the Supreme Court] ha[s] long insisted that 'the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (first quoting U.S. Const. art. I, § 1; then quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). However, "Congress may 'obtain[] the assistance of its coordinate Branches'—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (quoting *Mistretta*, 488 U.S. at 372). "[I]n our increasingly complex society, replete with ever changing and more technical problems," the Supreme Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Id.* (quoting *Mistretta*, 488 U.S. at 372). Thus, the Supreme Court has "held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by leg-

islative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" *Id.* 2123 (2019) (quoting *Mistretta*, 488 U.S. at 372; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). In fact, "[o]nly twice in this county's history (and that in a single year) has the [Supreme Court] found a delegation excessive—in each case because 'Congress had failed to articulate any policy or standard' to confine discretion." *Id.* (citing *Mistretta*, 488 U.S. at 373, n.3; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)).[8] "By contrast, [the Supreme Court] ha[s] over and over upheld even very broad delegations." *Id.* For example, the Court has upheld delegations to agencies to regulate in the "public interest," *id.* (citing *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)); "to set 'fair and equitable' prices and 'just and reasonable' rates," *id.* (citing *Yakus v. United States*, 321 U.S. 414,422, 427 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)); and, more recently, "to an agency to issue whatever air quality standards are 'requisite to protect the public health.'" *Id.* (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)). The Court has "almost never felt qualified to second-guess Congress regarding the permissible

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[8] "The nondelegation doctrine's continuing vitality is at least open to question." *United States v. Cotonuts*, 633 F. App'x 501, 505 (10th Cir. 2016) (quoting 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Proc.* § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.")).

degree of policy judgment that can be left to those executing or applying the law." *Whitman*, 531 U.S. at 474–475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

In their motion, plaintiffs argue that "an interpretation of the Procurement Act that allow[s] the President to unilaterally *displace* existing minimum wage rules" would be too broad without more explicit congressional delegation. Docket No. 7 at 15. But plaintiffs cannot use the non-delegation doctrine to attack an exercise of delegated authority because the non-delegation doctrine asks whether the authority was delegated constitutionally, not whether it was exercised in accordance with the delegation. *See Gundy*, 139 S. Ct. at 2123 (noting that "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation" and that "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion); *Cotonuts*, 633 F. App'x at 506 (citing *Mistretta*, 488 U.S. at 373 n.7 (noting that the non-delegation doctrine is largely "limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional"); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 242–47 (arguing that the non-delegation doctrine has been enforced by the narrow construction of statutes that may otherwise confer open-ended authority to executive agencies)).[9]

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[9] Even if plaintiffs' non-delegation argument were posed properly, it would fail, as the Court has found a "sufficiently close

Plaintiffs' alternative argument is that, if Congress delegated to the President authority to regulate contractors' minimum wage, such delegation "would be an unlawful delegation of legislative authority." Docket No. 1 at 19, ¶¶ 74, 76. Although this argument asks the right question under the non-delegation doctrine, it is no more successful. First, in their complaint, plaintiffs rely almost exclusively on *Schechter Poultry* and *Panama Refining*; however, the Supreme Court in *Gundy* explained that those two cases, from 1935, are the only instances in the Court's history that it has found Congress to have delegated impermissibly its legislative authority. *Gundy*, 139 S. Ct. at 2129. Plaintiffs cite no court that has found the Procurement Act to be a third instance, and *City of Albuquerque* forecloses such an argument. In that case, the court held that the Procurement Act provides a sufficiently intelligible principle. *City of Albuquerque*, 379 F.3d at 914–15 ("It is well established that Congress may delegate responsibility to the executive branch so long as Congress provides an 'intelligible principle' to guide the exercise of the power . . . . Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act]. However, Congress did instruct the President's exercise of authority should establish

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nexus" between President Biden's directive and the "values of providing the government an economical and efficient system for procurement and supply." *See Chao*, 325 F.3d at 366; *see also Kahn*, 618 F.2d at 793. Moreover, plaintiffs have not shown that the Biden Rule *displaces* Congress's past legislation on federal contractor minimum wage. As discussed previously, DOL recognized that SCA, DBA, and PCA "establish 'minimum' wage . . . wage floors," meaning that DOL's efforts "to establish a higher minimum wage rate" would not be inconsistent with those statutes. *See* 86 Fed. Reg. at 67,129.

'an economical and efficient system for . . . the procurement and supply' of property." (quoting 40 U.S.C. § 471, now codified at 40 U.S.C. § 101)). The Sixth Circuit recently held similarly. *See Kentucky*, 2022 WL 43178, at *14 n.14 ("We thus disagree with the district court that the [Procurement] Act likely presents nondelegation concerns. Those might arise if the [Procurement] Act had 'merely announce[d] vague aspirations" and then gave "the executive *carte blanche*' to do whatever the President saw fit. The [Procurement] Act instead grants the President specific, enumerated powers to achieve specific, enumerated goals in administering the federal procurement system." (quoting *Gundy*, 139 S. Ct. at 2133, 2144 (Gorsuch, J., dissenting)).

Plaintiffs, therefore, have not shown a likelihood of success in their nondelegation claim because a delegation is overbroad "[o]nly if [the Court] could say that there is an absence of standards for the guidance of the [agency's] action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *See Yakus*, 321 U.S. at 426. The Supreme Court has only found Congress to have failed to provide an intelligible twice in the last 87 years, and the Tenth Circuit has specifically found the Procurement Act meets the test. This forecloses plaintiffs' argument.

Because plaintiffs have not shown a likelihood of success on the merits of any of their claims, they have failed to demonstrate a "clear and unequivocal" right to relief. *Cf. Dalkita, Inc. v. Distilling Craft, LLC*, 356 F. Supp. 3d 1125, 1140–41 (D. Colo. 2018) (denying preliminary injunction where movants failed to show likelihood of success on the merits without considering

remaining preliminary injunction factors) (citing *Beltronics*, 562 F.3d at 1070). The Court will therefore deny plaintiffs' motion for a preliminary injunction without addressing the remaining preliminary injunction factors. *See Vill. of Logan v. Dep't of Interior*, 577 F. App'x 760, 766 (10th Cir. 2014) (unpublished) (noting that party's "failure to prove any one of the four preliminary injunction factors renders its request for injunctive relief unwarranted"); *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 888 (10th Cir. 2013) (unpublished) (stating that "[a] party seeking a preliminary injunction must prove that all four of the equitable factors weigh in its favor").

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that plaintiffs' Motion for a Preliminary Injunction [Docket No. 7] is **DENIED**.

DATED January 24, 2022.

BY THE COURT:

/s/ Phillip A. Brimmer
PHILIP A. BRIMMER
Chief United States District Judge

40 USC § 101. Purpose

The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for the following activities:

(1) Procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, storage, issue, setting specifications, identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before federal and state regulatory bodies.

(2) Using available property.

(3) Disposing of surplus property.

(4) Records management.

40 USC § 121. Administrative

(a) Policies prescribed by the President.--The President may prescribe policies and directives that the President considers necessary to carry out this subtitle. The policies must be consistent with this subtitle.

(b) Accounting principles and standards.--

(1) Prescription.--The Comptroller General, after considering the needs and requirements of executive agencies, shall prescribe principles and standards of accounting for property.

(2) Property accounting systems.--The Comptroller General shall cooperate with the Administrator of General Services and with executive agencies in the development of property accounting systems and approve the systems when they are adequate and in conformity with prescribed principles and standards.

(3) Compliance review.--From time to time the Comptroller General shall examine the property accounting systems established by executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems. The Comptroller General shall report to Congress any failure to comply with the principles and standards or to adequately account for property.

(c) Regulations by Administrator.--

(1) General authority.--The Administrator may prescribe regulations to carry out this subtitle.

(2) Required regulations and orders.--The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator's functions under this subtitle and the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.

(d) Delegation of authority by Administrator.--

(1) In general.--Except as provided in paragraph (2), the Administrator may delegate authority conferred on the Administrator by this subtitle to an official in the General Services Administration or to the head of another federal agency. The Administrator may authorize successive redelegation of authority conferred by this subtitle.

(2) Exceptions.--The Administrator may not delegate--

(A) the authority to prescribe regulations on matters of policy applying to executive agencies;

(B) the authority to transfer functions and related allocated amounts from one component of the Administration to another under paragraphs (1)(C) and (2)(A) of subsection (e); or

(C) other authority for which delegation is prohibited by this subtitle.

(3) Retention and use of rental payments.--A department or agency to which the Administrator has delegated authority to operate, maintain or repair

a building or facility under this subsection shall retain the portion of the rental payment that the Administrator determines is available to operate, maintain or repair the building or facility. The department or agency shall directly expend the retained amounts to operate, maintain, or repair the building or facility. Any amounts retained under this paragraph shall remain available until expended for these purposes.

(e) Assignment of functions by Administrator.--

(1) In general.--The Administrator may provide for the performance of a function assigned under this subtitle by any of the following methods:

(A) The Administrator may direct the Administration to perform the function.

(B) The Administrator may designate or establish a component of the Administration and direct the component to perform the function.

(C) The Administrator may transfer the function from one component of the Administration to another.

(D) The Administrator may direct an executive agency to perform the function for itself, with the consent of the agency or by direction of the President.

(E) The Administrator may direct one executive agency to perform the function for another executive agency, with the consent of the agencies concerned or by direction of the President.

(F) The Administrator may provide for performance of a function by a combination of the methods described in this paragraph.

(2) Transfer of resources.--

(A) Within Administration.--If the Administrator transfers a function from one component of the Administration to another, the Administrator may also provide for the transfer of appropriate allocated amounts from the component that previously carried out the function to the component being directed to carry out the function. A transfer under this subparagraph must be reported to the Director of the Office of Management and Budget.

(B) Between agencies.--If the Administrator transfers a function from one executive agency to another (including a transfer to or from the Administration), the Administrator may also provide for the transfer of appropriate personnel, records, property, and allocated amounts from the executive agency that previously carried out the function to the executive agency being directed to carry out the function. A transfer under this subparagraph is subject to approval by the Director.

(f) Advisory committees.--The Administrator may establish advisory committees to provide advice on any function of the Administrator under this subtitle. Members of the advisory committees shall serve without compensation but

are entitled to transportation and not more than $25 a day instead of expenses under section 5703 of title 5.

(g) Consultation with federal agencies.--The Administrator shall advise and consult with interested federal agencies and seek their advice and assistance to accomplish the purposes of this subtitle.

(h) Administering oaths.--In carrying out investigative duties, an officer or employee of the Administration, if authorized by the Administrator, may administer an oath to an individual.

Executive Order 14026
Increasing the Minimum Wage for Federal Contractors

April 27, 2021

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by increasing the hourly minimum wage paid by the parties that contract with the Federal Government to $15.00 for those workers working on or in connection with a Federal Government contract as described in section 8 of this order. Raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Accordingly, ensuring that Federal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in Federal procurement.

Sec. 2. Increasing the Minimum Wage for Federal Contractors and Subcontractors. (a) Executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (as defined in regulations issued pursuant to section 4(a) of this or-

der and as described in section 8(a) of this order) include a clause that the contractor and any covered subcontractors (as defined in regulations issued pursuant to section 4(a) of this order) shall incorporate into lower-tier subcontracts. This clause shall specify that, as a condition of payment, the minimum wage to be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)), shall be at least:

(i) $15.00 per hour, beginning January 30, 2022; and

(ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (Secretary).The amount shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be:

(A) not less than the amount in effect on the date of such determination;

(B) increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(C) rounded to the nearest multiple of $0.05.

(b) In calculating the annual percentage increase in the Consumer Price Index for purposes of subsection (a)(ii)(B) of this section, the Secretary shall compare such Consumer Price Index for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum

wage is in effect pursuant to subsection (a)(ii)(B) of this section) with the Consumer Price Index for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively.

(c) Nothing in this order shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this order.

Sec. 3. Application to Tipped Workers. (a) For workers covered under section 2 of this order who are tipped employees pursuant to section 3(t) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(t)), the cash wage that must be paid by an employer to such workers shall be at least:

(i) $10.50 per hour, beginning January 30, 2022;

(ii) beginning January 1, 2023, 85 percent of the wage in effect under section 2 of this order, rounded to the nearest multiple of $0.05; and

(iii) beginning January 1, 2024, and for each subsequent year, 100 percent of the wage in effect under section 2 of this order.

(b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of this order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of this order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 et seq., or any other applicable law or regulation is

higher than the wage required under section 2 of this order, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Sec. 4. Regulations and Implementation. (a) The Secretary shall, consistent with applicable law, issue regulations by November 24, 2021, to implement the requirements of this order. Such regulations shall include both definitions of relevant terms and, as appropriate, exclusions from the requirements of this order. Within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council, to the extent permitted by law, shall amend the Federal Acquisition Regulation to provide for inclusion in Federal procurement solicitations, contracts, and contract-like instruments subject to this order the clause described in section 2(a) of this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts and contract-like instruments as described in sections 8(a)(i)(C) and (D) of this order, entered into on or after January 30, 2022, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the Fair Labor Standards Act of 1938. 29 U.S.C. 201 et seq.; the Service Contract Act, 41 U.S.C. 6701 et seq.; the Davis-Bacon Act, 40 U.S.C. 3141 et seq.; Executive Order 13658 of Febru-

ary 12, 2014 (Establishing a Minimum Wage for Contractors); and regulations issued to implement that order.

Sec. 5. Enforcement. (a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order.

(b) This order creates no rights under the Contract Disputes Act, 41 U.S.C. 7101 et seq., and disputes regarding whether a contractor has paid the wages prescribed by this order, as appropriate and consistent with applicable law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

Sec. 6. Revocation of Certain Presidential Actions. Executive Order 13838 of May 25, 2018 (Exemption From Executive Order 13658 for Recreational Services on Federal Lands), is revoked as of January 30, 2022. Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors), is superseded, as of January 30, 2022, to the extent it is inconsistent with this order.

Sec. 7. Severability. If any provision of this order, or the application of any provision of this order to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 8. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if (i):

(A) it is a procurement contract or contract-like instrument for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. Where workers' wages are governed by the Fair Labor Standards Act of 1938, this order shall apply only to procurement contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(c) This order shall not apply to grants; contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

Sec. 9. Effective Date. (a) This order is effective immediately and shall apply to new contracts; new contract-like instruments; new solicitations; extensions or renewals of existing contracts or contract-like instruments; and exercises of options on existing contracts or contract-like instruments, as described in section 8(a) in this order, where the relevant contract or contract-like instrument will be entered into, the relevant contract or contract-like instrument will be extended or renewed, or the relevant option will be exercised, on or after:

(i) January 30, 2022, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 4(a) of this order; or

(ii) for contracts where an agency action is taken pursuant to section 4(b) of this order, January 30, 2022, consistent with the effective date for such action.

(b) As an exception to subsection (a) of this section, where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 4 of this order and entered into a new contract or contract-like instrument resulting from such solicitation within 60 days of such effective date, such agencies are strongly encouraged but not required to ensure that the minimum wages specified in sections 2 and 3 of this order are paid in the new contract or contract-like instrument. But if that contract or contract-like instrument is subsequently extended or renewed, or an option is subsequently exercised under that contract or contract-like instrument, the minimum wages specified in sections 2 and 3 of this order shall apply to that extension, renewal, or option.

(c) For all existing contracts and contract-like instruments, solicitations issued between the date of this order and the effective dates set forth in this section, and contracts and contract-like instruments entered into between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the hourly wages paid under such contracts or contract-like instruments are consistent with the minimum wages specified in sections 2 and 3 of this order.

Sec. 10. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,
April 27, 2021.

29 CFR § 23.20 Definitions.

For purposes of this part:

* * * *

Concessions contract or *contract for concessions* means a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes but is not limited to a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/ or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

Contract or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the Federal Acquisition Regulation (FAR) at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of

competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

* * * *

Procurement contract for services means a procurement contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The term *procurement contract for services* includes any contract subject to the provisions of the Service Contract Act, as amended, and the implementing regulations in this chapter.

29 CFR § 23.30 Coverage.

(a) This part applies to any new contract, as defined in § 23.20, with the Federal Government, unless excluded by § 23.40, provided that:

(1)(i) It is a procurement contract for construction covered by the Davis-Bacon Act;

(ii) It is a contract for services covered by the Service Contract Act;

(iii) It is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at 29 CFR 4.133(b); or

(iv) It is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(2) The wages of workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

29 CFR § 23.50 Minimum wage for Federal contractors and subcontractors.

(a) *General.* Pursuant to Executive Order 14026, the minimum hourly wage rate required to be paid to workers performing on or in connection with covered contracts with the Federal Government is at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) Beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 14026. In accordance with section 2 of the Order, the Secretary will determine the applicable minimum wage rate to be paid to workers performing on or in connection with covered contracts on an annual basis beginning at least 90 days before any new minimum wage is to take effect.

(b) *Method for determining the applicable Executive Order minimum wage for workers.* The minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of a covered contract shall be at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) An amount determined by the Secretary, beginning January 1, 2023, and annually thereafter. The applicable minimum wage determined for each calendar year by the Secretary shall be:

(i) Not less than the amount in effect on the date of such determination;

(ii) Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United

States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(iii) Rounded to the nearest multiple of $0.05. In calculating the annual percentage increase in the Consumer Price Index for purposes of this section, the Secretary shall compare such Consumer Price Index for the most recent year available with the Consumer Price Index for the preceding year.

29 CFR § 23.210 Contract clause.

(a) *Contract clause.* The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order minimum wage contract clause referred to in § 23.110(a).

(b) *Flow-down requirement.* The contractor and any subcontractors shall include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 23.110(a) and shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

29 CFR § 23.220 Rate of pay.

(a) *General.* The contractor must pay each worker performing work on or in connection with a covered contract no less than the applicable Executive Order minimum wage for all hours worked on or in connection with the covered contract, unless such worker is exempt under § 23.40. In determining whether a worker is performing within the scope of a covered contract, all workers who are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Executive Order and this part unless a specific exemption is applicable. Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 14026.

29 CFR § 23.240 Overtime payments.

(a) *General.* The Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act require overtime payment of not less than one and one-half times the regular rate of pay or basic rate of pay for all hours worked over 40 hours in a workweek to covered workers. The regular rate of pay under the Fair Labor Standards Act is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid.

United States Department of Interior
BUREAU OF LAND MANAGEMENT
Colorado River Valley Field Office
2300 River Frontage Road
Silt, Colorado 81652

SPECIAL RECREATION PERMIT AMENDMENT*
CO-078-06-90-09-0
Addition of Guided Whitewater Rafting and Ducky (inflatable kayak) Trips and Guided Wade and Float Fishing Trips on the Upper Colorado River (State Bridge to Dotsero).
Overnight Use
Expires March 30, 2022

Permission is hereby granted to Matt House, Brandon Gonski, Alison Mathes, and David Bradford, Forest Kirk, Arkansas Valley Adventures LLC; P.O. Box 2878, Breckenridge, CO 80424; (970) 423-7031; for commercial recreational use of public lands administered by the Bureau of Land Management within the Colorado River Valley Field Office for the following:

PERMITTED USE(S): **Guided Whitewater Rafting and Ducky (inflatable kayak) Trips and Guided Wade and Float Fishing Trips**

LOCATION(S): **BLM public lands within the Colorado River Valley Field Office on or adjacent to: (See Attached Map)**

- Upper Colorado River (State Bridge to Dotsero)

* Initials and dates for handwritten additions and strikes omitted.

- Camping authorized only at the locations of Windy Point, Before Bond, Cottonwood Bend, Catamount, Pinball, Cottonwood Island (on the actual island), and Lyon's Gulch.

And as described in the Operating Plan and are subject to all the Terms, Conditions, and Stipulations that are part of this permit amendment.

The original permit that authorizes Guided Whitewater Rafting (Day Use Only) on the Eagle River (Squaw Creek to the Colorado River confluence) remains unchanged.

The application for this permit amendment was evaluated in DOI-BLM-CO-N040-2014-0051-CX. This Permit Amendment is issued for the period June 15, 2014 to March 30, 2022.

Post Use Reports are due November 30th of each year. Late Post Use Reports are subject to penalties.

Please contact our Permit Administrator at 970-876-9080, if you have any questions or concerns about your Special Recreation Permit Amendment.

6/16/14	/s/ Brandon Gonski
Date	Permittee
6/20/14	/s/ Angela Foster
Date Authorized	Angela Foster Acting Supervisory Natural Resource Specialist

Form 2930-2 (August 2011)	BUREAU OF LAND MANAGEMENT Received Jun 26 2012 CO RIVER VALLEY FIELD OFFICE
United States DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT	Permit No. CO-078-06-90-09-0
SPECIAL RECREATION PERMIT (43 U.S.C. 1201; 43 U.S.C. 1701; 16 U.S.C. 460L-6(a); 16 U.S.C. 6802; and 43 CFR 2930)	BLM Issuing Office Colorado River Valley Field Office

Permittee Arkansas Valley Adventures LLC
Authorized Representative Brandon Gonski, Alison Mathes, David (Duke) Bradford + Forest Kirk Add Mike Sheppard and Ryan Santill

Address	Phone Number
107 Tally Ho Court Dillon CO 80435 Mailing PO Box 2878 Breckenridge, CO 80424	(970) 4237031 Email Address info@coloradorafting.net Website www.colora-dorafting.net

Permit is for (*check all that apply*): X Commercial
__ Competitive __Organized Group __Vending

Effective Date 04/01/2012 Expiration Date 03/30/2022
(*Terms greater than one year subject to annual authorization*)
Seasonal or other period of use limitations N/A

Permit Fee Formula Commercial: Greater of $100/year or 3% of gross revenue
Assigned Sites (*commercial only*): X None

No. of Assigned Sites subject to fees _____

Special Area Fees Apply: ___ Yes X No

Special Area Fee _____

Minimum insurance coverage requirements Moderate Risk: $500,000 per occurrence, $1,000,000 annual aggregate

Permit is valid only if a current Certificate of Insurance that meets BLM specifications is on file with the issuing BLM Office.

Post use report due date(s) 11/30/2012

Bond Requirement: X None Bond Amount _____

Purpose and activities authorized

Guide water rafting. Ducky/wade/float fishing trips. Shuttle services of vehicles/equipment/clients. Rental services of equipment

Shuttle & rental – Catamount, Pinball, Cottonwood Island, and Lyons Gulch only

Approved Area of Operation

Eagle River (Squaw Creek to the Colorado River confluence) – Rafting only. Day use only.

Upper Colorado River (State Bridge to Dotsero) – Rafting/ducky/wade/float fishing. Camping authorized at Windy Point, Catamount, Pinball, Cottonwood Island, Lyons Gulch.

Certification of Information: I certify use of this permit will be as per the operations plan on file with BLM. I acknowledge I am required to comply with any conditions or stipulations required by the BLM including the General Terms listed on page two of this form and any additional stipulations which may be attached.

Additional Stipulations are attached X Yes __ No

/s/ 07/01/12

(Permittee Signature) (date)

Approved and issued for the conduct of permitted activities and locations shown on this permit and in conformance with the operating plan. Permit is subject to General Terms and any additional stipulations attached.

Matthew Taorburn

(BLM Authorized Officer Printed Name)

/s/

(BLM Authorized Officer Signature)

08-07-2012

(Date)

(continued on page 2)

GENERAL TERMS

a. The permittee shall comply with all Federal, State, and local laws; ordinances; regulations; orders; postings; or written requirements applicable to the area or operations covered by the Special Recreation Permit (SRP or permit). The permittee shall ensure that all persons operating under the authorization have obtained all required Federal, State, and local licenses or registrations. The permittee shall make every reasonable effort to ensure compliance with these requirements by all agents of the permittee and by all clients, customers, participants, and spectators.

b. An SRP authorizes special uses of the public lands and related waters and, should circumstances warrant, the permit may be modified by the BLM at any time, including modification of the amount of use. The authorized officer may suspend or terminate an SRP if necessary to protect public resources, health, safety, the environment, or because of non-compliance with permit stipulations. Actions by the BLM to suspend or terminate an SRP are appealable.

c. No value shall be assigned to or claimed for the permit, or for the occupancy or use of Federal laws or related waters granted thereupon. The permit privileges are not to be considered property on which the permittee shall be entitled to earn or receive any return, income, price, or compensation. The use of a permit as collateral is not recognized by the BLM.

d. Unless expressly stated, the permit does not create an exclusive right of use of an area by the permittee. The permittee shall not interfere with other valid uses of the federal land by other users. The United

States reserves the right to use any part of the area for any purpose.

e. The permittee or permittee's representative may not assign, contract, or sublease any portion of the permit authorization or interest therein, directly or indirectly, voluntarily or involuntarily. However, contracting of equipment or services may be approved by the authorized officer in advance, if necessary to supplement a permittee's operations. Such contracting should not constitute more than half the required equipment or services for any one trip or activity and the permittee must retain operational control of the permitted activity. If equipment or services are contracted, the permittee shall continue to be responsible for compliance with all stipulations and conditions of the permit.

f. All advertising and representations made to the public and the authorized officer must be accurate. Although the addresses and telephone numbers of the BLM may be included in advertising materials, official agency symbols may not be used. The permittee shall not use advertising that attempts to portray or represent the activities as being conducted by the BLM. The permittee may not portray or represent the permit fee as a special federal user's tax. The permittee must furnish the authorized officer with any current brochure and price list if requested by the authorized officer.

g. The permittee assumes responsibility for inspecting the permitted area for any existing or new hazardous conditions, e.g., trail and route conditions, landslides, avalanches, rocks, changing water or weather conditions, falling limbs or trees, submerged objects, hazardous flora/fauna, abandoned

mines, or other hazards that present risks for which the permittee assumes responsibility.

h. In the event of default on any mortgage or other indebtedness, such as bankruptcy, creditors shall not succeed to the operating rights or privileges of the permittee's SRP.

i. The permittee cannot, unless specifically authorized, erect, construct, or place any building, structure, or other fixture on public lands. Upon leaving, the lands must be restored as nearly as possible to pre-existing conditions.

j. The permittee must present or display a copy of the SRP to an authorized officer's representative, or law enforcement personnel upon request. If required, the permittee must display a copy of the permit or other identification tag on equipment used during the period of authorized use.

k. The authorized officer, or other duly authorized representative of the BLM, may examine any of the records or other documents related to the permit, the permittee or the permittee's operator, employee, or agent for up to three years after expiration of the permit.

l. The permittee must submit a post-use report to the authorized officer according to the due dates shown on the permit. If the post-use report is not received by the established deadline, the permit will be suspended and/or late fees assessed.

m. The permittee shall notify the authorized officer of any incident that occurs while involved in activities authorized by this permit, which result in death, personal injury requiring hospitalization or emergency evacuation, or in property damage greater

than $2,500 (lesser amounts if established by State law). Reports should be submitted within 24 hours.

(Form 29030-2, page 2)

SPECIAL RECREATION PERMIT AMENDMENT
ARKANSAS VALLEY ADVENTURES LLC
ADDITIONAL SPECIAL STIPULATIONS

Use authorized under this permit will be subject to standard SRP terms, conditions and stipulations and the special stipulations described below:

1. An outfitter shall maintain a regular place of business at which mail and phone calls can be received and provide address and physical location of such business to the BLM. Any change of mailing address, place of residence, or telephone number shall be reported to the BLM within thirty (30) days of such change.
2. An outfitter shall maintain accurate and up to date records.
3. When using the boat ramps and/or parking areas, persons responsible for representing this business must coordinate with other outfitters and the general public to minimize congestion on the boat ramps and within the parking areas. If conflicts arise, the BLM retains the authority to suspend or terminate the permit. If congestion becomes problematic, the BLM will terminate the most recent permits to commercial outfitters for that area first.
4. No permission is granted for any other BLM public lands on or adjacent to the lands and related waters on this permit within the Colorado River Valley Field Office. Public lands may be used in emergency situations and the BLM must be notified of use within 24 hours of the incident. (River rescues excluded.) No permission is granted or implied to use or cross private land within the area described by this authorization. Obtaining permission to trespass on private land is the responsibility of the

permittee. No permission is granted or implied to use or cross land owned by the State of Colorado or the U.S. Forest Service without first obtaining a permit from the proper agency.

5. Precautions will be taken to minimize the spread of aquatic invasive species via proper cleaning and disinfecting procedures. BLM recommends that equipment be cleaned and disinfected between uses particularly if moving to new water bodies.
6. Fishing outfitters will use established fish handling protocols designed to minimize stress associated with the playing of fish, removal of hooks, and release of fish back into the water.
7. The permittee will keep at their place of business (address provided to the BLM) current copies of First Aid training cards, blank client waivers, and permission to use or access private land or other agency land related to operations on BLM public land. The permittee must provide proof of these items to the BLM upon request.
8. The permittee will require the use of a properly-sized whitewater type I, III, or V life jacket (approved on the label for paddling, whitewater, kayaking, etc. as required) in good working condition for each member of the party (including on all tubing trips). Inflatable life jackets are not allowed. Life jackets must be worn by both clients and guides at all times while in and on the water.
9. Operating or being in actual physical control of a floatation device is prohibited while the operator or guide is under the influence of alcohol or a drug or any combination thereto to a degree that ren-

ders the operator or guide incapable of safe operation. Further, operator or guide may not possess alcohol during field operations while tubing.

10. The permit holder must take precautions to not spread noxious weeds to public lands.
11. The permit holder will make sure all guides and employees display the BLM parking pass on their vehicles when conducting business operations while using the vehicle on BLM public land.
12. If future botanical surveys find populations or individuals of the threatened Ute ladies'-tresses at any of the identified camp sites, Section 7 consultation with US Fish and Wildlife Service (FWS) will be required. Following consultation, these sites may be removed from the approved camp site list or other mitigation may be required.
13. Cultural Resources and Native American Discovery Stipulations

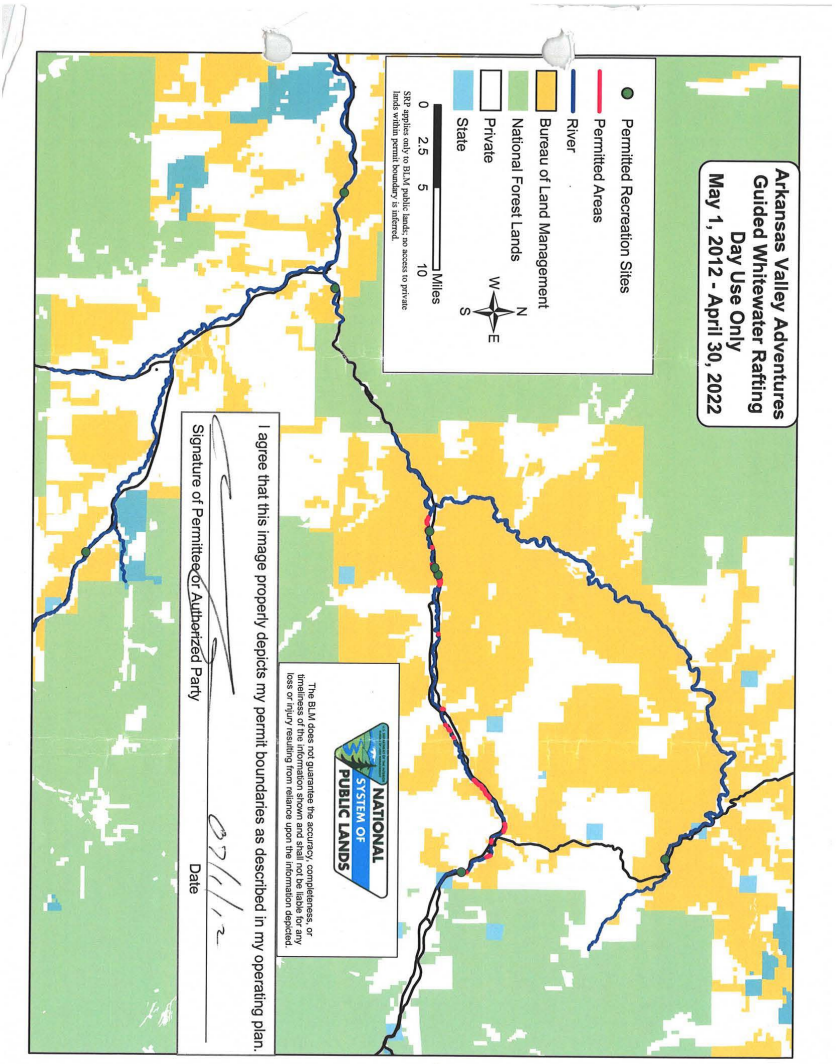
    If subsurface cultural values are uncovered during operations, all work in the vicinity of the resource will cease and the authorized officer with the BLM notified immediately. The operator shall take any additional measures requested by the BLM to protect discoveries until they can be adequately evaluated by the permitted archaeologist. Within 48 hours of the discovery, the State Historic Preservation Officer (SHPO) and consulting parties will be notified of the discovery and consultation will begin to determine an appropriate mitigation measure. BLM in cooperation with the operator will ensure that the discovery is protected from further disturbance until mitigation is completed. Operations may resume at the discovery site upon

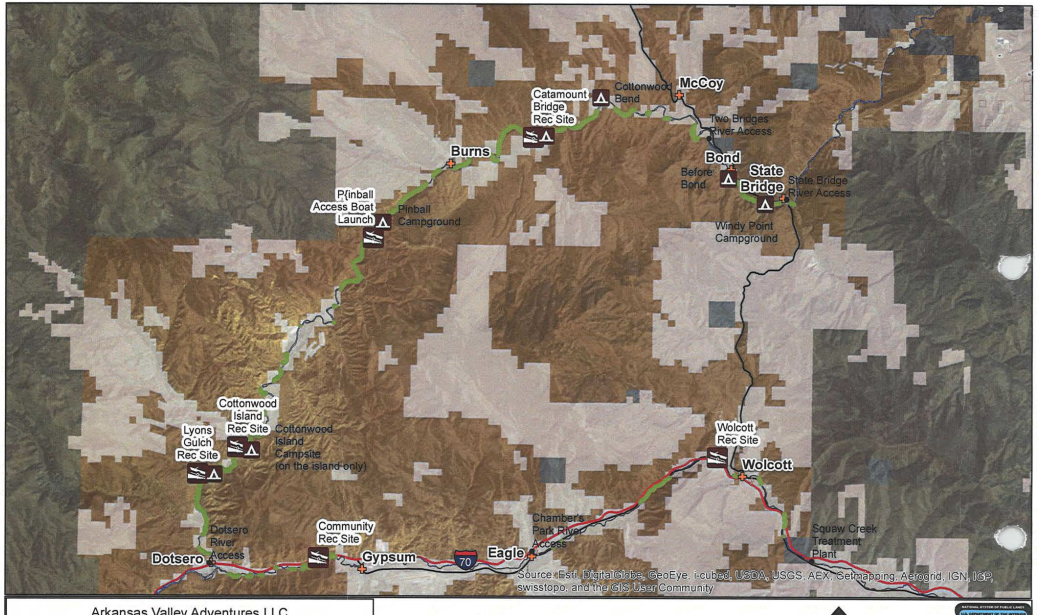
receipt of written instructions and authorization by the authorized officer.

Pursuant to 43 CFR 10.4(g), the holder must notify the authorized officer, by telephone, with written confirmation, immediately upon the discovery of human remains, funerary items, sacred objects, or objects of cultural patrimony on federal land. Further, pursuant to 43 CFR 10.4 (c) and (d), the holder must stop activities in the vicinity of the discovery that could adversely affect the discovery. The holder shall make a reasonable effort to protect the human remains, funerary items, sacred objects, or objects of cultural patrimony for a period of thirty days after written notice is provided to the authorized officer, or until the authorized officer has issued a written notice to proceed, whichever occurs first.

14. All associated activities shall use existing hardened trails within riparian areas. Do not create new trails or surface disturbances in riparian vegetation. (Riparian areas are defined as the interface between land and a river or stream; the river bank.)
15. Pet owners must clean up and properly dispose of pet feces within the site to maintain site sanitation.
16. When making vessel landings on the river banks outside of developed sites, use gravelly or rocky sites along the bank that are naturally hardened to this activity. Groups with multiple vessels must keep the landing site to its absolute minimum necessary and must not spread out up and down the river bank. Keep landing areas and sites to the minimum area necessary to complete your activity safely.

6/16/14	/s/
Date	Permittee


Arkansas Valley Adventures
Guided Whitewater Rafting
Day Use Only
May 1, 2012 - April 30, 2022
Permitted Recreation Sites
Permitted Areas
River
Bureau of Land Management
National Forest Lands
Private
State
N
W
E
S
0 2.5 5 10 Miles
SRP's within non-BLM public lands no access to private lands within permit boundary is allowed.
NATIONAL SYSTEM OF PUBLIC LANDS
The BLM does not guarantee the accuracy, completeness, or timeliness of this information shown and shall not be liable for any loss or injury resulting from reliance upon the information depicted.
I agree that this image properly depicts my permit boundaries as described in my operating plan.
Signature of Permittee or Authorized Party
Date



Arkansas Valley Adventures LLC
Guided Whitewater Rafting and Ducky Trips and
Wade and Float Fishing Trips on the Upper Colorado River
(Overnight camping authorized).
Guided Whitewater Rafting Trips on the Eagle River
(Day Use Only).
June 15, 2014 - March 30, 2022

Town
Non-BLM Public River Access
Permitted Boat Put-ins/Take-outs
Permitted River Segments
Rivers
Bureau of Land Management
Private
State
US Forest Service

N

0 2.5 5 10 Miles

1:239,548

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data. Original data were compiled from various sources. This information may not meet National Map Accuracy Standards. This project was developed through digital means and may be updated without notice.

Map produced by the BLM Colorado River Valley Field Office June 2014

I agree that this image properly depicts my permit boundaries as described in my operating plan.

Signature of Permittee or Authorized Party

6/16/14
Date