

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

DUKE BRADFORD, <i>et al.</i> , Plaintiffs, v. U.S. DEPARTMENT OF LABOR, <i>et al.</i> , Defendants.	CIVIL ACTION NO.: 1:21-cv-03283
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MOTION FOR SUMMARY JUDGMENT

Pursuant to FRCP 56, Plaintiffs Duke Bradford, Arkansas Valley Adventure, LLC d/b/a AVA Rafting and Zipline (AVA), and the Colorado River Outfitters Association (CROA), move for summary judgment against Defendants, Pres. Joseph R. Biden, Sec. Martin J. Walsh, Acting Admin. Jessica Looman, the U.S. Dept. of Labor, and the Wage & Hour Division (collectively DOL or the Department), and an order setting aside the rule, *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 23, 2021).

Defendants' rule is unlawful because it exceeds the President's authority to regulate a system of *procurement*. As a panel of the Tenth Circuit already concluded, the rule is likely unlawful. That was because DOL has distorted the putative statutory authority for the rule—the Procurement Act—beyond any rational limits and tried to regulate businesses that neither procure nor supply anything to or from the government. This Court should reach the same conclusion as the motions panel and set the rule aside.

STATEMENT OF UNDISPUTED MATERIAL FACTS

I. Prior Agency Action

1. On February 12, 2014, President Obama issued EO 13658, *Establishing a Minimum Wage for Contractors*, under the Federal Property and Administrative Services Act (The Procurement Act), 40 U.S.C.

§ 101, directing DOL to establish a minimum wage for “federal contractors and subcontractors.” 79 Fed. Reg. 9851, 9852-53.¹

2. DOL then mandated a \$10.10/hr. minimum wage plus overtime. 79 Fed. Reg. 60,634 (Oct. 7, 2014).

3. The rule applied to “contracts or contract-like instruments,” an “intentionally all-encompassing” definition that included employers with “special use permits.” *Id.* at 60,652.

4. In 2018, President Trump issued EO 13838, exempting outfitters and guides from the rule. *Exemption from Executive Order 13658 for Recreational Services on Federal Lands*, 83 Fed. Reg. 25,341.

5. The President said that the rule’s application “to outfitters and guides operating on Federal lands” would “not promote economy and efficiency” because of that sector’s unusual work structures. *Id.*

6. DOL issued a rule implementing the order and included an analysis that agreed with the President. 83 Fed. Reg. 48,537, 48,540 (Sept. 26, 2018).

II. The New Rule

7. On April 27, 2021, President Biden reversed course, issuing EO 14026, *Increasing the Minimum Wage for Federal Contractors*, raising the previous threshold to \$15/hr., and revoking the exemption for recreational services on federal lands. 86 Fed. Reg. 22,835–37.

8. On November 23, 2021, DOL issued its final rule implementing the order, effective January 30, 2022. *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126.

9. The rule confirmed that its \$15/hr. minimum wage applied to recipients of special use permits like those held by Plaintiffs. *Id.* at 67,147.

¹ By agreement of the parties, regulatory actions published in the Federal Register were not reproduced with the Administrative Record (AR) but is nonetheless part of the official record.

10. DOL estimated the rule would affect more than 500,000 private firms, including 40,000 firms that provide services pursuant to special use permits on federal lands, and result in “transfers of income from employers to employees in the form of higher wage rates” of “\$1.7 billion per year over 10 years,” with “average annualized direct employer costs” of “\$2.4 million” for each firm. *Id.* at 67,194–96.

11. The rule is economically significant. *Id.*

12. The rule recognized that these cost increases, as well “regulatory familiarization costs and [] implementation costs” would likely be passed on to the government itself—at least as to procurement contracts—and thus “Government expenditures may rise.” *Id.* at 67,204, 67,206.

13. Recreational firms holding permits to use federal lands are “[n]on-procurement,” and thus “cannot as directly pass costs along to the Federal Government.” *Id.*

14. As a result, the rule “may result in reduced profits” for such firms, or outright losses, ameliorated only to the extent consumers are willing to pay “higher prices.” *Id.*

15. The only study cited by DOL concerning firm profitability concluded that there is “a significant negative association between the [minimum wage] introduction and firm profitability.” *Id.* at 67,207; AR Vol. II at 130.

16. Other research relied on by DOL suggests that firms will face reduced profits and will be forced to raise prices and reduce benefits and overtime for workers. See AR Vol. II, 4 (minimum wage resulted in “full or near-full price pass-through of minimum-wage-induced higher costs of labor”); AR Vol. II, 362 (“Firms have adapted to the remaining costs in a variety of ways, including cutting fringe benefits and overtime, hiring more highly trained workers, cutting profits and passing on costs to the city or to the public.”); AR Vol. III, 61 (“Cost increases were instead absorbed through other channels of adjustment, including higher prices, lower profit margins, wage compression, reduced turnover, and higher performance standards.”); AR Vol. III, 192 (“It is

well established in the literature that minimum wage increases compress the wage distribution. Firms respond to these higher labour costs by reducing employment, reducing profits, or raising prices.”); AR Vol. III, 213 (“firms respond to minimum wage increases not by reducing production and employment, but by raising prices”).

17. DOL claimed “this final rule would result in negligible or no disemployment effects.” *Id.* at 67,211.

18. DOL’s supporting evidence suggests significant negative effects. *See id.*; AR Vol. V, 221 (meta-analysis of 15 years of research concluded that “the minimum wage [] has negative employment effects,” which are “statistically significant”).

19. DOL’s research suggested that minimum wage rules shift wage increases to more advantaged workers and away from less-advantaged workers. *See* AR Vol. I, 127 (“Our results show that a minimum wage hike is then not a transfer from rich firms to poor workers, but from *poor* workers to *rich* workers.”); AR Vol. II, 172 (“There is a clear drop in employment at the bottom of the wage distribution . . . in cities with minimum wage[.]”); AR Vol. III, 134 (“The entirety of these [wage] gains accrued to workers with above-median experience at baseline; less-experienced workers saw no significant change to weekly pay,” and minimum wage rules resulted in “a significant reduction in the rate of new entries into the workforce.”).

20. DOL acknowledged that the rule might place permittees at a competitive disadvantage with competitors not operating on federal lands. *Id.* at 67,208.

21. DOL said that the “purpose of this rulemaking is to implement Executive Order 14026,” and thus it had no discretion to consider continuing the exemption for special use permits. *Id.* at 67,129, 67,216.

22. DOL said that whether statutory authority existed for the executive order and rule was “not within the scope of this rulemaking action.” *Id.* at 67,131.

23. DOL attempted to justify the rule by pointing to economic research that it claimed proved that losses for special use permit holders would be “substantially offset” due to increased productivity and morale, which would improve services for the government and public. *Id.* at 67,153.

III. The Plaintiffs

24. AVA is a licensed river outfitter headquartered in Buena Vista, CO, which relies on special use permits to operate. Ex. A, Bradford Decl. ¶¶ 2-3.

25. AVA recruits experienced guides who typically negotiate fixed rates based on the number of days a trip is expected to take. *Id.*

26. If paid hourly, these rates would typically exceed \$15/hr., but because the trips last for multiple days, the guides work far more than 40 hours in a typical week. *Id.*

27. Should the rule go into effect, AVA would need to expend resources immediately to ensure compliance with the rule. Ex. B; PI Hearing Tr., Bradford Testimony at 20:1–11 (Jan. 6, 2022).

28. AVA expects to expend “between five and \$10,000” on attorney costs prior to the effective date. *Id.*

29. AVA would need to spend more on wage costs, hire more staff, limit hours for existing staff, and provide more housing for employees, all of which “will drive expenses up.” *Id.* at 20:18–21:21.

30. AVA would need to eliminate overnight rafting trips entirely or else the “price would go beyond what our public could afford.” *Id.* at 21:22–22:2.

31. The rule would further make AVA less competitive with other outfitters not subject to the rule by increasing costs and decreasing revenue. *Id.* at 21:12–23:21.

32. CROA is a trade association representing as many as 50 independently operating river outfitters, including AVA. Ex. C, Costlow Decl. ¶¶ 3, 6.

33. Most CROA members operate on federal lands under special use permits, and they typically pay the government a fixed percentage of any fees they charge for services. *Id.* ¶¶ 6, 8.

34. CROA's members typically pay their guides a flat fee on a per-trip basis. *Id.* ¶ 8.

35. The work is seasonal, however, so many guides working for CROA's members work as many hours as they can through the busy season—almost always working more than 40 hours in a week. *Id.*

36. Increasing the wages for guides to \$15/hr. and paying overtime based on that wage would dramatically increase wage costs, and many of these outfitters would be forced to significantly raise the costs of their services to customers and eliminate many multi-day trips. *Id.* ¶¶ 10, 14.

37. CROA members would need to comply with the rule immediately should it go into effect and would need to pay implementation and compliance costs to meet the new requirements. *Id.* ¶¶ 12, 13.

IV. Procedural History

38. Plaintiffs filed a Complaint for declaratory relief on December 7, 2021. ECF No. 1.

39. Plaintiffs then moved for a preliminary injunction on December 9, 2021, and after an evidentiary hearing, this Court denied the injunction in a written opinion. ECF No. 31.

40. Plaintiffs filed a notice of interlocutory appeal, and on February 17, 2022, Judges Phillips and Kelly granted an injunction pending appeal in an order. Ex. D, Order.

41. Noting that the “the right to relief must be clear and unequivocal,” the panel concluded that Plaintiffs “demonstrated an entitlement to relief.” *Id.* at 1–2 (citations omitted).

42. The Court enjoined the rule as to “seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands,” pending “further order of this court.” *Id.* at 2.

ARGUMENT

Typically, a movant must “show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law” for summary judgment. Fed. R. Civ. P. 56(a). But when

assessing such a motion in an APA case, “the district judge sits as an appellate tribunal,” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001), and “[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985).

The rule is unlawful for three independent reasons. First, it exceeds the Procurement Act’s reach because it attempts to regulate conduct that does not involve the procurement of supply of anything to or from *the government*. Second, the rule fails the statutory economy and efficiency requirement because it is not necessary for the reduction of government expenditures. Third, the rule is arbitrary and capricious because it was enacted at the President’s direction *irrespective* of economic benefits or policy alternatives. This Court should therefore follow the Tenth Circuit panel’s decision and hold the rule unlawful.²

I. THE PROCUREMENT ACT DOES NOT PROVIDE A BASIS FOR THE RULE

A. The Rule Does Not Relate to the Procurement or Supply of Nonpersonal Services by the Government

The executive branch’s authority “must stem either from an act of Congress or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). A rule “in excess of statutory . . . authority” must be set aside. 5 U.S.C. § 706(2)(C).

The Procurement Act authorizes the President to “prescribe policies and directives that the President considers necessary to carry out” an “economical and efficient system of” four limited categories of government activities, including “procuring and supplying property and nonpersonal services.” 40 U.S.C. §§

² While decisions made in unpublished orders from a motions panel are not binding precedent, a subsequent court “does not lightly overturn” such a decision. *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th Cir. 1996) (citation omitted).

101(1), 121(a). But the statute only empowers the President to control such activities by “*the Federal Government*.” See *id.* § 101(1) (emphasis added).³

The most natural reading of that statute suggests that the government is on one end of the transaction—either *procuring* or *supplying* nonpersonal services. “Contracting” must be “confined to its contextual meaning—the government’s making of the agreement, rather than all subsequent performance of it.” *Kentucky v. Biden*, 23 F.4th 585, 605 (6th Cir. 2022). It makes no sense therefore to adopt DOL’s view that the agency can regulate a company, like AVA, who neither procures nor supplies any nonpersonal services to the government, just because AVA later supplies nonpersonal services to its customers; the government is simply not party to those transactions.

Certainly, the government’s provision of permits to *Plaintiffs* is not the “supply[of] nonpersonal services,” defined to “mean[] contractual services . . . other than personal and professional services.” See 40 U.S.C. §§ 101(1), 102. Instead, the Act empowers the President to regulate the supply of services that it produces itself, see, e.g., 16 U.S.C. §§ 831c(d), 831h-1 (authorizing Tennessee Valley Authority to enter contracts for the sale of electrical service); *Matt v. Comm’r of Internal Revenue*, 59 T.C.M. (CCH) 472 (T.C. 1990) (mem.) (discussing “nonpersonal services” contracts that “USAID [] an agency of the United States Government,” “supplies” “to foreign countries”), or that are procured from elsewhere.

Nor does the government’s limited interest in how *Plaintiffs* conduct their activities pull them into the statute’s reach. DOL’s concern with how activities under a permit are conducted—and almost by definition, permitted activities require permits because the government is concerned with how such activities are

³ DOL has not defended the rule based on the regulation of government “procurement.” This is sensible as *Plaintiffs’* use of federal lands has nothing to do with procurement. Indeed, the final rule refers to *Plaintiffs* and other permittees as “*non-procurement* contractors.” 86 Fed. Reg. at 67,512 (emphasis added).

conducted—does not transform the government’s role into the entity conducting those activities. See *Noel v. N.Y.C. Taxi & Limousine Comm’n*, 687 F.3d 63, 70 (2d Cir. 2012) (“An activity does not become a program or activity of a public entity merely because it is licensed by the public entity.”) (cleaned up). And this Court previously recognized that Plaintiffs’ permits did “not subject [them] to the supervision and control of the government.” ECF No. 31 at 19. Nor do the permits require Plaintiffs to operate. Thus, it cannot be said that *the government* is supplying services *through* Plaintiffs.

B. The Rule Is Not Necessary for Economical and Efficient Procurement Policy

Courts have also concluded that “some content must be injected into the general phrases ‘not inconsistent with’ the [Act] and ‘to effectuate the provisions’ of the Act,” to avoid a completely “open-ended” grant of authority. *AFL-CIO v. Kahn*, 618 F.2d 784, 788 (D.C. Cir. 1979) (*en banc*). “Any order” “must accord with the values of ‘economy’ and ‘efficiency,’” and have “a sufficiently close nexus between those criteria and the procurement [] program[.]” *Id.* at 792; accord *Albuquerque v. U.S. Dep’t of Interior*, 379 F.3d 901, 914 (10th Cir. 2004) (requiring that “the President’s exercise of authority establish an economical and efficient system for the procurement and supply of property”) (cleaned up). The “nexus” to cost savings must be “close,” and must relate to “procurement and supply,” not other benefits asserted “as a naked pretext.” *Kentucky*, 23 F.4th at 607, 609. It is not enough for DOL to claim that a rule makes “contractor employees . . . more ‘economical and efficient’” through, for instance, reduced absenteeism. *Id.* at 606. It is “importan[t],” therefore, for the President to show a “nexus between the wage and price standards and likely savings to the Government.” *Kahn*, 618 F.2d at 793.

These limits derive from the statutory text. The Act limits the President to actions he “considers necessary” for “economical and efficient” “[p]rocurring and supplying property.” 40 U.S.C. §§ 101(1), 121(a). The word “necessary” “suggests [] something indispensable, essential, something that cannot be done

without.” *Cin. Hills Youth Crisis Ctr., Inc. v. Saint George*, 685 F.3d 917, 923 (10th Cir. 2012) (citation omitted). “Economical” implies the use of fewer resources—“marked by careful, efficient, and prudent use of resources.” “Economical.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/economical>. “Efficient” likewise suggests *less* of something—“capable of producing desired results without wasting materials, time, or energy.” “Efficient.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/efficient>.

DOL’s invocation of the Act cannot be justified. For actual procurement contractors, DOL expects increased wage costs to be passed on to the government, and thus “Government expenditures may rise.” 86 Fed. Reg. at 67,206. Non-procurement firms, like Plaintiffs, will have to make up their losses from “the public in the form of higher prices,” at least to the extent that the public is willing to bear them. *Id.* To the extent the public is unwilling to pay, Plaintiffs will be less competitive, and their guides will face “disemployment” of up to 0.9%. *Id.* at 67,207, 67,211. The net result will be *more* costs to the public, to non-procurement firms, and to the government—the opposite of a permitted action under the Act. *See Khan*, 618 F.2d at 792.

The Executive Branch previously arrived at the same conclusions. EO 13838 concluded that applying the contractor minimum wage standards “to outfitters and guides operating on Federal lands,” “does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands.” 83 Fed. Reg. 25,341. Such a wage “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.” *Id.* The wage would harm the affected workers because they “have irregular work schedules, a high incidence of overtime pay, and an unusually high turnover rate” such that “a minimum wage increase would generally entail large negative effects on hours worked by recreational service workers.” *Id.* In other words, to maintain financial viability, employers would have to cut hours to avoid overtime limits, which would reduce overall

wages for guides. DOL previously emphasized that rescinding the prior wage rule for these businesses would “[l]ower[] the costs of business,” and “incentivize existing outfitters to hire more guides and to increase the hours of current employees.” 83 Fed. Reg. at 48,541. *Significantly increasing* the minimum wage would have the opposite effect—increasing costs, cutting hours for guides, and limiting access to public lands.

DOL’s defense of the rule relies on factors that will not apply to those with special use permits or that have nothing to do with efficiency or economy in government expenditures. DOL says the rule could: (1) improve government services; (2) increase morale and productivity; (3) reduce turnover; (4) reduce absenteeism; and (5) reduce poverty and income inequality. 86 Fed. Reg. at 67,195. Employers like Plaintiffs with special use permits provide no “government services” though, so that benefit would “not apply to the outfitters and guides industry.” *See id.* at 67,212. The remaining benefits bear a striking resemblance to the benefits deemed too attenuated from procurement economy to support the contractor vaccine mandate and are likewise inadequate to justify the rule here. *See Kentucky*, 23 F.4th at 606. And the language of *Kahn* is not ambiguous; the challenged rule was acceptable only because it “will likely have the direct and immediate effect of holding down the Government’s procurement costs.” 618 F.2d at 792 (emphasis added).

These purported benefits are not the ones required by the Act—“economical and efficient” use of *government* resources. *See* 40 U.S.C. §§ 101(1); 120(a). DOL agrees that these “benefits are not monetized,” but that means that they cannot be shown to result in cost savings, much less cost savings to the *government*. To the extent the rule serves other policy goals, it cannot be said to be “necessary” for the statutory aims. *See Cin. Hills*, 685 F.3d at 924. This Court previously suggested that even though the rule might be inefficient and uneconomical for Plaintiffs the “relevant savings is not to individual contractors or contractors as a whole, but rather to the government.” ECF No. 31 at 27. But that conflicts with DOL’s analysis that for typical procurement contractors “Government expenditures may rise.” 86 Fed. Reg. at 67,206. Moreover, even if the

premise were correct, rules are reviewed in their entirety, not piecemeal. See 7 U.S.C. § 706(2)(A) (“reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law”).

C. This Court Must Read the Statute Narrowly To Harmonize Relevant Labor Laws and Avoid Major Policy and Difficult Constitutional Questions

This Court can resolve this case by looking to the plain language of the statute and concluding that the rule exceeds the President’s authority. However, three related doctrines require this Court to construe any uncertainty in favor of the plaintiffs.

i. The Procurement Act Must Not Be Read To Displace Congressional Action Concerning Federal Contractors

“Agency authority may not be lightly presumed.” *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001). An agency “may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 485 (2001).

“In determining whether an agency’s regulations are valid under a particular statute . . . [a court] begin with the question of whether the statute unambiguously addresses the ‘precise question at issue.’” *New Mexico v. DOI*, 854 F.3d 1207, 1221 (10th Cir. 2017) (quoting *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 842 (1984)). “If Congress has spoken *directly* to the issue, that is the end of the matter; the court, as well as the agency, must give effect to Congress’s unambiguously expressed intent.” *Id.* (citation omitted). “When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.” *Nat’l R.R. Pass. Corp. v. Nat’l Ass’n of R.R. Pass.*, 414 U.S. 453, 458 (1974).

Congress has comprehensively addressed the issue of how much federal contractors must be paid. The Fair Labor Standards Act (FLSA) set “standards of minimum wages and maximum hours” for most private employers. See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945). At least three statutes, the Davis-Bacon Act (DBA), the Walsh-Healey Public Contracts Act (PCA), and the Service Contract Act (SCA) set

wage standards for federal contractors. See 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(a). When Congress passed the SCA in 1965 it did so because “[t]he service contract is the only remaining category of Federal contracts to which no labor standards protection applies.” S. Rep. No. 798, 89th Cong., 1st Sess., 3 (Oct. 1, 1965). Congress, therefore, meant to extend specific coverage to *certain* federal contractors. See *id.*

Congress has thus spoken to the issue of whether federal contractors should be required to pay a minimum wage—deciding that only *some* contractors have obligations to do so. See 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(a). Congress also carefully limited those requirements. The DBA applies to “mechanics or laborers” working on public buildings. 40 U.S.C. § 3142(a). The PCA covers manufacturing “contract[s] made by an agency of the United States.” 41 U.S.C. § 6502. The SCA excludes contracts that do not principally furnish “services” to federal agencies. See 40 U.S.C. § 3142. All three statutes require payment of a “prevailing wage.” See 40 U.S.C. § 3142(b); 41 U.S.C. §§ 6502(1), 6703(1).

It is “implausible” that Congress meant to grant the President the “implicit power to create an alternative to the explicit and detailed [] scheme” that Congress set out in these statutes. See *New Mexico*, 854 F.3d at 1226. This is particularly apt considering that the SCA, which comes the closest to the rule’s reach, came after the Procurement Act of 1949. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“[T]he implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.”) (citation omitted).

Congress’s longstanding rules governing contractor wages cannot be read as a free pass for the agency to legislate wherever the statutes end. The rule applies *only* to employers who are already covered by the FLSA, the SCA, or the DBA. See 86 Fed. Reg. at 67,225. Plaintiffs are required to pay wages under

both the FLSA and SCA. See 86 Fed. Reg. 67,147-48. The new rule exists simply to extend requirements to those already regulated by Congress, but in a manner separate and apart from the existing statutes.

To be sure, these statutes do not directly *conflict* with the rule, but that implicates a different question. The issue is not whether DOL, may, in the abstract, regulate wages. It instead is whether DOL may do so *pursuant to the Procurement Act* and whether that Act's grant of authority gave the President and the agency the "implicit power to create an alternative" to these statutes. See *New Mexico*, 854 F.3d at 1226. The Procurement Act, which never mentions wages, much less those affecting *non-procurement* permittees, cannot plausibly be read to have always been the source of such a vast authority over wages. See *id.* Instead, if DOL wants to wade in here, it should look to the statutes Congress passed concerning these matters.

ii. The Procurement Act Must Be Read To Avoid Major Questions

Courts will not assume that Congress has assigned to the Executive Branch questions of "deep economic and political significance" unless it has done so "expressly." *King v. Burwell*, 576 U.S. 473, 486 (2015). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citations omitted). A court should thus adopt a narrow reading of a statute when an agency tries "to exercise powers of vast economic and political significance." *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (citations omitted).

DOL rightly acknowledges that the rule "is economically significant," since it would result in *direct* costs to employers of "\$1.7 billion per year over 10 years." 86 Fed. Reg. at 67,194. This is in *addition* to "regulatory familiarization costs," "implementation costs," "compliance costs, increased consumer costs, and reduced profits," "disemployment," and even increased "Government expenditures." *Id.* at 67,204, 67,206, 67,208, 67,211. This Court should therefore meet the rule "with a measure of skepticism," and look for a clear

statement from Congress. *Util. Air Regul. Grp.*, 573 U.S. at 304. As discussed above, the best DOL has is a reed-thin argument that this is all about “procurement,” despite applying the rule to “non-procurement” firms.

Moreover, there is no requirement in this doctrine that a rule exceed these kinds of economic impacts. The doctrine applies whenever an agency exercises “powers of vast economic and political significance.” *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (citation omitted). In a concurring opinion Justice Gorsuch, joined by two others, noted that “[f]ar less consequential agency rules [than a vaccine mandate] have run afoul of the major questions doctrine,” such as rate regulation for telephone companies. *Id.* at 668 (citation omitted). There is simply no authority for the idea that the major questions doctrine empowers agency action until it reaches a certain value threshold. Instead, because the doctrine is about Congressional intent, it applies whenever a court cannot say with certainty that Congress meant for the outcome implicated by the rule. See *NFIB*, 142 S. Ct. at 665 (Gorsuch, J., concurring). That is the case here.

iii. The Procurement Act Must be Read To Avoid a Non-Delegation Problem

The canon of constitutional avoidance instructs that a court must “construe [a] statute to avoid [serious constitutional] problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*, 485 U.S. 568, 575 (1988). Thus, if an agency’s broad reading of a statute implicates “concerns over separation of powers principles” under the “nondelegation doctrine,” a court must read the statute narrowly. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 611, 617 (5th Cir. 2021) *aff’d by NFIB*, 142 S. Ct. at 664.

If the President’s view of his own power is correct, then the Procurement Act would “raise a nondelegation problem.” See *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021). “In applying the nondelegation doctrine, the ‘degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.’” *Id.* (quoting *Whitman*, 531 U.S. at 475). But an interpretation of the

Procurement Act that allowed the President to unilaterally *sidestep* existing minimum wage rules for employers who merely have a special use permit, based on the pretense of his “procurement” authority, would be akin to saying the President can control any private company that receives any federal benefit. “Such unfettered power would likely require greater guidance than” the provisions set out in the Procurement Act. *See id.* As the Sixth Circuit recently concluded in analyzing the Procurement Act, “[i]f the government’s interpretation were correct—that the President can do essentially whatever he wants so long as he determines it necessary to make federal contractors more ‘economical and efficient’—then that *certainly* would present non-delegation concerns.” *Kentucky*, 23 F.4th at 608 n.14.⁴

This is not a new concern. In *Kahn* the court emphasized the need to enforce strict limits to avoid “the constitutional prohibition against excessive delegation of legislative power to the President,” and make sure that its decision did “not write a blank check for the President to fill in at his will.” 618 F.2d at 793 n.51. Even those limits raised concerns though. *See id.* at 797 (MacKinnon, J., dissenting). Furthermore, the Tenth Circuit found the Procurement Act constitutional but only because of the statutory limits on the President’s authority. *See City of Albuquerque*, 379 F.3d at 914. This Court must therefore not construe the *Procurement* Act to allow DOL’s intrusion into what it agrees are *non-procurement* contracts.

II. THE FINAL RULE IS ARBITRARY AND CAPRICIOUS

A court must set aside action that is “arbitrary [or] capricious.” 5 U.S.C. § 706(2)(A). While this review is “necessarily narrow, it is not insubstantial.” *Qwest Commc’ns. Int’l, Inc. v. FCC*, 398 F.3d 1222, 1229 (10th

⁴ Importantly, the rule cannot be viewed as a mere housekeeping rule that is within the President’s primary area of discretionary authority. Minimum wage requirements for federal permittees are not merely directives of “internal operations,” because they “substantively affect the regulated public.” *Mendoza v. Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014).

Cir. 2005). Agency action is arbitrary and capricious “if the agency has relied on factors which Congress had 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).

When an agency changes course “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *FCC v. Fox Television, Inc.*, 556 U.S. 502, 515–16 (2009); accord *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). “[W]hen an agency rescinds a prior policy[,] its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.” *Regents*, 140 S. Ct. at 1913 (quotation omitted).

The rule rescinded DOL’s prior exception for non-procurement firms like Plaintiffs without explaining why it disregarded its own prior conclusions, considering alternatives, or supporting the rule with meaningful evidence. DOL doesn’t engage with President Trump’s findings that applying a minimum wage to outfitters and guides “does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands.” 83 Fed. Reg. at 25,341. Nor did DOL acknowledge its *own* findings that exempting permittees like Plaintiffs would “lower[] the cost of business for outfitter providers.” 83 Fed. Reg. at 48,540. True, in response to comments DOL agreed it was rescinding the exception, but it insisted it “does not have the discretion to implement alternatives that would violate the text of the EO, such as the . . . continued exemption of recreational businesses.” 86 Fed. Reg. at 67,216.

Any explanation hardly *could* justify the change though, because DOL’s own findings show why the rule harms Plaintiffs. It admits that outfitters and guides will suffer “increased costs” that they will not be able to recoup from the government, and that will then be passed on to the public, will reduce profits, make these

businesses less competitive, and will result in disemployment, all of which they will suffer to a much greater extent than for procurement contractors. 86 Fed. Reg. at 67,206–08, 67,211. It also admits that some of the purported benefits of the rule will not actually apply to the industry. *See id.* at 67,211–12. DOL never explains why these harms should be cast aside, why it should rescind the old exception, and why it should lump in Plaintiffs with procurement contractors.

The Record is also filled with research that DOL claimed supported its rule but undermines the President’s directive. For instance, DOL insisted that it “believes this final rule would result in negligible or no disemployment effects.” 86 Fed. Reg. at 67,211. But one of the studies it relies on concluded that a minimum wage *can* result in slight increase in overall employment, but only with respect to more privileged workers. AR Vol. I, 136. On balance “there are possibly large negative welfare effects from a minimum wage increase, even if the employment level stays constant or increases,” because “a minimum wage hike is then not a transfer from rich firms to poor workers, but from *poor* workers to *rich* workers.” *Id.* at 126–27. This is a point reinforced in other studies DOL cited. *See, e.g.*, AR Vol. II, 172 (“There is a clear drop in employment at the bottom of the wage distribution . . . in cities with minimum wage[.]”).

Otherwise, the literature suggests significant negative effects. In one study concerning Los Angeles’ living wage ordinance, the authors concluded that “[e]mployers have cut costs by making small reductions in employment and fringe benefits.” AR Vol. II, 364. Indeed, in a metaanalysis of 15 years of research, which DOL itself cited to, the authors concluded that the minimum wage [] has negative employment effects,” which are “statistically significant.” AR Vol. V, 221.

Even if the net loss in jobs might be small, DOL’s research explains how the job losses hurt the poorest workers. As discussed, minimum wage rules simply shift opportunities *away* from less-qualified workers. AR Vol. I, 127. As other studies confirm, “The entirety of these [wage] gains accrued to workers with

above-median experience at baseline; less-experienced workers saw no significant change to weekly pay,” and, in fact, minimum wage rules resulted in “a significant reduction in the rate of new entries into the workforce.” AR Vol. III, 134. Jobs that can be accomplished by automation are also simply eliminated. AR, Vol. III, 241. Workers in such jobs are “quite vulnerable to employment changes and job loss because of automation following a minimum wage increase.” *Id.*

DOL also dismissed concerns about price increases, which “would impact [companies] profits, competitiveness, and viability,” saying that there was no “data or substantive information” submitted by commentators and asserting that there was “little literature showing a link between minimum wages and profits.” 86 Fed. Reg. at 67,207. The one study cited, however, concluded that there is “a significant negative association between the [minimum wage] introduction and firm profitability.” AR, Vol. II, 130.

Yet again, DOL’s “supporting” evidence proves its error. According to one study cited by DOL, “It is well established in the literature that minimum wage increases compress the wage distribution. Firms respond to these higher labour costs by reducing employment, reducing profits, or raising prices.” AR Vol. III, 192. The one study DOL cited concerning job losses to automation found “full or near-full price pass-through of minimum-wage-induced higher costs of labor.” AR Vol. II, 4. Other researchers concluded that “firms respond to minimum wage increases not by reducing production and employment, but by raising prices.” AR Vol. III, 213. In other instances, “Firms have adapted to the remaining costs [by] cutting fringe benefits and overtime, hiring more highly trained workers, cutting profits and passing on costs to the city or to the public.” AR Vol. II, 362. In yet others, Wage-related costs resulted in “higher prices, lower profit margins, wage compression, reduced turnover, and higher performance standards.” AR Vol. III, 61.

The research was never meant to point the Department in one direction or another. It was provided just to give cover to whatever DOL was already doing, but it did so poorly. After all, by its own admission,

DOL did *not* “consider the alternatives that are within the ambit of the existing policy” when it rescinded its prior policy for outfitters. See *Regents*, 140 S. Ct. at 1913. EO 14026 rescinded the prior rule without a word of explanation. 86 Fed. Reg. at 22,836–37. But DOL shook off criticisms of applying the rule to outfitters by blaming the President, saying “that due to the prescriptive nature of Executive Order 14026, the Department does not have the discretion to implement alternatives that would violate the text of the EO, such as the adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses.” *Id.* at 67,216. It agrees it did not “consider the alternatives,” because it claimed it couldn’t. But the APA’s arbitrary and capriciousness standard still applies in such contexts. Consider *Regents*—there the Attorney General had ordered the Acting Secretary of Homeland Security to rescind an executive policy. 140 S. Ct. at 1903. Regardless of whether the Secretary had any choice to depart from the Executive’s directives, her action was still reviewed under the APA’s arbitrary and capriciousness standard. See *id.* at 1911–12. And the agency action was invalid because the Secretary rescinded the prior policy without providing an explanation *beyond* the Attorney General’s order. See *id.* at 1913. The rule here must also be vacated on this basis.

CONCLUSION

The final rule exceeds Defendants’ regulatory authority, and must be set aside.

DATED: June 15, 2022.

Respectfully,
/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
MICHAEL A. POON
STEVEN M. SIMPSON
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Respectfully,

/s/ Caleb Kruckenberg
CALEB KRUCKENBERG
MICHAEL A. POON
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Counsel for Plaintiffs

DUKE BRADFORD, et al., v. U.S. DEPARTMENT OF LABOR, et al., 1:21-cv-03283
Motion for Summary Judgment

EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

<p>DUKE BRADFORD, <i>et al.</i>, Plaintiffs,</p> <p>v.</p> <p>JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, <i>et al.</i>, Defendants.</p>	<p>CIVIL ACTION NO.:</p>
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DECLARATION OF DUKE BRADFORD

I, Duke Bradford, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the State of Colorado and a Plaintiff in this matter.
2. I own and operate Arkansas Valley Adventure, LLC, d/b/a AVA Rafting & Zipline, which is headquartered in Buena Vista, CO.
3. AVA is a licensed river outfitter and is registered with and regulated by the Colorado Division of Parks and Wildlife. AVA has been in business for over 20 years. AVA relies on special use permits with federal agencies to operate its business. It has effective special use permits pursuant to 16 U.S.C. § 6802(h) with the U.S. Department of Agriculture’s Forest Service for the Dillon Ranger District of the White River National Forest. AVA also has effective special recreation permits pursuant to 43 C.F.R. § 2930 *et seq.* from the Department of the Interior’s Bureau of Land Management for rafting activities on the Upper Colorado River and Eagle River, and the use of utility terrain vehicles at Wolford Mountain Special Recreation Management Area.
4. AVA could not operate its business without these permits.

5. Every summer, AVA employs about 250 people. AVA recruits experienced guides who typically negotiate fixed fees for the duration of the trip. If paid hourly, these rates would exceed \$15/hour. However, because the trips last for multiple days, the guides work far more than 40 hours in a typical week. If AVA were required to pay overtime, set at a \$15/hour minimum wage, AVA's operating costs would significantly increase, which would result in higher fees to clients for services. AVA would also be forced to limit the duration of its trips and eliminate multi-day adventures.

6. AVA will need to renew or amend its existing special use permits in order to operate for the upcoming 2022 season. Without these permits AVA cannot provide services on federal lands, which is a key component of its business.

7. The Department of Labor's rule *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 23, 2021), will significantly harm AVA.

8. After the rule's effective date, AVA will be required to pay higher wages to its employees, particularly to its guides who lead multi-day trips in the backcountry. Additionally, AVA will need to pay new implementation and compliance costs to ensure that it complies with the new requirements.

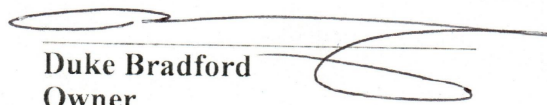
9. The rule's wage increases will also make AVA's current service offerings financially unviable. As a result, AVA will be forced to change its business practices, such as by reducing the duration of many of its guided trips and limiting the hours its guides can work in a workweek in an effort to mitigate losses caused by the rule's overtime provisions. AVA would not be able to offer its guides as many hours of work as it has in past seasons. AVA also expects to need to increase its costs to customers, pricing out many consumers.

10. These changes not only harm AVA, its guides, and its consumers financially. It also harms me and AVA more personally. My primary motivation for establishing AVA was to offer multi-day trips into the wilderness. It is only on these long trips that one can truly appreciate the beauty of nature. I love these excursions and being able to share that experience with the public at an affordable price. But this rule's provisions will destroy my ability to offer these services—whether by limiting their duration, pricing out large segments of the public, discouraging guides from continuing in this type of work due to the limited hours available to work, or a combination of these.

11. AVA will also be at a competitive disadvantage with outfitters that are not affected by the new rule. Competitors who operate on lands not owned by the federal government will be able to offer more multi-day trips at lower rates than AVA. Competitors will also be able to offer guides more work hours than AVA because they will not be required to pay the same overtime wages.

12. None of AVA's costs will be recoverable from the U.S. Government, and AVA does not receive any compensation from the government from its special use permits.

Executed on December 6, 2021


Duke Bradford
Owner
Arkansas Valley Adventure, LLC

DUKE BRADFORD, et al., v. U.S. DEPARTMENT OF LABOR, et al., 1:21-cv-03283
Motion for Summary Judgment

EXHIBIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-CV-03283-PAB

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

Plaintiffs,

vs.

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

REPORTER'S TRANSCRIPT
Hearing on Motion for Preliminary Injunction

Proceedings before the HONORABLE PHILIP A. BRIMMER,
Judge, United States District Court for the District of
Colorado, commencing at 8:38 a.m., on the 6th day of January,
2022, in Courtroom A-701, United States Courthouse, Denver,
Colorado.

Proceeding Recorded by Mechanical Stenography, Transcription
Produced via Computer by Janet M. Coppock, 901 19th Street,
Room A-257, Denver, Colorado, 80294, (303) 893-2835

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APPEARANCES

Michael Poon, Pacific Legal Foundation,
555 Capitol Mall, Suite 1290, Sacramento, CA 95814;

Caleb J. Kruckenberg, Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 610, Arlington, VA 20036-9005,
appearing for the Plaintiffs.

Kate Talmor and Taisa Goodnature, U.S. Department of
Justice, Civil Division, 1100 L Street NW, Washington, DC
20002, appearing for the Defendants.

* * * * *

PROCEEDINGS

THE COURT: The matter before the Court is Duke
Bradford, Arkansas Valley Adventure, LLC, Colorado River
Outfitters Association, plaintiffs, versus the United States
Department of Labor, the United States Department of Labor Wage
and Hour Division, Joseph R. Biden, Martin J. Walsh and Jessica
Looman. This is Civil Action 21-CV-3283.

I will take entries of appearances, first of all, on
behalf of the plaintiffs.

MR. KRUCKENBERG: Good morning, Your Honor. Caleb
Kruckenberg and Michael Poon for the plaintiffs.

THE COURT: Good morning to both of you.
And on behalf of the defendants?

MS. GOODNATURE: Good morning, Your Honor. Taisa
Goodnature and Kate Talmor for the defendants.

1 *THE COURT:* Good morning to both of you too.
2 We are here today on the Motion for Preliminary
3 Injunction which is Docket No. 7. The plaintiffs have
4 indicated that they have three witnesses to call. I would
5 propose that we dispense with any types of opening statements
6 and go right to the evidence. We had a status conference where
7 we talked about trying to really focus the testimony on just
8 those issues that were going to be relevant for purposes of the
9 preliminary injunction.

10 First of all, let me ask the defendants whether there
11 is an objection -- whether they wish to have sequestration of
12 witnesses.

13 *MS. GOODNATURE:* Yes, Your Honor, we do.

14 *THE COURT:* Okay. So to the extent that there is two
15 witnesses in the courtroom, one of them would need -- whoever
16 is not called would need to go into one of the witness rooms
17 outside the door, all right?

18 And then with that being said, anything on a
19 preliminary basis on behalf of plaintiffs?

20 *MR. KRUCKENBERG:* Yes, Your Honor, just a couple of
21 housekeeping things. First of all, we are just going to have
22 two witnesses testify. It's Mr. Bradford and Mr. Costlow. And
23 I believe also there is a stipulation to the exhibits. We were
24 talking with the government this morning. I think the three
25 plaintiff's exhibits I think can be stipulated to admission.

1 THE COURT: That's fine. We will take them up at the
2 time that they are offered.

3 MR. KRUCKENBERG: Yes, sir.

4 THE COURT: Okay. Anything else?

5 MR. KRUCKENBERG: No.

6 THE COURT: Thank you.

7 And Ms. Goodnature, anything on behalf of the
8 defendants as a preliminary matter?

9 MS. GOODNATURE: No, nothing preliminary, Your Honor.

10 THE COURT: Okay. Thank you.

11 Then plaintiffs may call their first witness.

12 MR. KRUCKENBERG: Thank you, Your Honor. We would
13 call Mr. Bradford to the stand.

14 THE COURT: Okay. And assuming that that's
15 Mr. Costlow, he is going back to one of the witness rooms.

16 MR. KRUCKENBERG: Yes, sir.

17 THE COURT: Mr. Bradford, if you don't mind, if you
18 could go over there, Ms. Grimm, my courtroom deputy, she will
19 administer the oath to you.

20 **(Duke Bradford was sworn.)**

21 THE WITNESS: Yes.

22 COURT DEPUTY CLERK: Please be seated.

23 Please state your name and spell your first and last
24 name for the record.

25 THE WITNESS: First name is Duke, Duke, D-U-K-E. Last

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Duke Bradford - Direct

1 name Bradford, B-R-A-D-F-O-R-D.

2 **DIRECT EXAMINATION**

3 *BY MR. KRUCKENBERG:*

4 Q. Good morning, Mr. Bradford.

5 Can you state your occupation, please?

6 A. I am a white water rafting guide and owner.

7 Q. And what is it that you own?

8 A. I am sorry?

9 Q. What is it that you own?

10 A. I own Arkansas Valley Adventures.

11 Q. What is Arkansas Valley Adventure?

12 A. It's an adventure company that operates in central
13 Colorado. We do everything from rafting to zip-line to fishing
14 to ATV tours.

15 Q. And how long has Arkansas Valley Adventure been in
16 business?

17 A. Since 1998.

18 Q. And if I refer to it as AVA, do you know what I am talking
19 about?

20 A. Yes, that would be how we refer to it as well.

21 Q. And you mentioned river guiding. Is AVA licensed to
22 operate as a river outfitter in Colorado?

23 A. Yes.

24 Q. And you mentioned you do some other lines of business other
25 than just river outfitting. Why do you do that? Why do you do

Duke Bradford - Direct

1 more than one thing?

2 A. Just with the seasonality of rafting, it's important to be
3 sustainable and be able to do other activities.

4 Q. Do you consider river outfitting or river guiding to be the
5 main part of your business?

6 A. Yes.

7 Q. And does AVA operate year round?

8 A. No.

9 Q. When do you operate?

10 A. Predominantly run from May until September. We have a
11 couple things we do that stretch out into October, November,
12 but predominantly it's the summer season.

13 Q. Do you -- when you are not in operation, do you still have
14 employees or some business operations?

15 A. Yes, yes. We have a year-round staff that, you know, take
16 care of marketing and operations and that sort of thing, but we
17 actually see guests in the summer.

18 Q. And how many, if you could estimate on average, year-round
19 employees does AVA have?

20 A. 15.

21 Q. And what about seasonal employees, how many typically does
22 AVA hire in a season?

23 A. 250 to 350, somewhere in there.

24 Q. Are those all river guides or do they do a variety of
25 tasks?

Duke Bradford - Direct

1 A. A variety. I mean, the majority are guides, but obviously
2 there is people that work in the retail shop and the other
3 things we do. We have drivers. And so, you know, it's an
4 eclectic group.

5 Q. Do you consider your river guides employees?

6 A. Yes.

7 Q. And do you have annual gross sales of more than half a
8 million dollars?

9 A. Yes.

10 Q. And do you operate more than seven months out of the year?

11 A. Operate as far as on the river?

12 Q. Yes.

13 A. I think we would be just short of that. We are right
14 there, right about seven months, a little less.

15 Q. Let me ask you this. In all of AVA's operations, all of
16 their different activities, do you operate more than seven
17 months out of the year?

18 A. Yeah, I would say yes.

19 Q. Do you maintain payroll records for all of your employees?

20 A. Yes.

21 Q. And do you have an employee in-house or do you hire someone
22 to help you with payroll?

23 A. We have staff, we have in-house staff. And then we
24 outsource to ADP who handles all our payroll.

25 Q. And I am sorry, you used an acronym. What was that?

Duke Bradford - Direct

1 A. ADP. I don't know the acronym for that. I don't know what
2 that acronym stands for, but it's a payroll processing company.

3 Q. And if you could estimate how much you pay, AVA pays every
4 year for payroll processing.

5 A. I think right around \$40,000.

6 Q. Now, does AVA operate on lands owned by the Federal
7 Government?

8 A. Yes.

9 Q. Where?

10 A. We operate on the Colorado River with the Bureau of Land
11 Management. In that area we also work on what's called the
12 Blue River with the Forest Service, as well as the Eagle River.
13 And that's predominantly in central Colorado.

14 Q. Does AVA have to have permits or some sort of permission
15 from federal land agencies to operate on those lands?

16 A. Yes.

17 Q. What does that permission look like?

18 A. It's a permit basically that is given to us. It can be --
19 it I think starts as a one-year permit and then it can go to a
20 10-year permit. And it allows us to operate on those --
21 whatever river is designated in that permit.

22 MR. KRUCKENBERG: Your Honor, at this time I would
23 like to show Mr. Bradford what's been marked as Plaintiffs'
24 Exhibit A.

25 THE COURT: Sure. And does he have exhibits on the

Duke Bradford - Direct

1 witness stand with him?

2 *COURT DEPUTY CLERK:* He does.

3 *THE COURT:* It looks like he does.

4 *BY MR. KRUCKENBERG:*

5 Q. Mr. Bradford, if you could turn to what has been marked as
6 Exhibit A. And looking at the first page, it should have a
7 sticker. It says Plaintiffs' Exhibit A at the top. Do you
8 recognize that document?

9 A. Yes.

10 Q. What is that?

11 A. That's a Special Recreation Permit that we apply for that
12 allows us to operate.

13 Q. And where does that allow you to operate?

14 A. This particular one allows us to operate on the Colorado
15 River.

16 Q. Who issued that permit?

17 A. The Bureau of Land Management.

18 *MR. KRUCKENBERG:* Your Honor, I don't think there is
19 an objection, but at this point I would offer Plaintiffs'
20 Exhibit A into evidence.

21 *THE COURT:* All right. Any objection to the admission
22 for purposes of this hearing of Exhibit A?

23 *MS. TALMOR:* No objection, but we would like to
24 stipulate the fuller version be offered into evidence.

25 *THE COURT:* Well, plaintiffs are offering what's

Duke Bradford - Direct

1 marked as Exhibit A, which I think has been -- has it been
2 provided to the defendants?

3 MR. KRUCKENBERG: It has.

4 MS. TALMOR: Yes, Your Honor.

5 THE COURT: So that's the issue. Any objection to
6 Exhibit A?

7 MS. TALMOR: No, Your Honor.

8 THE COURT: Exhibit A will be admitted.

9 BY MR. KRUCKENBERG:

10 Q. And Mr. Bradford, looking at Exhibit A, how did AVA acquire
11 this permit?

12 A. We acquired this permit, you know, a number of years ago as
13 we set up for -- I had a river operator's license and we
14 applied for this special recreational permit when we opened in
15 '98.

16 Q. And who -- I am not sure if I asked you this. Which agency
17 issued this permit?

18 A. Bureau of Land Management.

19 Q. And when was it issued?

20 A. This particular one was entered -- this was in 2012.

21 Q. And how long was it effective for or is it effective for?

22 A. This one is for 10 years.

23 Q. So when does it expire?

24 A. March of '22.

25 Q. So March of this year.

Duke Bradford - Direct

1 A. Yes, sir.

2 Q. And what does it authorize AVA to do on the lands that are
3 described in this permit?

4 A. It allows us to do all the activities listed below which
5 predominantly is river rafting, but it also allows us to do
6 shuttle services. And as it says below, guided -- purpose of
7 the activities authorized. And then we have to list all the
8 activities we want to do on that land.

9 Q. So is it fair to say this is a permit to operate rafting
10 services on this river?

11 A. Yes.

12 Q. And do you -- does AVA have to pay the BLM for use of this
13 permit?

14 A. Yes.

15 Q. What do they pay?

16 A. We have a -- I think just the process would be a hundred
17 dollars and it's 3 percent of our gross.

18 Q. And when you say 3 percent of your gross, what is that? Is
19 that gross --

20 A. Gross revenue.

21 Q. From who?

22 A. Anything that our company runs that has to do with any
23 activity that's listed here, we give 3 percent of whatever that
24 gross is to the BLM.

25 Q. So if you charge more or less, does that affect the

Duke Bradford - Direct

1 percentage that you pay the BLM?

2 A. Yes, yes.

3 Q. Now, I'm going to turn to the second page of this document.

4 There is a list that says General Terms. Do you see that?

5 A. Yes.

6 Q. And I am going to direct your attention to Paragraph F. Do

7 you see that language?

8 A. Yes.

9 Q. What is that language or what is that paragraph? What do
10 you understand that to be?

11 A. That's just our association with the BLM essentially.

12 Q. Does that set a condition on what you're allowed to do
13 under the terms of this permit?

14 A. Yes.

15 Q. And what does the BLM not want AVA to do?

16 A. They don't want us to present ourselves as the Bureau of
17 Land Management, so they don't want us to use their logos.
18 They don't want to be presented as the BLM offering these
19 activities. We have to offer these activities free and clear
20 of BLM as our own -- in our company it's AVA. So we have to
21 set up and market to the public without, you know, the use of
22 BLM material.

23 Q. And this specifically says that you're not allowed to
24 represent the activities as being conducted by the BLM, right?

25 A. Yes.

Duke Bradford - Direct

1 Q. What activities are those?

2 A. Rafting predominantly, shuttle services. Any of the
3 activities that are listed on the previous document is what we
4 are allowed to do. And we're not allowed to act as if the BLM
5 has any sort of connection with those activities.

6 Q. Why do you -- what is your understanding of why you're not
7 allowed to do that?

8 A. Well, the BLM is not in the business of obviously doing
9 activities. One of the reasons we as always understand is for
10 liability reasons. They don't want to be associated with -- in
11 the event of an accident, they don't want to be brought into
12 that issue. So on the river, for example, they don't tell us
13 how to run rapids or tell us that we can move a rock or
14 anything like that because they don't want to assume that
15 responsibility. So they've always been very clear that we
16 simply have a permit to operate, and as far as how we operate
17 is on us. And as it said in the previous document, they
18 require that we carry a certain amount of insurance to do so.

19 Q. Does the BLM provide any services under this agreement?

20 A. No.

21 Q. Has AVA operated using this permit in the past?

22 A. Yes.

23 Q. Have they done that every year that it's been issued?

24 A. Yes.

25 Q. Does AVA intend to operate on this land this year?

Duke Bradford - Direct

1 A. Yes.

2 Q. Will you need to renew this permit?

3 A. Yes.

4 Q. When will rafting activities start in 2022 on this land?

5 A. Typically May, middle of May.

6 Q. So when will you need to start the process of renewing this
7 permit?

8 A. Immediately. We are in the process because we will be
9 obviously putting out material in the marketplace and, you
10 know, offering these activities to people that are thinking
11 about this summer.

12 Q. Does AVA have other special use permits with federal
13 agencies?

14 A. Other than the BLM and Forest Service?

15 Q. Other than this specific document.

16 A. Yes, we do.

17 Q. Do you know how many?

18 A. Forest Service, just one other.

19 Q. And with any other agencies?

20 A. Other agency, but not federal; state.

21 Q. So just one other federal agency.

22 A. Yes.

23 Q. And that's the U.S. Forest Service.

24 A. Yes.

25 Q. And does it have similar terms?

1 A. Yes.

2 Q. When does that permit expire?

3 A. I think we have a couple years. I can't say specifically,
4 but it's not expiring this year.

5 Q. And is it fair to say that you intend to renew it when it
6 does expire?

7 A. Oh, yes.

8 Q. Now, are these permits necessary, these federal permits
9 necessary for AVA to continue its operations?

10 A. They would be essential. I mean, obviously our business
11 would not exist if we couldn't offer the activities on the BLM.

12 Q. Does AVA offer multiple day rafting trips to customers?

13 A. Yes, yes.

14 Q. Do they do that on federal lands?

15 A. Yes.

16 Q. And how much would it cost currently one of your customers
17 to go on a multiple day rafting trip?

18 A. Around a thousand dollars.

19 Q. And for how long would that trip be?

20 A. Three days.

21 Q. And that thousand dollars, does that determine how much you
22 have to pay the federal agency for the special use permit?

23 A. Yes.

24 Q. On a three-day rafting trip, how would you typically pay
25 guides?

Duke Bradford - Direct

1 A. We would pay them by the trip. We pay what we call a trip
2 salary.

3 Q. And what would a trip salary be on a three-day trip?

4 A. Three-day trip, probably would be around 400 -- four, \$500.

5 Q. Does that depend on the experience level of the guide?

6 A. Yes.

7 Q. And is that type of pay arrangement typical in the
8 industry?

9 A. Yes.

10 Q. Do you have any idea of how many work hours are involved in
11 a three-day trip?

12 A. Yeah. I mean, it's probably between eight to 10.

13 Q. If I counted all of the number of hours, though, for a
14 three-day trip -- because these are all day, right?

15 A. Oh, yeah, and overnight.

16 Q. So if I counted all the numbers of hours that a guide is
17 actually on the water with clients, does that go over 40 hours?

18 A. On the water or off the water? I guess you obviously are
19 on the water for a period of time and then you are off at camp
20 for a period of time, so there is two things. Specifically on
21 the water?

22 Q. Well, specifically let me ask you this. So for these
23 three-day trips, how many guides go out with customers?

24 A. You know, on a three-day trip our average is one guide to
25 every four guests. So if it was, you know, 12 people, we would

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Duke Bradford - Direct

1 have three guides, probably four go on an overnight. It's a
2 little more labor intensive, so to give you an idea.

3 Q. And on an overnight trip they are not on the water the
4 whole time, right?

5 A. No.

6 Q. And so they will be on the water part of the day and they
7 will also camp some of the time, won't they?

8 A. Correct.

9 Q. But the guides are with the customers the whole time; is
10 that fair?

11 A. Yes.

12 Q. So from the time the guides leave with the customers to go
13 on the trip to the time they return, it's fair to say that more
14 than 40 hours elapse.

15 A. Oh, yeah. I mean, it would be three days, 72 hours.

16 Q. As you understand it, does AVA have to comply with the Fair
17 Labor Standards Act?

18 A. Yes.

19 Q. And does AVA do that?

20 A. Yes.

21 Q. And under that do you make sure to pay your guides what
22 averages out to at least the federal minimum wage?

23 A. Yes.

24 Q. And does that include overtime for hours worked over 40
25 hours?

Duke Bradford - Direct

1 A. No, I wouldn't say we do if you are looking at 72 hours.
2 We would pay them for time on river and meal time, but we
3 wouldn't look at it as overnight. We're not paying them for 72
4 hours.

5 Q. Well, you pay a trip salary.

6 A. Trip salary, yes.

7 Q. And if you average the trip salary out even for 72 hours --

8 A. Oh, yeah.

9 Q. -- would that be greater than the federal minimum wage?

10 A. Yes. We always base our salary pay based on that with that
11 in mind.

12 Q. Now, in your experience do your guides typically work more
13 than one trip in a week?

14 A. Yes.

15 Q. During the season do you have guides who work seven days a
16 week?

17 A. Not seven days a week, but they could work five or six.

18 Q. And when they work five or six, is that all day on a trip?

19 A. On one trip or various trips like day trips?

20 Q. Either one.

21 A. Well, a lot of guides -- some guides will want to come in
22 because it's a seasonal job, so gosh, they want to work every
23 day if you would let them, but -- so, you know, they'll work
24 back-to-back trips, but they will work -- six days would be the
25 most.

Duke Bradford - Direct

1 Q. And in your experience, why are your guides willing to work
2 so much?

3 A. Well, it's -- the outdoor industry is -- guides come for
4 various reasons. They are seasonal employees. A lot of them
5 are, you know, they are more of a migratory workforce, if you
6 will. They come in when the river is running and they work as
7 much as the river runs, and then they leave and go -- some
8 travel. Some go to school. So the employment group tends to
9 travel with the water, so that's kind of how they come. They
10 come and go.

11 Q. Now, because we are here I assume you are familiar with the
12 new wage rule that's set to take effect in January?

13 A. Yes.

14 Q. Have you read the entire rule?

15 A. Yes.

16 Q. Will you -- will AVA need to do anything to try to
17 implement the rule payroll-wise or otherwise?

18 A. Yes.

19 Q. Will you need to consult with any outside consultants or
20 attorneys to help you comply with the rule?

21 A. Yes.

22 Q. Have you estimated how much it's going to cost AVA to be
23 able to be in compliance?

24 A. You know, with what it will take, you know, some of this we
25 don't know yet, obviously, because we have to work with the

Duke Bradford - Direct

1 attorneys. So attorney fees, I guess we have set aside right
2 now between five and \$10,000. And then, you know, what that
3 labor costs, what would be associated with that, the HR and
4 those things and how much more staff we are looking to have to
5 hire.

6 Q. When you say five to \$10,000 for legal costs, is that just
7 to do an initial compliance review of the rule?

8 A. Yes.

9 Q. Would that have to happen before January 30th, before the
10 rule takes effect?

11 A. Yes.

12 Q. And will you have to have any expenditures with your
13 payroll company to change based on the new rule?

14 A. I -- I don't know at this juncture.

15 Q. And it's fair to say that you, AVA, will have to renew at
16 least the special use permit in Exhibit A this year, right?

17 A. Yes.

18 Q. Now, if AVA has to follow this new minimum wage rule, would
19 that result in increased wage costs?

20 A. Yeah. I think the biggest thing it will do to us, we may
21 end our -- some of our products. Obviously, overnight will
22 probably go out of -- we will stop doing that. And then we'll
23 go to more of a four-day workweek so that staff -- we'll hire
24 more staff. We'll do a four-day workweek with our staff
25 instead of letting them work whenever they want. And then we

Duke Bradford - Direct

1 will have to hire more staff, which the problem that happens
2 there, it's going to drive up -- all these people live at our
3 facility. So if we have to hire twice as much staff to do the
4 same work, then we are going to be in a situation where we have
5 more housing. And we will see a lot of that different kind of
6 expense that will drive expenses up. And then the staffing
7 issue will be the -- a major player.

8 Q. So when you say the staffing issue, what do you mean by
9 that?

10 A. Well, we won't allow seasonal guides to come in and work as
11 much as they want. We'll keep them on a 40-hour work week. We
12 would move to just an hourly as opposed to a trip pay and we
13 would just go straight hourly, clock in, clock out. Well,
14 because the river and the outdoor environment has variables, we
15 would run them on a four-day workweek so they didn't go over 40
16 hours. So that would leave three more days to have to staff,
17 so we would have to staff those three days. That would drive
18 us up as far as more labor.

19 Q. So when you say you likely would eliminate overnight trips,
20 have you made that decision?

21 A. Yes.

22 Q. If you were -- if you chose not to eliminate overnight
23 trips and the rule went into effect, how would you be able to
24 do them? Would you be able to offer them for the same price?

25 A. No. The price would go beyond what our public could

Duke Bradford - Direct

1 afford, so we wouldn't need the staff to do it because the
2 people that could afford it would be so few.

3 Q. Would the new rule affect AVA's profits?

4 A. You know, I think we would just diversify. I can't speak
5 to whether it would -- I am sure there would be some loss. To
6 what, I couldn't say.

7 Q. And when you talked about limiting your guides' hours to 40
8 hours in a week, would that affect the availability of work for
9 the guides that you hired yearly?

10 A. Oh, yes.

11 Q. Would they be able to work as much as they do currently?

12 A. No.

13 Q. Do you have -- does AVA have any competitors that do not
14 operate on federal land?

15 A. Yes.

16 Q. If they did not -- those competitors didn't have to comply
17 with this rule and you do, how does that affect your ability to
18 compete with them?

19 A. Well, you wouldn't. So let's take AHRA, which is Arkansas
20 Headwaters Recreation Area, which is a state run river in this
21 state. You could have different rules on the Arkansas River
22 than you would on the Colorado River. So then an overnight
23 structured a certain way would be able to run differently on
24 different -- I mean, labor is your No. 1 expense in a guided
25 experience. As I said, it's one to four ratio. So that said,

Duke Bradford - Direct

1 it would change -- it would tip the scales as far as what would
2 be affordable and what would not be.

3 Q. And do you believe that other companies that operate on
4 state lands would be able to offer multiple day trips?

5 A. Yeah, you know, in certain situations with exemptions.

6 Q. And would AVA lose its customers for overnight trips if
7 they couldn't offer those anymore?

8 A. Yes, yes.

9 Q. And are you concerned about losing guides to other
10 outfitters?

11 A. Yes. It sets us up in a really unique situation. I mean,
12 do you share staff? So there is discussions around would an
13 employee who wants to work a lot work four days for one company
14 and then three days for another company? What is that like?
15 It would be like reporting to two different organizations.

16 Just not ideal, and I don't think anybody really wants to go
17 down that road, but yes, they would have to -- we could lose
18 guides to it. It just -- it's just going to be an adjustment.

19 Q. And overall, what would be the impact of the rule on AVA's
20 operations and costs?

21 A. Well, costs would go up and revenue would go down.

22 MR. KRUCKENBERG: Just one moment, Your Honor.

23 THE COURT: Yes.

24 MR. KRUCKENBERG: Your Honor, I don't have any other
25 questions.

1 Q. Horseback riding?

2 A. We don't do that. We do -- we partner with the client. We
3 don't specifically do that ourselves.

4 Q. Your website offers horseback riding as part of your
5 services; isn't that correct?

6 A. Yes.

7 Q. And rock climbing?

8 A. Yes.

9 Q. Stand-up paddle boarding?

10 A. Yes.

11 Q. Hot air balloon rides?

12 A. Again, we don't do that anymore, I don't think. But we
13 used to have a partner that did that, but they no longer do it.

14 Q. Your website still states that as an offering to clients,
15 correct?

16 A. I think I better get that cleaned up. Yes, that was at a
17 time, but we no longer do that.

18 Q. You offer train rides?

19 A. Yes.

20 Q. And gear rental?

21 A. Gear rental, yes.

22 Q. And cabin rentals?

23 A. Yes.

24 Q. And campsite rentals.

25 A. Yes.

Duke Bradford - Cross

1 Q. So most of those activities we just discussed with the
2 exception of the cabin and campsite rentals, those are partial
3 day or one-day activities, correct?

4 A. Yes, for the most part.

5 Q. And of those offerings that rely on the use of guides out
6 of those activities we just discussed, it's fair to say, isn't
7 it, that most of those activities are single day or partial day
8 activities, correct?

9 A. Yes.

10 Q. And AVA offers those adventures in multiple destinations
11 across Colorado, correct?

12 A. Yes.

13 Q. So, for instance, you offer both rafting and zip-lining in
14 Aspen, correct?

15 A. Not in Aspen, no.

16 Q. Not in Aspen? Near Aspen?

17 A. Our zip-lining is in Buena Vista, as well as in Idaho
18 Springs. We don't have it in Aspen.

19 Q. And isn't it correct that you advertise that near
20 Breckenridge clients can engage in, in addition to rafting,
21 kayaking, zip-lining, rock climbing, fly fishing and
22 off-roading?

23 A. Yes.

24 Q. And you offer rafting near Colorado Springs, correct?

25 A. Yes.

1 Q. And according to your website, what you offer there are
2 one-third day, one-half day or full day rafting trips there,
3 correct?

4 A. Near Colorado Springs on the Arkansas? Yes.

5 Q. Yes. And you also offer activities near Denver?

6 A. Yes.

7 Q. And you offer activities in Rocky Mountain National Park?

8 A. No, not anymore. Are you talking about our hiking, our
9 overnight hikes?

10 Q. Isn't it correct that your website advertises activities
11 that take place in Rocky Mountain National Park?

12 A. Yes. I will say yes for now. We don't do hiking anymore,
13 though. I think that's what you're referring to.

14 Q. You offer activities near Estes Park?

15 A. If Kremmling would be close to Estes Park in your mind,
16 then yes.

17 Q. And in Glenwood Springs?

18 A. Yes.

19 Q. And Steamboat Springs?

20 A. No.

21 Q. And near Vail?

22 A. Yes.

23 Q. So not all of these activities are conducted on federal
24 lands, correct?

25 A. Correct.

1 Q. So some of your activities are conducted on state lands.

2 A. Yes.

3 Q. And, in fact, currently you hold only two special use
4 permits or special recreational permits issued by the Federal
5 Government, correct?

6 A. Correct.

7 Q. Now, you testified today that your business has effective
8 special use permits for the White River National Forest,
9 correct?

10 A. Correct.

11 Q. That's the upper Colorado River?

12 A. Yes.

13 Q. And that's for rafting on the upper Colorado and Eagle
14 River areas, correct?

15 A. Correct.

16 Q. And isn't it correct that your website tells customers that
17 the average rafting trip on these federal lands is one-third
18 day, one-half day or a full six-hour day, correct?

19 A. On those -- which rivers are we talking about?

20 Q. Isn't it correct that your website states that for the
21 upper Colorado and Eagle River areas, that the average length
22 of a rafting trip would be one-third day, one-half day or a
23 full six-hour day?

24 A. Those are those trips, but you're not including multi-day
25 trips. There is multi-day trips on the Colorado.

Duke Bradford - Cross

1 Q. Correct. I am sorry if I am being unclear. Let me
2 rephrase that. Isn't it correct that under a frequently asked
3 question on your website it states that the average length of a
4 rafting trip for those specific areas is a one-third day,
5 one-half day or full six-hour day trip?

6 A. Those are the three trips you're offering. You're offering
7 a third day, half day or full day. That's what those are
8 saying is that you can do those trips. You're describing a
9 frequently asked question, so you tell a customer or a
10 potential guest what kind of trip they can expect and how long
11 the trip will be, because that's all that that question is
12 answering. If that's what your question is, is what the length
13 of a third day, half day and full day, then yes, that's
14 correct.

15 Q. Isn't it correct that your website says: What is the
16 average length of a rafting trip of the upper Colorado and
17 Eagle River areas? And it says: The average length is a
18 one-third day, one-half day or full six-hour day trip.

19 A. For a full day, half day and third day, yes.

20 Q. Isn't it true that the longest trip advertised on your
21 website for these locations is a two-night trip?

22 A. No. We have a two-night, three-day, yes.

23 Q. So isn't it correct that the longest trip advertised is a
24 two-night trip?

25 A. Yes.

Duke Bradford - Cross

1 Q. So isn't it fair to say that the bulk of the rafting trips
2 that you run in these locations under the special permit are
3 partial or single day trips?

4 A. Yes.

5 Q. So the greatest number of trips are single day trips,
6 correct?

7 A. Yes.

8 Q. And you run just a smaller number of overnight trips,
9 correct?

10 A. Yes.

11 Q. And an even smaller number of those trips are the two-night
12 trips, correct?

13 A. Yes.

14 Q. And you offer rafting in other locations across Colorado,
15 correct?

16 A. Yes.

17 Q. So besides those that we discussed, which is the Eagle and
18 upper Colorado River, you also run rafting on Clear Creek,
19 correct?

20 A. Yes.

21 Q. And on the Blue River?

22 A. Yes.

23 Q. And these trips don't rely on federal special permits,
24 correct?

25 A. No, the Blue River does. The Blue River is Forest Service.

Duke Bradford - Cross

1 Q. Is the Blue River on one of the permits that you discussed
2 with my colleague a few minutes ago?

3 A. No. The one that's presented today is the Bureau of Land
4 Management. The National Forest Service manages the Blue.

5 Q. So that does not operate under the special permit that you
6 were discussing with my colleague earlier today, correct?

7 A. No.

8 Q. I am sorry?

9 A. No, it does not. It's not -- Exhibit A does not represent
10 the National Forest Service.

11 Q. So these -- some of these rafting trips that you operate
12 operate without the need for special federal permits, correct?

13 A. On the one -- the Arkansas would be the only one and that
14 would be -- and Clear Creek. They are under the river
15 outfitters license that the State of Colorado issues. I
16 shouldn't say -- the Arkansas River is under Parks and
17 Wildlife, which is Arkansas Headwater Recreation Area. So they
18 are state managed areas as opposed to --

19 Q. Thank you. So a fair number of your rafting trips operate
20 on state lands, correct?

21 A. Yes.

22 Q. And you also stated in your declaration in this case that
23 you have special recreation permits for utility terrain
24 vehicles at Wolford Mountain; is that correct?

25 A. Yes.

Duke Bradford - Cross

1 Q. And operating a utility terrain vehicle at Wolford Mountain
2 from the customer's point of view, that's a single day
3 activity, correct?

4 A. Yes.

5 Q. So use of a utility terrain vehicle at Wolford Mountain,
6 that doesn't require a multi-day guide, correct?

7 A. No.

8 Q. So across all of AVA's offerings, sitting here today can
9 you tell us what percentage or portion of AVA's annual revenue
10 comes from activities that are conducted on federal lands
11 requiring a special permit?

12 A. I would say between 5 percent -- below 10 percent.

13 Q. So below 10 percent of your annual revenue comes from
14 activities conducted on federal lands whether single day or
15 multi-day, correct?

16 A. No, no. I thought you meant just overnight trips. On
17 federal land?

18 Q. Let me clarify. I just don't want to have any confusion on
19 the record, so I apologize.

20 Sitting here today can you tell us what percentage of
21 AVA's annual revenue comes from activities that are conducted
22 on federal lands under a special permit?

23 A. It would be probably around 30 percent.

24 Q. Around 30 percent. So wouldn't it be fair to say that
25 about 70 percent of AVA's annual revenue comes from activities

1 conducted on state or non-federal land?

2 A. Yes.

3 Q. And I believe you just stated that the percentage of
4 revenue that comes from overnight or multi-day trips you would
5 estimate to be less than 10 percent, correct?

6 A. Yes.

7 Q. So would it be fair to say that greater than 90 percent of
8 your annual revenue comes from single day activities?

9 A. Yes.

10 Q. Out of the 250 or so seasonal employees that you discussed
11 a few moments ago, how many of those conduct overnight trips?

12 A. Probably a hundred.

13 Q. How many of those 250 seasonal employees regularly exceed
14 40 compensable hours per week?

15 A. A week?

16 Q. Yes, sir.

17 A. Probably 10.

18 Q. So roughly 10 of your seasonal employees regularly exceed
19 40 compensable hours per week.

20 A. Would that be -- when you say -- tell me, what's your 40
21 hours? Are you saying 40 continual hours? Is that what you're
22 basically saying?

23 Q. Compensable hours. How many of your employees regularly
24 exceed 40 hours which you are legally obligated to pay them
25 for, 40 compensable hours?

Duke Bradford - Cross

1 A. Oh, on a weekly basis? Yeah, I think 10, if they do at
2 all. You know, everything we pay -- we do trip salary. If you
3 average that out, it would cover that. So I don't think it
4 happens 10 percent of the time.

5 Q. All of your employees make at least the state minimum wage,
6 correct?

7 A. Yes.

8 Q. And that state minimum wage as of January 1st is \$12.56 per
9 hour, correct?

10 A. Correct.

11 Q. So currently you are not paying any employee less than
12 \$12.56 per hour, correct?

13 A. Correct.

14 Q. Now, you stated a few moments ago with my colleague that
15 the average two-night trip salary, that's for those longest
16 trips that are two nights, is between four and \$500, correct?

17 A. Depending on your -- that would be your base. You know, if
18 you're a senior guide, it would be more than that.

19 Q. Okay. So some of those guides make more than the four to
20 \$500 for a two-night trip.

21 A. Yes.

22 Q. And I think you testified a few moments ago that on those
23 two-night trips that the guides will typically have eight to 10
24 compensable hours that they work each day, correct?

25 A. Correct.

1 Q. They're not required to be paid for 24 hours including
2 sleeping and other off-duty time, correct?

3 A. Correct.

4 Q. So on a three-day trip those employees are required to be
5 paid for that eight to 10 hours a day they are on duty, not 24
6 hours a day, correct?

7 A. Correct.

8 Q. And so if they work eight hours a day that are compensable
9 on those two-night trips, even counting all three days of the
10 two-night trips, that would be 24 hours that you are required
11 by law to pay them, correct?

12 A. Correct.

13 Q. And if they work 10-hour on-duty days, even considering if
14 those were all three full days, that would be at most 30
15 compensable hours for a two-night trip, wouldn't it?

16 A. Yes.

17 Q. And you testified that you only have about 10 guides that
18 are currently working more than 40 compensable hours per week,
19 correct?

20 A. Correct.

21 Q. So those employees, they are already making more than \$15
22 an hour for the compensable hours worked, aren't they?

23 A. Yes.

24 Q. So have you quantified how much more, if any, it might cost
25 to pay those 10 employees a base rate of \$15 per hour even if

1 they work six days a week?

2 A. Well, it depends on the day trips. Because of the trips
3 that would set up, we would have to take on more labor because
4 you'd still set up all those guides on the day trips. If you
5 switched them over to hourly as opposed to trip pay, we would
6 set them up and have to run them and keep them under 40 hours.
7 So we would run them four -- four 10-hour shifts essentially
8 would be an all day because you have to set up trips and break
9 down trips. So instead of trip salary, we would switch to
10 hourly and that would allow us -- so we would have our day
11 people would be affected too.

12 You could no longer come as a seasonal employee to AVA
13 and work as much as or whenever you wanted. You would have to
14 work a standard week by the hour. You would have to be
15 structured on a 40-hour week. We don't structure like that.
16 So we would be in a situation where not only would our
17 overnight people be affected, which we would just stop running
18 because of the cost associated with that, we would be in a
19 situation where we would take our regular hourly employees --
20 or our trip pay employees and we would not let them work six,
21 seven days a week. We would just run them in 4/10 shifts.
22 Does that make sense?

23 So they'd run four days because at times that trip --
24 on a river trip or any outdoor activity, the hours vary.
25 Sometimes the river is fast, so they get off sooner. Sometimes

Duke Bradford - Cross

1 it's -- it runs longer so it takes more time or maybe a raft
2 flips. So what happens is you are in a situation where we will
3 run four shifts of employees. They would never work six or
4 seven days because they would go into overtime immediately.
5 Probably --

6 Q. Mr. Bradford, didn't you just testify that you only have
7 about 10 employees who regularly work more than 40 compensable
8 hours per week?

9 A. Well, yes, in the sense that, you know, as far as the
10 average we just do it by pay. So when they work or not, the
11 point is I thought on the 10 employees you were talking about,
12 we were talking about overnight as far as who works overnights
13 because for us, as you said, most of us do day trips. But our
14 biggest concern is that we launch about three different
15 overnights a week, average three, four employees. That's about
16 10 employees a week that work over multi-day trips. As far as
17 our day --

18 Q. Mr. Bradford, I didn't mean to cut you off. I'm
19 afraid I need to clarify my question.

20 A. Yeah.

21 Q. Isn't it correct that you just testified that you only have
22 10 employees who regularly work more than 40 compensable hours
23 per week?

24 A. No, I think I stand corrected. I was thinking you were
25 talking about employees in an overnight setting. If you employ

1 our day trip guides that work -- they may work five or six days
2 a week, they would be over that. Because it's a seasonal
3 employee, so some of those employees come in. Not all
4 employees work that many days in a row, so it varies of the 200
5 guides we have. So, you know --

6 Q. Mr. Bradford, sitting here today do you know how many of
7 your employees regularly work more than 40 compensable hours
8 per week on federal lands?

9 A. Specifically, no; generally, yes.

10 Q. I am not sure I understand that question.

11 Sitting here today can you tell us how many of your
12 employees regularly work more than 40 compensable hours a week
13 on federal lands?

14 A. Including day trips, probably 50 or 60.

15 Q. And didn't you just testify that those employees are
16 already making an average hourly wage of more than \$15 per
17 hour?

18 A. Yes.

19 Q. Now, in your declaration in this matter, you stated that as
20 a result of the challenged rule, "AVA will be forced to change
21 its business practices, such as by reducing the duration of
22 many of its guided trips and limiting the hours its guides can
23 work." But isn't it the case that the majority of AVA's trips
24 are not overnight trips?

25 A. Yes.

Duke Bradford - Cross

1 Q. And the overnight trips are single or two-night trips.

2 A. Yes.

3 Q. And the guides on those overnight trips are only working
4 eight to 10 hours a day.

5 A. Yes.

6 Q. I would like to turn briefly to the special use permit that
7 you discussed with my colleague a few minutes ago. This is the
8 recreation permit amendment that contains authorization for
9 activities in the upper Colorado that you were discussing,
10 correct?

11 A. Yes. Are you talking about this document, Special
12 Recreation Permit?

13 Q. Yes, sir.

14 *MS. TALMOR:* I would like to turn on screen sharing
15 for a moment, Your Honor.

16 *THE COURT:* You may, but I caution you that screen
17 sharing has the effect of keeping me from being able to see you
18 which, you know, you're not the witness so that's okay, but it
19 will have that effect. The witness has the documents in front
20 of him, so another alternative would be to just simply point
21 out the language that you're calling his attention to, but it's
22 up to you.

23 *MS. TALMOR:* Thank you, Your Honor. I am not sure
24 whether the witness has been presented with the fuller version
25 that we sent to opposing counsel this morning or the shorter

1 version that my colleague introduced into evidence.

2 *THE COURT:* Well, I required that the exhibit be
3 exchanged, so it would be a violation of that order were the
4 witness not to have the same document that was provided to
5 defendants. However, you know, if you want the witness to look
6 at something that you believe may be different, you can do
7 that.

8 *MS. TALMOR:* Thank you, Your Honor.

9 *BY MS. TALMOR:*

10 Q. Mr. Bradford, can you see the document I have displayed on
11 the screen?

12 A. Yes. Yes, I can.

13 Q. And based on the portion that I am displaying at this time,
14 does this look like the same permit that you were discussing
15 with my colleague a few minutes ago?

16 A. Yes, similar.

17 Q. And this is again the authorization for activities in the
18 upper Colorado, correct?

19 A. Correct.

20 Q. Now, this section right here that lists activities
21 permitted, most of the services encompassed on this permit are
22 day use only, correct?

23 A. Most of rental services are not equipment. That's all
24 overnight stuff.

25 Q. Most of the services here that would involve use of a

1 guide, those are day use only, correct?

2 A. Except for the river trips, yes.

3 Q. So this permit allows --

4 A. Fly fishing overnights too. So yeah, I mean, most of it
5 by -- most of it, if you were to go by gross revenue, yes,
6 would be mostly day.

7 Q. So it involves ducky/wade float fishing trips, correct?

8 A. Correct.

9 Q. Which are days, correct?

10 A. No. We do float fishing trips on overnights too. This
11 just calls out the activities. Whether you do them in a half
12 day format or an all day format is entirely up to you.

13 Q. But the majority of these activities are single day
14 activities, correct?

15 A. For AVA, yes, we as an outfitter, but you can do on this
16 permit as much overnight or as little overnight as you want.
17 And any of these ducky wade trips can be overnights or day
18 trips. We do them predominantly as day trips.

19 Q. I think it says here that for one section in particular day
20 use only, correct?

21 A. No. It states scratched out day use only.

22 Q. Just below that where it says Eagle River (Squaw Creek to
23 the Colorado River confluence), doesn't it say rafting only,
24 day use only?

25 A. That's day use only. The Colorado is not day use only

1 because there is no overnight trips on the Eagle River. People
2 don't do overnights on the Eagle River. They do them on the
3 Colorado.

4 Q. And on this permit, on the Colorado section or what's
5 authorized on the Colorado under this permit, these are the
6 two-night trips we were talking about earlier, correct?

7 A. What are we referring to right now? Are you talking about
8 the Eagle River Squaw to the Colorado River confluence or are
9 you talking about just the guided white water rafting trips up
10 top?

11 Q. I am saying generally under this permit, this is the permit
12 that authorizes the trips we were discussing a few moments ago,
13 correct?

14 A. Uh-huh.

15 Q. So this is the permit under which you operate at the
16 longest two-night guided trips, correct?

17 A. Yes.

18 Q. And how many of your 250 guides operate overnight trips
19 under this specific permit?

20 A. This is out of our current outpost and up there there is
21 probably about 40 guides that work out of this particular
22 outpost that handles this river. Of those 40, probably 15 of
23 them are checked out, 15 to 20 are checked out to run overnight
24 trips.

25 Q. Okay. So fewer than 10 percent of your employees are

1 running overnight trips under this permit, correct?

2 A. Well, I mean, all the employees do them, but any given time
3 10 percent of what's going on at that particular outpost is
4 overnights.

5 Q. And isn't it true that the version of the special use
6 permit admitted into evidence by my colleague this morning
7 admits several pages from the original document?

8 A. I don't know that to be true or not true.

9 Q. Do you know whether the version that you have in front of
10 you and was admitted by your counsel this morning is the full
11 version that BLM sent to you when that permit was issued or
12 modified?

13 A. No, I think there is probably another page or two to this.

14 Q. In particular, of the pages that counsel admitted in the
15 version admitted into evidence this morning, it includes two
16 pages of additional special stipulations with which AVA must
17 comply, correct?

18 A. Yes.

19 Q. So just for example under additional special stipulation
20 No. 3, persons including your guides responsible for
21 representing this business must coordinate with other
22 outfitters and the general public to minimize congestion on
23 boat ramps, correct?

24 A. Correct.

25 Q. Under No. 5, your guides must take precautions to minimize

1 the spread of aquatic invasive species including cleaning and
2 disinfecting equipment, correct?

3 A. Correct.

4 Q. Under No. 6, your guides must use established fish handling
5 protocols to minimize stress, correct?

6 A. Correct.

7 Q. Under No. 8, your guides must assure -- ensure that
8 approved life jackets are worn at all times by guides and
9 clients, correct?

10 A. Correct.

11 Q. Under No. 9, as a condition of your permit, your guides are
12 not allowed to use alcohol or possess alcohol at any time on
13 federal lands, correct?

14 A. Correct.

15 Q. On No. 10, your guides must take precautions not to spread
16 noxious weeds, correct?

17 A. Correct.

18 Q. And under 11, they must display BLM parking passes,
19 correct?

20 A. Correct.

21 Q. Under No. 13, as a condition of your use of federal lands,
22 your guides are charged with notifying the company and the
23 company with notifying BLM of any potential Native American
24 discoveries, correct?

25 A. Correct.

1 Q. And under No. 14, your guides are charged with ensuring
2 that only hardened trails in riparian areas are used correctly?

3 A. Correct.

4 Q. And that pet owners dispose of feces?

5 A. Correct.

6 MS. TALMOR: I am going to stop screen sharing now.

7 BY MS. TALMOR:

8 Q. So it's fair to say, isn't it, that the existing permit
9 includes 16 additional stipulations related to your use of
10 federal lands which both your company and your guides must
11 comply, correct?

12 A. Correct.

13 Q. Do you know across all of your employees what the average
14 hourly rate that you're paying is?

15 A. Do I know the average hourly rate I am paying?

16 Q. Yes.

17 A. No. I mean, I know in general terms, but I don't -- we
18 basically pay a trip salary day and we base it on whatever the
19 rules and regulations we're faced at that time, the rate of
20 that hourly plus gratuities, plus we do a bonus system at the
21 end of the year. So there is several compensation issues that
22 come into play when we do compensation. We don't do it
23 necessarily as you say by hourly. We have bonus structures
24 for -- and compensation. If they complete the year, they get
25 an additional 10 percent on their gross. So our pay scale is a

1 little different.

2 Q. What is the rate for an experienced guide on a two-night,
3 your longest trip?

4 A. They are probably making on an overnight like that right
5 around 200 bucks a day.

6 Q. For that eight to 10-hour compensable day?

7 A. Uh-huh. For that reason it can turn into a 12-hour day if
8 something happens at camp or -- you know, there is just
9 variables that can happen that might extend or shorten that
10 day.

11 Q. Are you familiar with the partial overtime exemption under
12 FLSA Section 13(b)(29) that allows some employees of private
13 establishments under contracts on national parks and forests to
14 work 56 rather than 40 hours before receiving overtime pay?

15 A. I am familiar with it.

16 Q. Are you aware that in these overnight trips your company
17 can exclude from compensable hours both sleep and other
18 non-duty times?

19 A. Yes.

20 Q. So a two-night trip doesn't mean 24 hours a day
21 compensable, correct?

22 A. Correct.

23 Q. Are you also aware that overtime is calculated on a work
24 week basis so longer trips can be spread across two work weeks
25 which would affect overtime eligibility?

1 A. Well, yeah, but that wouldn't work in our situation because
2 you would have to go into guess mode to do it. So setting that
3 structure up wouldn't work depending on when people actually
4 want to go on river trips.

5 Q. You testified that you expect to incur compliance with the
6 rule by January 31st, the effective date, correct?

7 A. Correct.

8 Q. But your permit won't require any modification to occur in
9 January, will it?

10 A. No, but we'll still have to get our pieces out in the
11 marketplace and let guests know what they can expect for the
12 upcoming summer.

13 Q. Your permits won't require any modification in February,
14 will they?

15 A. No.

16 Q. So your permits wouldn't require any modification until at
17 least March, correct?

18 A. Correct.

19 *MS. TALMOR:* No further questions. Thank you.

20 *THE COURT:* Thank you.

21 Redirect?

22 *MR. KRUCKENBERG:* Yes. Thank you, Your Honor.

23 **REDIRECT EXAMINATION**

24 *BY MR. KRUCKENBERG:*

25 Q. Mr. Bradford, I just want to clarify a few things that you

Duke Bradford - Redirect

1 testified about. You testified that AVA operates on the Blue
2 River for rafting services; is that right?

3 A. Correct.

4 Q. Does AVA have a special use permit with a federal agency to
5 do that?

6 A. Yes.

7 Q. That's not the permit that was entered as Exhibit A,
8 correct?

9 A. Correct.

10 Q. But you do have a separate permit.

11 A. Yes.

12 Q. Under the new rule that's taking affect, the \$15 an hour
13 minimum wage, would AVA need to increase its wages for its
14 employees that don't work overnight trips?

15 A. Currently?

16 Q. Yes.

17 A. Yes.

18 Q. And so when I'm talking about across all of AVA's
19 employees, under the new rule would AVA have to increase some
20 of the salaries?

21 A. Yes.

22 Q. There was some confusion a few minutes ago about how many
23 employees regularly work overtime hours. And I think there was
24 some confusion about overnight trips versus day trips. In your
25 experience, do the guides who just do day trips, do they still

Duke Bradford - Redirect

1 work more than 40 hours in a work week?

2 A. Yes, yeah. The situation is the seasonal employees as they
3 come in want to work multiple days. Some don't want to have
4 any days off at all. But of that group everybody, say, in July
5 when it's busy will work multiple days. Does that make sense?
6 So they'll go maybe six days in a row.

7 Q. And would it be uncommon during the season for a guide --

8 *THE COURT:* Mr. Kruckenberg, let's hold off for one
9 second. I am not quite sure if we have audio for Ms. Talmor.
10 Were you trying to make an objection?

11 *MS. TALMOR:* No, Your Honor, I was not. I apologize.

12 *THE COURT:* Right now the video of you seems to be
13 frozen. I am not sure if we can try to remedy that problem.
14 Can you hear me?

15 *MS. TALMOR:* Yes, Your Honor, I can.

16 *THE COURT:* Okay. The video is still frozen. Are you
17 all right proceeding as long as you are able to hear what's
18 being said?

19 *MS. TALMOR:* Yes, Your Honor.

20 *THE COURT:* Okay.

21 Mr. Kruckenberg, go ahead.

22 *MR. KRUCKENBERG:* Thank you, Your Honor.

23 *BY MR. KRUCKENBERG:*

24 Q. So would it be uncommon during the height of the season to
25 have a guide do six day trips in a work week?

1 A. Yes, it would be very common.

2 Q. And would that guide work more than 40 hours?

3 A. Yes.

4 Q. You were asked about whether currently the average wage is
5 greater than \$15 an hour for your guides, right?

6 A. Uh-huh.

7 Q. And it is; isn't that right?

8 A. Yes.

9 Q. Does the average wage that you pay account for overtime?

10 A. No.

11 Q. With an overtime calculated at \$22.50 or time and a half of
12 \$15, does AVA currently pay hourly wages that meet that
13 standard?

14 A. No.

15 Q. There was also a question about compensable time versus
16 just how many hours a guide is on a trip. Do you recall that?

17 A. Yeah. Can I get a definition of compensable time? Is that
18 just compensation? Is that what we're saying?

19 Q. Well, that actually was my question. What do you
20 understand that to be, compensable time?

21 A. There was some confusion there and I didn't want to
22 interrupt, but yeah, compensable time for clarification, is
23 that compensated time?

24 Q. So I think government's counsel was asking you whether
25 you're required to pay your guides for every hour of a trip or

Duke Bradford - Redirect

1 whether you only have to pay for some of the hours. Is that
2 how you understood that?

3 A. Yeah, I didn't understand the compensable side, what the
4 question was there, but ...

5 Q. Well, here is my question for you.

6 *THE COURT:* Hold on one second, Mr. Kruckenberg. Let
7 me just mention that the video now seems to be working properly
8 so I can see defense counsel.

9 Go ahead.

10 *MR. KRUCKENBERG:* Thank you, Your Honor.

11 *BY MR. KRUCKENBERG:*

12 Q. Let me ask you this. Do you know whether you have a legal
13 obligation to pay your guides --

14 *MS. TALMOR:* Your Honor, I apologize. I would like to
15 object to the last question under which counsel himself
16 characterized government counsel's questions.

17 *THE COURT:* And specifically what's the objection?

18 *MS. TALMOR:* Leading.

19 *THE COURT:* He mischaracterized it or --

20 *MS. TALMOR:* I do not believe it accurately
21 characterized the question I was trying to ask.

22 *THE COURT:* I will overrule the objection. He can
23 answer if he understands.

24 Go ahead.

25 *BY MR. KRUCKENBERG:*

1 Q. And Mr. Bradford, let me just ask you this. As far as you
2 understand it, is AVA responsible for paying for all the hours
3 that a guide has to be on a trip or are some hours paid, some
4 are not paid? How do you understand that?

5 A. As we understand it, some are paid, some are not paid.

6 Q. Where do you get that understanding?

7 A. Predominantly just from our organization is how we
8 understand it.

9 Q. And are you an attorney?

10 A. No.

11 Q. Do you have any degree of confidence that that's accurate?

12 A. I would like to think it's accurate. I don't know -- as
13 far as I understand, it's accurate.

14 Q. So let me just ask you what a guide does during the day.

15 So there is river time, right?

16 A. So do you want me to walk you through that?

17 Q. Yeah, why don't you walk --

18 A. So guides load boats. They in this particular -- we are
19 talking about an overnight, right?

20 Q. Yes.

21 A. I want to make sure I am not getting confused.

22 So guides load boats. They go meet their guests.

23 They depart for the river. They do safety talks and they get
24 on the river. They enjoy the day. River use is done by miles,
25 not hours. So say your camp is 10 miles away. The water is

1 high. You get there pretty quickly. If the water is low, you
2 get there slower. You get there, you set up camp. So you will
3 set up meals for the night. Guests will set up their tents in
4 an overnight setting and they will serve dinner. And that's
5 their -- sort of their day. And then they will set the day for
6 the next day and retire basically.

7 Q. So if we count the number of hours, say, from when your
8 guides show up to the office, meet the client, until they are
9 done serving dinner, how long is that?

10 A. Probably 12 hours.

11 Q. And what happens if there is an emergency in the middle of
12 the night?

13 A. They would be required to handle that emergency.

14 Q. Is it fair to say the guides are on call if anything comes
15 up?

16 A. Yes.

17 Q. And that's for the entire duration of the trip, right?

18 A. Correct.

19 Q. And those hours are variable, right?

20 A. Yes.

21 Q. Because, as you said, the river runs how it runs, right?

22 A. Exactly.

23 MR. KRUCKENBERG: Thank you, Mr. Bradford. I have no
24 further questions.

25 THE COURT: Mr. Bradford, you are excused. Thank you.

David Costlow - Direct

1 Q. And how long have you been involved with CROA?

2 A. I have been involved with CROA directly since 1993.

3 Q. And did you ever own and operate an outfitter company?

4 A. That was how I first became involved with CROA. I had an
5 outfitting operation for 18 years, so my company was a member
6 and I was on the board for a number of years.

7 Q. Got it. And when did you start this outfitter company?

8 A. In 2012.

9 Q. What services did it offer?

10 A. Oh, I am sorry. Ask me that last question again. I may
11 have misinterpreted it.

12 Q. When did you start running this outfitter company?

13 A. The outfitting company, I am sorry, 1993. I thought you
14 meant executive director. I am sorry.

15 Q. And what services did this outfitter company offer?

16 A. We offered rafting. We offered fly fishing. We offered
17 kayaking. We had a retail operation and we did trips
18 internationally.

19 Q. Given your involvement with CROA and your own experience
20 running an outfitter, are you generally familiar with the
21 operations of CROA members?

22 A. I am.

23 Q. And how many members does CROA have?

24 A. It varies year to year, but typically around 50.

25 Q. And what's sorts of services do they offer?

David Costlow - Direct

1 A. The outfitters?

2 Q. Uh-huh.

3 A. Most -- all of them have to offer white water rafting.

4 They have to have a river rafter license issued by the State of
5 Colorado.

6 Q. And where do they operate?

7 A. Primarily in Colorado, but we have some that operate
8 Arizona, Utah, Wyoming.

9 Q. And in the states where they operate, do you understand
10 that they pay the minimum wage applicable in those states?

11 A. Yes.

12 Q. About what proportion of CROA members operate on federal
13 lands?

14 A. I have not done a tally, but I think about 90, 95 percent.

15 Q. And can you go over the services that they offer on those
16 federal lands?

17 A. Yes. Primarily white water rafting. Some are float
18 fishing. You have to be white water qualified to offer float
19 fishing in Colorado, so some do both. Some are only fly
20 fishing from a raft.

21 Q. And how many of these CROA members conduct overnight trips
22 on federal lands?

23 A. A smaller -- a smaller percentage, but I would say probably
24 seven or eight.

25 Q. Seven or 8 percent or --

David Costlow - Direct

1 A. Seven or eight of the 50.

2 Q. Got it.

3 A. Now, that's not of the total number of outfitters in
4 Colorado, but of our members, yes.

5 Q. Can you give us a range of how long these overnight trips
6 can be?

7 A. Yeah, two days up to -- we have one outfitter that
8 typically offers five and six-day trips. And we have one
9 outfitter that primarily -- whose primary business is offering
10 overnight trips, five, six, and 16-day trips.

11 Q. And for those CROA members that operate on federal lands
12 doing overnight trips, do they have to have permits to operate
13 on federal lands?

14 A. Correct.

15 Q. And if they didn't have those permits for whatever reason,
16 how would that impact them financially?

17 A. Well, they could not -- their business could not operate on
18 those federal lands, so they would be severely restricted on
19 where they could operate.

20 Q. I want to ask about CROA members' employees.

21 A. Yes.

22 Q. What are the busy months of the year for CROA members
23 generally?

24 A. Typically it begins -- for most of them it begins in May,
25 middle of May, and runs if we are lucky until Labor Day

David Costlow - Direct

1 depending on water conditions.

2 Q. And during these busy months, what proportion roughly of
3 the CROA members workforce is made up of seasonal guides?

4 A. It will depend on the operation, but I would say
5 95 percent.

6 Q. And what is the typical profile of a seasonal guide?

7 A. Well, they have a strong interest in the outdoors. There
8 is -- for many guides there is an educational slant for them.
9 They like educating people about the environment, about water
10 safety. They also -- there is an entertainment component.
11 They enjoy taking people down, entertaining them. There is a
12 safety component where they not only want to take them down and
13 entertain them, but they want to bring them back happy.

14 Q. And how much does a typical seasonal guide work during CROA
15 members' busy season?

16 A. Many guides like to work as many days as they can. Their
17 goal is to work, work, work, save money, and then at the end of
18 the season perhaps, you know, sometime in September to take
19 weeks off to travel and do other activities before they begin
20 some type of winter employment.

21 Q. And would it be fair to call that a sort of lifestyle
22 choice?

23 A. It certainly is a lifestyle choice and I think for owners
24 and for guides.

25 Q. What do employees, these seasonal guides do in the off

David Costlow - Direct

1 season?

2 A. Some are teachers. Some are students, undergrad students.
3 Some are perpetual graduate students. Some work at the ski
4 industry. And then some work internationally, they follow the
5 sun, so they are in Chile, New Zealand, Costa Rica.

6 Q. And what would they be doing in --

7 A. Guiding, guiding.

8 Q. Let's talk about the new rule.

9 Are you familiar with the new minimum wage rule for
10 federal contractors to take effect?

11 A. Yes.

12 Q. And to your knowledge, what's the earliest point at which
13 any CROA member will need to renew their permit under this
14 rule?

15 A. Well, I got notification on Monday from an outfitter who
16 was buying part of an operation from another CROA member. And
17 so they requested for their permit to transfer and they are
18 hoping that will happen in February.

19 Q. And what sorts of expenses will CROA members need to incur
20 to comply with the new rule?

21 A. Well, they are going to depend on the association to help
22 them, but we do not offer legal advice. So most all outfitters
23 will hire legal assistance on that to review all 348 pages of
24 the Executive Order. And so that will be an expense. You
25 know, there are stipulations that we have to ensure that

David Costlow - Direct

1 subcontractors such as food providers, transportation
2 providers, meet the minimum wage requirements. So I am sure
3 they will have to hear assistance on that. And, you know,
4 there could be trickle costs from that too, so those costs will
5 be very real costs. And then they will have to alter payroll
6 services, accounting, et cetera.

7 Q. And if CROA members didn't change their operations in terms
8 of the services they offer at all, you know, they didn't take
9 away overnight trips, they didn't change the prices or anything
10 like that, and they continued operating under the new rule, how
11 would that affect their finances?

12 A. Well, they are not going to be able to make it unless they
13 raise trip prices, and that they will have to raise quite
14 substantially.

15 Q. And if CROA members make those changes to trip prices but
16 don't change the rest of their -- the way their services are
17 structured, they still do the same overnight trips but they are
18 only raising prices to compensate for the increased costs, how
19 would that affect their business?

20 A. Well, there is only a limit to what the customer is willing
21 to pay for the service. At some point Go Kart racing, axe
22 throwing, putt-putt golf become more attractive because of the
23 price. And I think the outfitters' biggest fear is -- we have
24 always as an industry prided ourselves on accommodating people
25 of modest income on vacations even if it's a half day or full

David Costlow - Direct

1 day trip up to people that the price is no problem. We think
2 as the price rises, our worry is we'll become an outfitting
3 operation for the elite and we'll miss the opportunity to
4 expose people to wilderness and outdoor environments who are
5 not wealthy.

6 Q. So CROA members aren't just in this business to make as
7 much money as possible.

8 A. I think most outfitters -- some have left very profitable
9 enterprises to begin an outfitting industry and they have taken
10 a pay cut to do that and they know that. There are some that
11 kind of started their business early but have the skills to
12 certainly make more money elsewhere, but it goes back to there
13 is a nice lifestyle about it. There are trade-offs.

14 Q. Do CROA members who operate on federal lands compete with
15 recreational companies that don't operate on federal lands?

16 A. Yes.

17 Q. And how does the rule affect CROA members' ability to
18 compete in hiring seasonal workers?

19 A. Well, if the rule goes into effect, overtime becomes a
20 major consideration after 40 hours. Those outfitters that
21 don't fall under the rule will continue to operate as the
22 industry has typically done. And guides will tend to -- our
23 guess is guides will tend to trickle over to those companies
24 that will allow them to work as much as they want, as many days
25 as they want. So that would be somewhat of a disadvantage to

David Costlow - Direct

1 somebody operating on federal lands under the Executive Order.

2 Q. And how does the rule affect CROA members' ability to
3 compete for customers with recreational companies that don't
4 operate on federal lands?

5 A. Well, those other companies, the costs are going to be less
6 because they will not have to raise their prices to
7 accommodate.

8 Q. And will those recreational companies that don't operate on
9 federal lands be able to offer longer multi-day trips than CROA
10 members who do operate on federal lands?

11 A. Some can. Some are restricted by the resource and so won't
12 be able to, but you know.

13 Q. Do you have members who operate in Utah?

14 A. Yes.

15 Q. And do they pay the guides there less than \$10 an hour?

16 A. Probably so.

17 Q. And will the new rule raise those hourly costs?

18 A. Yes. So the wage they have to -- the minimum wage they
19 have to adhere to in Utah is the federal minimum wage, \$7.25 an
20 hour. This new rule will almost double that. Now, I do think
21 most outfitters are paying above \$7.25, but still this will be
22 a substantial increase for them.

23 MR. POON: Thank you. Nothing further, Your Honor.

24 THE COURT: Thank you.

25 Cross-examination?

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David Costlow - Cross

1 MS. TALMOR: Thank you, Your Honor.

2 **CROSS-EXAMINATION**

3 BY MS. TALMOR:

4 Q. Good morning. Nice to meet you.

5 A. Good morning.

6 Q. You testified a few moments ago that many of your members
7 are federal permit holders, correct?

8 A. Correct.

9 Q. And so none of your members are federal contractors,
10 correct?

11 A. No.

12 Q. So the applicability of the rule to them, if any, would be
13 through holding special federal permits, correct?

14 A. Well, they hold special permits for sure.

15 Q. And you said they are not federal contractors, correct?

16 A. No.

17 Q. So any applicability of the rule, if any, to their
18 operations would be through their status as special permit
19 holders, correct?

20 A. Correct.

21 Q. Now, of your members what percentage of their operations
22 are on public federal lands versus state or other nonfederal
23 lands?

24 A. I have not done a specific calculation of that. Let me say
25 why that's difficult. It depends on water flow. Like this

David Costlow - Cross

1 last year was a drought, so there is a stretch of river west of
2 Denver here called Clear Creek. That river started running out
3 of water in July, so people then transferred their operations
4 to other locations, and most of those were on federal lands
5 such as the Colorado River and perhaps the Arkansas River. So
6 that would be hard for me to give you in any specific way
7 because it varies year to year.

8 Q. That makes sense. Sitting here today you couldn't tell us
9 what percentage of your members' operations typically run on
10 federal lands versus state or other nonfederal lands, correct?

11 A. I would say that the vast majority are running on federal
12 lands.

13 Q. Do you have firsthand knowledge of what percentage of their
14 operations are on federal lands or is that kind of a sense
15 you've gathered over the years?

16 A. Well, some are a hundred percent on federal lands. Some
17 are divided. Some run on federal lands and state lands. Some
18 run basically on state lands or city lands. It might not be
19 states lands. It might be city lands.

20 Q. Other nonfederal lands? Is it fair to say there is a
21 variety of structures that your members use, correct?

22 A. Correct. Well, not all members, but a few members, yes.
23 Some are only on city runs. Some are on state runs. Some are
24 only on federal. And then there is some that have a mix there.

25 Q. So sitting here today you wouldn't be able to tell us what

1 percentage of your members' revenue comes from activities
2 conducted under special federal permits, correct?

3 A. I would say a large majority. If you took all of our 50
4 members, a large majority of their income is certainly on
5 federal property.

6 Q. But sitting here today you couldn't tell us what
7 percentage, correct?

8 A. Correct, because again it varies seasonally.

9 Q. Are you able to testify today as to how much your members
10 pay their guides for these trips on federal lands under special
11 permits?

12 A. They meet minimum wage requirements, I do know that, but I
13 am -- and some experienced guides I know get paid very well,
14 but I do not know of the thousands of guides, I do not know
15 what each makes individually, no.

16 Q. So out of your 50 members, you don't know individually what
17 the average is for a guide, say, per day on a multi-day trip,
18 correct?

19 A. Right. It depends on the skill level. A guide who was
20 just qualified on that river will certainly not make what a
21 10-year guide would make.

22 Q. So sitting here today, you are not sure how many, if any,
23 of your members are already paying their guides more than \$15
24 per hour worked out on a daily basis, correct?

25 A. I would say many do, yes. But give me a particular company

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1 with a hundred employees, I can't tell you what each of those
2 individuals of the hundred make.

3 Q. But isn't it fair to say that many of these guides we are
4 talking about already make more than \$15 an hour, correct?

5 A. Yes.

6 Q. And do you know how many of your members are eligible for
7 an exemption under the Federal Labor Standards Act 13(b)(29)
8 which allows some employees of private establishments operating
9 on national parks and forests to work 56 hours rather than 40
10 before they are eligible for overtime?

11 A. My understanding is that overtime with the new Executive
12 Order is 40 hours.

13 Q. Is it your understanding that the new Executive Order has
14 changed in any way the eligibility for overtime?

15 A. I'm not sure about that, but my understanding of reading
16 the Executive Order was that it was at 40 hours.

17 Q. So is it fair to say that you are not aware as to whether
18 any of your members would qualify for an exemption on national
19 parks and forest lands that could change that eligibility from
20 40 to 56 hours, correct?

21 A. Right.

22 Q. Are you aware if on overnight trips your company members
23 can exclude from compensable hours non-duty time such as sleep
24 time?

25 A. We know that there are some stipulations where that is

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1 allowed, yes.

2 Q. Sitting here today do you know how many of the guides that
3 are employed by your members currently work more than 40 hours
4 per week?

5 A. Most do. It's a seasonal business, so it's typical for
6 guides to try to pack in as many trips as they can because the
7 seasons are short. It's typically 11 weeks or so.

8 Q. But isn't it correct that employees on a multi-day trip
9 aren't paid for all 24 hours. They are paid for duty hours,
10 correct?

11 A. Well, they are actually paid trip salaries. It's historic
12 in the industry that you get paid a trip salary. And you go
13 out, do the trip. When you return, that is what you would
14 expect to make, the agreed upon trip salary.

15 Q. As it stands now absent the rule that is challenged in this
16 litigation, isn't it correct that employees' and guides'
17 overtime eligibility kicks in at 40 duty hours, not 40 hours
18 gone from the base. In other words, is it your understanding
19 that employees are eligible for overtime on the second day of
20 an overnight trip?

21 A. Yes.

22 Q. So it's your understanding that overtime eligibility kicks
23 in on the 40th hour that an employee is gone from base, not on
24 the 40th duty hour?

25 A. Correct. Because if a guide were to be interrupted 2:00 in

1 the morning by, say, a sick child on the trip, then the
2 employee is not eligible -- or the owner is not eligible to
3 say, oh, we're not going to pay you during that period. Those
4 eight hours of sleeping time are compensatory.

5 Q. So when you testified earlier this morning in response to
6 questions from my colleagues about the impact that this rule
7 will have on your members, your testimony about the harms that
8 will accrue to your members is based on an understanding that
9 those members will be required to compensate their employees
10 for every hour they are gone on a multi-day trip?

11 A. Our concern is that they will be required to compensate on
12 a large majority of those, yes.

13 Q. For every hour they are gone on a multi-day trip.

14 A. That's our concern, sure, yeah.

15 Q. Do any of your members currently pay their guides less --
16 in Colorado less than the Colorado minimum wage?

17 A. No, not that I'm aware of, no.

18 Q. So it's fair to say that each of your Colorado members pays
19 its guides at least \$12.56 per hour, correct?

20 A. Correct.

21 Q. And your members are already subject to currently
22 applicable overtime requirements, correct?

23 A. From federal? Is that what you are referring to?

24 Q. Under state minimum wage laws.

25 A. I am sorry, state? Our industry has always paid trip

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1 salaries. So if you go on a half day trip, there is a salary
2 associated with that. And if it gets back early, you get paid
3 that wage. If it gets back a little late, you get paid that
4 wage. Same with full day, same with overnight. Our industry,
5 we are like the horse packing industry, the hunting industry
6 and the dude ranch industry. It's all based on set salaries.

7 Q. Certainly. But is it your understanding that your members
8 are subject to state minimum wage requirements?

9 A. Yes.

10 Q. And those minimum wage requirements include applicable
11 overtime requirements, correct?

12 A. Our industry has -- there are probably a few exceptions,
13 but our industry has always operated on trip wages, trip
14 salaries.

15 Q. I understand. Let me ask the question more clearly.

16 I understand that your guides are paid on a trip
17 basis.

18 A. Yes.

19 Q. But as far as requirements that your members currently are
20 subject to, isn't it correct they already are subject to state
21 minimum wage requirements including applicable overtime
22 requirements for hours worked in excess of the threshold under
23 state law?

24 A. We have never interpreted it to be such, no.

25 Q. So your testimony is based on an understanding that your

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1 members currently aren't subject to overtime requirements under
2 Colorado's \$12.56 per hour minimum wage?

3 A. We have always adhered to the minimum wage for state or
4 federal, so the \$12.56 we adhere to. And we make sure that
5 every day that employees work, that their average is \$12.56.
6 That doesn't include their tips. Most people are not
7 subtracting for tips. Guides earn tips for sure, very good
8 tips at times, but outfitters pay at least the minimum wage.
9 Overtime, because of the trip salary, overtime is typically not
10 calculated.

11 Q. So is it your understanding -- scratch that. Let me
12 rephrase.

13 Was your testimony this morning about the impacts of
14 the rule to your members, was it based on an understanding that
15 the effectiveness of the rule will change the applicability of
16 overtime requirements?

17 A. Correct. That's one of the concerns.

18 Q. Do you know if any of your members' guides make on average
19 less than \$15 an hour currently if their hours were averaged
20 out?

21 A. There are probably some brand new beginning guides that
22 could earn under \$15. There is some beginning guides that make
23 more than \$15. You know, it depends on the market. You know,
24 markets are regional.

25 Q. Is it fair to say that you're not sure whether any of your

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1 members currently are paying their guides less than \$15 per
2 hour?

3 A. There are some that do, yes.

4 Q. And you're certain that your members aren't paying their
5 guides less than the state minimum wage of \$12.56 per hour,
6 correct?

7 A. Well, I have never done an audit on them, but just with
8 talking to them, they tell me that they are meeting minimum
9 wage requirements.

10 Q. You testified this morning that your members can't make it
11 under the rule without raising trip prices.

12 A. Correct.

13 Q. Do I have that correct?

14 A. Correct.

15 Q. Have you seen the accounting records of your members?

16 A. No. I have had -- no, that's not something that we would
17 do as an association, but that information comes from
18 discussions with outfitters.

19 Q. So this is your recollection of conversations you had with
20 members.

21 A. Correct.

22 Q. Do you have knowledge of the profit margins for your
23 members?

24 A. Some outfitters tell me what their profit is for the
25 season. Some don't. It's never that spectacular, so we always

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1 wish it were, but it's never that spectacular.

2 Q. Is it fair to say that you can't testify at this time about
3 the specifics of how much your members are paying individual
4 guides, how much that might change, if any, for particular
5 guides and how much they may have to change those rates if at
6 all under the rule, correct?

7 A. Except for discussions with them.

8 Q. Can you state with reasonable certainty this morning the
9 extent to which your members can or cannot absorb any increased
10 labor costs if applicable?

11 A. In my conversations with them, they will have difficulty
12 absorbing those costs, certainly without raising rates. If a
13 minimum wage goes up, to keep harmony in the company, all the
14 other wages need to go up too. If you have -- let's say if you
15 have -- if you are a rather larger outfitter and you have a
16 hundred employees and you have some people making \$14.50 an
17 hour, some making \$16 an hour and the new people come in at
18 \$15, the person making \$14.50 would certainly expect to make
19 more. The person making \$16 would not want to be making a
20 dollar more. There is social comparison going on. So to keep
21 harmony in your company, it will push all the other salaries
22 up.

23 Q. But you testified this morning you don't know how many of
24 these guides are currently making under \$15 an hour, if any,
25 correct?

1 A. Right, right.

2 Q. And you mentioned speaking with my colleague a few minutes
3 ago that members of CROA in Utah probably pay less than \$10 an
4 hour; is that correct?

5 A. Some do probably for beginning guides. Some have indicated
6 to me they do.

7 Q. Isn't it correct that your declaration submitted in this
8 case discusses only members in Colorado?

9 A. Correct.

10 Q. Isn't it correct that to your knowledge your organization
11 hasn't submitted in this litigation any permits or any evidence
12 related to members in Utah?

13 A. I would have to refer to legal counsel on that.

14 Q. Have you provided to your counsel any permits or other
15 evidence related to members in Utah?

16 A. I have not.

17 *MS. TALMOR:* No further questions.

18 *THE COURT:* Thank you.

19 Redirect?

20 *MR. POON:* Yes, Your Honor.

21 **REDIRECT EXAMINATION**

22 *BY MR. POON:*

23 Q. I wanted to clarify a few things --

24 A. Sure.

25 Q. -- that defense counsel asked you about. So you testified

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1 before that you have members that operate in Utah. Are they
2 still Colorado companies?

3 A. One's headquarters is in Colorado. One headquarters is in
4 California, but they have a river rafter license in Colorado
5 and operate outfitting activities in Colorado. So people that
6 operate in Wyoming. One is in eastern Utah and they come over
7 to western Colorado to run raft trips.

8 Q. So would it be fair to say that the members that operate
9 out of state are either headquartered here or they also have
10 operations in Colorado?

11 A. Absolutely, yes. You have to have a river rafting license
12 in Colorado to join our association, which means you would be
13 conducting operations in Colorado.

14 Q. And can you tell me about where you get the knowledge of
15 the river outfitter market from your knowledge of, for example,
16 employee wages and prices that the market will bear?

17 A. Yes. I get it from discussions with outfitters. And let
18 me say this. I do not encourage -- I do not want and tell
19 outfitters not to discuss what they pay with each other. That
20 gets into legal areas they should not be going into. Our
21 association doesn't allow any conversation about price setting
22 or anything. That's just totally out of line. So we would
23 never have a group conversation about profit, about what you
24 pay, what you charge. We would never have those kind of
25 conversations. So my knowledge is speaking with individual

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1 outfitters who often call me out of concern.

2 Q. And when these members have a problem, they come to you; is
3 that correct?

4 A. Well, not with every problem, but some problems for sure.

5 Q. And do any non-members come to you as well?

6 A. Oh, yes; oh, yes.

7 Q. And how long have you been the executive director of CROA?

8 A. Since 2012.

9 Q. And you testified that some employees make more than \$15 an
10 hour, employees that are CROA members.

11 A. Yes.

12 Q. Are there some that make less than \$15 an hour?

13 A. Yes.

14 Q. Would you -- what proportion would you say make less than
15 \$15 an hour?

16 A. Well, it's very difficult because, to answer that again,
17 because every year salaries change. And economic --

18 *MS. TALMOR:* Objection, foundation.

19 *THE COURT:* Overruled. He can answer.

20 A. And so, you know, I have no idea what the employers right
21 now are going to set for their beginning wages for this next
22 season. But the Colorado minimum wage was a state amendment
23 that went into effect and, you know, it rises with the Consumer
24 Price Index. So outfitters are very aware of that.

25 And there are some outfitters that have no beginning

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1 guides. They may only run a crew of 10 and all those 10
2 perhaps could be five-year guides or more. So that group
3 probably is well above minimum wage. And there are others that
4 run easier stretches that can accommodate a train and then
5 accommodate beginning guides. And what are they going to pay
6 this season? I'm not sure. Some of the concern was how is
7 this Executive Order going to play out and do I have to adhere
8 to that for this season?

9 *BY MR. POON:*

10 *Q.* Understood.

11 *A.* So they are hiring right now I might add and they are
12 having to -- you know, you are not going to hire without giving
13 a pay quote.

14 *Q.* And are there many employees that historically, you know,
15 not this upcoming year, but historically, maybe last year, make
16 less than \$22.50 an hour?

17 *A.* Less than \$22.50?

18 *Q.* Yes.

19 *A.* Yes.

20 *Q.* What proportion of CROA member employees would you say work
21 more than 40 hours a week?

22 *A.* A large proportion.

23 *Q.* And is that including or excluding, for example, sleeping
24 time on overnights?

25 *A.* Well, they get paid a trip salary, so that doesn't come

1 into play for most outfitters.

2 Q. Got it. So if you take the trip salary and divide it by
3 the number of hours in the trip subtracting the sleeping
4 time -- sorry, let me revise that. If you take an average -- a
5 week of an average employee.

6 A. Okay.

7 Q. And you take out sleeping time and you are only looking at
8 times where they are with clients or, you know, doing other
9 waking -- clearly working hours, what proportion of employees
10 would be over 40 hours on that sort of calculation?

11 A. For instance, on a five-day trip? I think a lot of guides
12 and employers think of an overnight trip that you're probably
13 actually doing customer contact, guiding, meal service, et
14 cetera, for about 10 hours a day. So under that they would
15 think that 40 hours of working time would occur over four days.

16 Q. And would you -- are there members who conduct longer than
17 four-day trips?

18 A. There are members. One of our members conducts 16-day
19 trips -- well, actually 21-day trips, I might add, not as many,
20 but on the Grand Canyon in Arizona.

21 MR. POON: Nothing further, Your Honor.

22 THE COURT: Thank you very much, Mr. Costlow. You are
23 excused.

24 THE WITNESS: Thank you.

25 THE COURT: All right. Before we take our mid-morning

1 break, let me ask plaintiffs, first of all, whether there is
2 any additional evidence on behalf of plaintiffs?

3 *MR. KRUCKENBERG:* No, Your Honor.

4 *THE COURT:* And let me check with the defendants. Any
5 evidence on behalf of defendants at this time?

6 *MS. TALMOR:* We would only wish to admit the full
7 version of the permit that plaintiff introduced which includes
8 three additional pages that were omitted in the version
9 plaintiff submitted. We apologize for not identifying that
10 earlier, but we did not receive that from the -- I stand
11 corrected. We would like to admit the full version.

12 *THE COURT:* And do you have a copy of the full version
13 for the Court?

14 *MS. TALMOR:* I would be happy to provide that however
15 the Court would find most useful. We provided it to
16 Plaintiffs' counsel this morning. We would be happy to provide
17 it by e-mail or by filing on the docket.

18 *THE COURT:* It should have been provided. This is not
19 something that was unanticipated because the exhibits were
20 exchanged beforehand, so it should have already been provided.
21 But the government may e-mail a copy of that to chambers as
22 soon as possible and it should be marked. How is it marked?
23 How is it marked? You are moving the admission of it.

24 *MS. TALMOR:* We will mark it as Defendants' Exhibit 1.

25 *THE COURT:* All right. Any objection to the admission

1 of Defendants' Exhibit 1?

2 *MR. KRUCKENBERG:* No, Your Honor.

3 *THE COURT:* Exhibit 1 will be admitted.

4 Any additional evidence?

5 *MS. TALMOR:* Not for defendants, Your Honor.

6 *THE COURT:* And I understand no witnesses either; is
7 that correct?

8 *MS. TALMOR:* Yes, Your Honor, that's correct.

9 *THE COURT:* Okay. Then the evidence is closed. It's
10 now 10:30. We will take a 15-minute break. And then when we
11 reconvene at 10:45, I will hear argument starting with
12 plaintiffs, all right?

13 The Court will be in recess. Thank you.

14 (Recess at 10:30 a.m.)

15 (Reconvened at 10:46 a.m.)

16 *THE COURT:* We are back on the record. The evidence
17 is closed. And plaintiffs have the burden of proof, so I will
18 hear, first of all, argument in support of the motion on behalf
19 of plaintiffs.

20 Mr. Kruckenberg, go ahead.

21 *MR. KRUCKENBERG:* Thank you, Your Honor.

22 As we laid out in our papers, the Procurement Act is
23 not a blank check for the President to issue any social or
24 labor policy that he desires. And really this is an issue
25 about the specific grant of authority under the Procurement Act

1 and whether it can be used to set policy for non-procurement
2 purposes for people that we all agree are not federal
3 contractors.

4 And I think it is very significant that in 2018 the
5 last administration and this Department of Labor recognized
6 that at least for outfitters and guides, people with special
7 use permits, it is not economical and efficient under the
8 Procurement Act to impose wage restrictions. And, in fact, the
9 economic impact of such a rule is it hurts employees and it
10 hurts those industries.

11 *THE COURT:* Yeah, but one thing that is interesting
12 about that, and obviously that is what President Trump found in
13 carving out the exemption, is that President Trump didn't say,
14 hey, you know, President Obama couldn't have done this anyway.
15 But instead what President Trump said was that these service
16 contracts do not promote economy and efficiency in making these
17 services available to those who seek to enjoy our federal
18 lands. In other words, even President Trump had the
19 understanding that, you know, those people, namely the
20 outfitters, et cetera, were within the ballpark of the
21 Procurement Act because they were making services available,
22 you know, for the customers. Doesn't that kind of, you know,
23 emphasize just how broad the Procurement Act really is?

24 *MR. KRUCKENBERG:* I think that's not necessarily
25 correct. I think it's not even necessarily the case that the

1 Trump administration was passing on the legality of that. I
2 think if you look at the language of the Procurement Act, there
3 are two limits. And there are two -- we've made two distinct
4 arguments about the Procurement Act itself. Now, the
5 government has argued -- they have justified this rule as
6 applied to my clients as the supplying of nonpersonal services.
7 That's the provision of the Procurement Act that they've
8 invoked. They said the President can regulate supplying of
9 nonpersonal services.

10 But what they've argued is that we can regulate
11 supplying of nonpersonal services by a non-government entity to
12 a non-governmental customer. And I think that's really sort of
13 the step one problem here. My clients aren't providing any
14 nonpersonal services to the government. They are providing
15 services to their own clients, to their customers.

16 *THE COURT:* Right. But it does get back to the
17 fundamental issue, and, of course, there have been so few
18 appellate decisions in this area, that we haven't had every
19 factual situation that has been ruled upon, but just like you
20 had the testimony from the two witnesses today who have said
21 that they require permission to operate on waters, lands
22 controlled by the Federal Government, that, you know, if the
23 services that they provide to their customers, customers who
24 are not necessarily customers of the Federal Government, but
25 they are people who want to enjoy services on federal lands,

1 that, you know, doesn't the Procurement Act give some scope of
2 authority to the President to be able to regulate that, those
3 services that someone such as the outfitters are providing?

4 *MR. KRUCKENBERG:* Well, what the Bureau of Land
5 Management or the Forest Service, what they are conditioning,
6 these special use permits, they are conditioning the use of
7 federal property, but that's a totally different authority.
8 Special use permits are issued under a totally different
9 statute. There is different rules. And the Procurement Act
10 actually specifically excludes conditions on the use of federal
11 property. The way it defines property, it says it does not
12 include federal lands.

13 *THE COURT:* True, but, yeah, then you would get into
14 some issues that may not be directly pertinent, but exactly
15 what it means to -- you know, those references to federal
16 lands, what it means, it's not the disposition of them
17 obviously, but perhaps it seems to be something -- the use of
18 the lands would be a different subject.

19 *MR. KRUCKENBERG:* Right. So the only way, the only
20 really hook the government has here under the Procurement Act
21 is to say that somehow we are through these special use permits
22 regulating nonpersonal services to someone else. And they are
23 saying we have conditions on how you can use federal land
24 through a totally different statute, totally different source
25 of authority. And the government is arguing this also gives

1 the President the authority to impose whatever condition he
2 wants on that same entity because they are providing
3 nonpersonal services. But it's not services to the government.
4 They are simply paying money for the privilege of using federal
5 lands. And I think that really is an important distinction.

6 Now, the second issue, though, is the economy and
7 efficiency. I mean, I think we all agree that the statute says
8 whatever policy, whatever rule, if within the statutory ambit,
9 it still has to promote economy and efficiency. And the way I
10 read President Trump's order, the way I read the Department of
11 Labor's prior rule is a conclusion that with respect to these
12 entities, it's not economical and efficient. And I read that
13 as a conclusion that it does not meet the statutory standard
14 for my clients.

15 *THE COURT:* I am sorry, when you said it is not
16 economical or efficient, you were referring to whose
17 conclusion?

18 *MR. KRUCKENBERG:* President Trump's.

19 *THE COURT:* Right. So obviously President Trump came
20 to that conclusion, and there probably is good reasons that he
21 came to that conclusion given the nature of the business that's
22 being operated. But if President Biden came to a different
23 conclusion and if he provided an explanation, which he did, why
24 do you -- why can't I second-guess that conclusion without
25 intruding upon a, you know, decision that is to be made

1 pursuant to statute by the President?

2 MR. KRUCKENBERG: Well, that's actually two separate
3 issues. And first of all, every case that's dealt with this,
4 that's dealt with the statutory limit, has said the economy and
5 efficiency line is a meaningful line that a court, not the
6 President, has to evaluate. That is a statutory requirement.
7 And it is a court's job to consider whether the President's
8 activities, stated purpose actually comports with that --

9 THE COURT: Right. Yeah, I guess more pertinently the
10 issue would be to what extent is deference owed to the
11 President's decision? Because you're right, those are two
12 limiting principles that at least the D.C. Circuit has
13 identified as ones that would prevent a delegation clause
14 problem.

15 MR. KRUCKENBERG: Right. And if we look at the
16 *Liberty Mutual* decision, for instance, out of the Fourth
17 Circuit, and that was a case that we cited in our brief, that
18 dealt with affirmative action requirements. And the Fourth
19 Circuit said just as a legal matter whether that's true or not,
20 whether affirmative action plans for federal contractors will,
21 in fact, save money, it's not close enough. It is not of the
22 kind of economy and efficiency that's necessary under the
23 statute. And it vacated that Executive Order.

24 Much more recently we have all the litigation about
25 federal contractor mandates for vaccinations. And every court

1 has passed on that so far, and it's -- by my count it's five in
2 the last month. They have all said as a legal matter whatever
3 justification the President is giving here, even if it's
4 accurate, even if factually we believe it is true, it is
5 legally insufficient under the standard.

6 And I would just alert this Court to a decision that
7 was decided by the Sixth Circuit yesterday. I believe I
8 provided a copy and I provided a copy to the government. In
9 that case the majority of the Sixth Circuit in what will become
10 a published opinion, that's what they talked about. They
11 affirmed -- or they refused to stay the injunction for the
12 vaccine mandate for federal contractors and that was the legal
13 conclusion of the court. It said this is not a legally
14 cognizable goal under the Procurement Act.

15 And I think it's very relevant here because the goals
16 they articulate, the goals in the vaccine mandate are almost
17 identical to those listed in this case. They say it's worker
18 satisfaction. It's reduced absenteeism, these sort of soft
19 economic factors for worker benefits or worker well-being. And
20 the Sixth Circuit said no, that's just not close enough under
21 the statute. So respectfully, I think there is a large amount
22 of authority to say that this type of act here is -- it's just
23 not close enough.

24 I think also --

25 *THE COURT:* But even President Trump in his Executive

1 Order talked about an unusually high turnover rate as being
2 something that characterized those entities that he decided to
3 exempt. President Biden has a different view of that subject
4 and believes that by paying a higher minimum wage, perhaps -- I
5 can't remember if he tied it to the overtime rule -- that that
6 would have a tendency to lessen that unusually high overtime --
7 or sorry, unusually high turnover rate.

8 *MR. KRUCKENBERG:* I don't think that's --

9 *THE COURT:* You are interrupting me.

10 *MR. KRUCKENBERG:* Excuse me. I apologize, Your Honor.

11 *THE COURT:* So why would this Court be in a position
12 to second-guess that, particularly because that was an opinion
13 that was articulated, you know, by President Biden?

14 *MR. KRUCKENBERG:* Your Honor, I don't think it's a
15 one-to-one correspondence like that because the Trump
16 administration issued an exemption for special use permits for
17 the guiding industry. And the conclusions there were this is a
18 unique industry. It will harm the availability of work. It
19 will harm the industry. Those were their conclusions in that
20 narrow sense.

21 In the new rule and in the new Executive Order, there
22 is no discussion in the Executive Order at all about the
23 outfitting and guiding industry other than just a sentence
24 saying I am repealing the exemption. There is no finding,
25 there is no conclusion that it makes sense for this industry.

1 The President didn't discuss it at all.

2 In the rule the department says a lot of these
3 benefits that we purport based on contracting, they don't apply
4 to the outfitting and guiding industry. There is a continuous
5 recognition where they say, well, it doesn't really work in
6 that industry. Only some of the benefits do. So I think if we
7 just look at what the department is asserting versus what the
8 President has asserted, I think there is no evidence or there
9 is no -- the department isn't coming forward with anything that
10 this Court can say, okay, that is a valid purpose or that's a
11 benefit that's going to happen.

12 I mean, that really goes into our arbitrary and
13 capriciousness argument. You don't even necessarily have to
14 get into the question of whether the President has authority
15 over outfitters and guides in general because there is no
16 explanation from President Biden about why the exception should
17 go away. The President didn't address it. And now the
18 department is saying, well, our hands are tied because the
19 President has told us we have to issue this rule as it applies
20 to outfitters and guides.

21 If we look at the *DHS v. Regents* case, that's the
22 situation. That's where an agency is just saying I am
23 following orders. And it's up to this Court to say, well,
24 that's not good enough. You have to have a better reason or
25 you have to articulate a better reason.

1 *THE COURT:* Go ahead.

2 *MR. KRUCKENBERG:* Your Honor, I do want to talk about
3 standing and irreparable harm because obviously that was the
4 evidentiary portion of this hearing.

5 *THE COURT:* Sure.

6 *MR. KRUCKENBERG:* And I think it's important for this
7 Court to remember that we don't have to -- the plaintiffs don't
8 have to demonstrate they are going to go out of business or
9 their entire industry will be ruined by the rule.

10 *THE COURT:* No. Obviously, you know, there would have
11 to be standing, typically a fairly low standard. There would
12 also need to be for each of the plaintiffs some demonstration
13 of imminence, in other words, that there would be some harm to
14 them before the case would otherwise be resolved.

15 So let's talk about CROA and what the evidence was in
16 terms of -- we talk about, first of all, what the imminence of
17 harm was. The testimony it seems to me was that one member was
18 in the process of being acquired by a nonmember and that could
19 potentially affect some things, but it was quite unclear. But
20 other than that, what evidence was there of any imminence of
21 harm to CROA during the pendency of the litigation?

22 *MR. KRUCKENBERG:* Well, so just with respect to CROA,
23 I believe the testimony was that at least one member will be
24 renewing a permit, and they hope to have it renewed in
25 February. And I think the pertinence there is that if this

1 rule goes into effect on January 30th, that means the new
2 permit, the newly renewed permit, in February that will impose
3 the new wage rule. So the imminent harm there, at least for
4 that member, they will have to comply with the rule in full
5 force as soon as the new permit is renewed or issued.

6 I think the other costs --

7 *THE COURT:* Yeah, I would have to look back at
8 Mr. Costlow's testimony. I am not 100 percent sure when he
9 talked about that one member -- once again, I need to look, but
10 I am not sure that he mentioned that it was a member who was
11 also operating -- that that permit was a federal permit. I
12 will have to check. Maybe you recall whether the question was
13 posed in that fashion.

14 *MR. KRUCKENBERG:* It is my recollection that it was,
15 but obviously I would defer to the transcript. But even beyond
16 that, I think what the testimony was was that even for the
17 remaining members, they have special use permits. The majority
18 of the members use special use permits to operate their
19 businesses. And they will have to comply with the new rule for
20 the upcoming season.

21 There was also testimony about --

22 *THE COURT:* But why would they need to do that?
23 Because that was an issue that came up in the briefing. You
24 know, if you have a permit that hasn't expired yet -- and
25 Mr. Bradford talked about how permits can vary in terms of

1 their length -- if a permit is not expiring yet, why would the
2 new rule necessarily affect the members' bottom line?

3 *MR. KRUCKENBERG:* Part of what Mr. Costlow testified
4 about was sort of prevailing wages and sort of this rising tide
5 issue. And I think one of the concerns he expressed was that
6 if -- as soon as some members are affected, they will have to
7 raise their wages. And that will in turn force other members
8 to raise their wages.

9 I think the other thing that he testified about is
10 just about implementation. The rafters have to get ready for
11 the season now. They have to start preparations. They have to
12 advertise wages I think is something that he testified about.

13 *THE COURT:* Right. But if your permit is not up, what
14 evidence was there that the new rule would apply and trigger
15 all those things that you just talked about?

16 *MR. KRUCKENBERG:* Well, because eventually the permits
17 will be up. None of these permits are permanent. And
18 eventually the entire industry will have to comply. And I
19 believe his testimony was that he knows of members that will
20 have to comply, that will have to renew their permits. And I
21 think he gave you an example of someone who they are going to
22 have to renew the permit in February.

23 Regardless, you can't just change your entire wage
24 structure. You can't just comply with the new rule overnight
25 with no effort. You have to consult with legal counsel. You

1 have to consult with payroll. And for what it's worth, Your
2 Honor, these are all implementation and compliance costs the
3 government recognized in the rule. The Department of Labor
4 said over and over again --

5 *THE COURT:* Yeah, no doubt about it. I think what we
6 are focusing in here is just the imminence issue. In other
7 words, you're right. I mean, at some point those permits all
8 expire. And as a result, each of the different outfitters or
9 members of CROA are going to need to comply and incur the cost
10 that you just referred to either in preparation for compliance
11 or in the course of compliance. But what we're focusing on now
12 is what evidence there was that there would be an imminent
13 expenditure that would have to take place before this -- the
14 legal issues in this case would otherwise be decided.

15 *MR. KRUCKENBERG:* Yes, Your Honor. And with respect
16 to AVA, I think the testimony was very direct.

17 *THE COURT:* Yeah, I think that AVA is a different
18 situation. That's why I was focusing on CROA.

19 *MR. KRUCKENBERG:* So I think with respect to CROA, I
20 think the most imminent issue really is that February permit.
21 And that again, we would just have to go back to the
22 transcript.

23 *THE COURT:* Okay.

24 *MR. KRUCKENBERG:* But just to sort of close the loop
25 on AVA, as you have indicated, Mr. Bradford testified directly.

1 He said we are going to have to incur I think between five and
2 \$10,000 in legal compliance costs before the end of the month.
3 That is certainly an imminent -- that's an imminent expenditure
4 to try to get in compliance with the rule.

5 And we know that he is going to have to renew his
6 permit before the end of March, and we know that that process
7 has to start now. And that I think is why I keep going back to
8 really the point I made at the very beginning of this
9 discussion of imminent harm. As the 10th Circuit recognized in
10 the *Edmondson* case, it's not that this is a very large harm.
11 It's that it's irreparable. That's what really makes
12 injunctive relief appropriate.

13 And there is no recovery. I don't think there is any
14 dispute here that whatever costs my clients have to outlay, if
15 they ultimately prevail, they will never get those back. They
16 can't sue under the Administrative Procedure Act for their
17 compliance costs or their wage costs or any of those. And so
18 if they have to incur any costs, those are irreparable. And
19 that's enough to warrant this Court's intervention. And
20 certainly there are a number of cases that say so, that suggest
21 that. So I think that's really our -- our position here is
22 that, you know, Mr. Bradford, when he has to pay those \$10,000,
23 \$5,000 legal fees, that's an irreparable harm and that needs a
24 decision unfortunately before the effective date.

25 Another point just on the statutory argument that I

1 want to bring up that I think the government has really either
2 misunderstood or mischaracterized about really what's going on
3 here about the different wage rules. And obviously there is a
4 lot of overlap and there is a lot of confusion about what wage
5 statutes apply, what wage rules apply. And I think it's very
6 meaningful that Congress has already made the decision in
7 multiple different instances that government contractors like
8 the Service Contract Act have to pay prevailing wage standards.
9 They have imposed these very specific limits on government
10 contractors and on my clients. And this rule even says it only
11 applies if those other government wage rules apply.

12 But that is a strong indication, and there are a
13 number of cases and the Supreme Court said it time and again,
14 that's a strong indication that the Procurement Act, which
15 doesn't talk about wage control, doesn't talk about wages, it
16 is not -- should not be read in a way that's allowed to
17 circumvent those rules or change those rules. It's not really
18 a preemption argument. We're not saying that it conflicts with
19 those statutes. But this Court should be very hesitant to read
20 the Procurement Act to allow wage rules, particularly when the
21 Service Contract Act does exactly that. That is a clear direct
22 purpose from Congress.

23 And I think it goes into the clear statement rule that
24 we also brought up, and that's actually something that comes up
25 in the case that I handed up to Your Honor that was decided by

1 the Sixth Circuit yesterday. There is no question that this is
2 an economically significant rule. This will have billions of
3 dollars in direct costs next year according to the government.
4 But to have a rule like that on what is at best an ambiguous
5 reading of the statute that does not obviously apply, that is
6 concerning. And this Court should say if it's uncertain, then
7 I have to cut away from economically significant conduct that
8 Congress has not clearly authorized. And in the *Alabama*
9 *Association of Realtors* case, the Supreme Court made it very
10 clear that is the rule going forward.

11 And I also just want to sort of briefly address some
12 of those cases from the D.C. Circuit. There is the *UAW* case
13 which I think the government points to and they say this is
14 really, you know, the high water mark. This shows we can
15 really do whatever we want to do, whatever the President says
16 is appropriate.

17 But whatever the precedential value of that case,
18 there is a major distinction here. That case only dealt with
19 direct contractors. And what I mean by that are contractors
20 that provide direct services or products to the United States
21 Government in exchange for money.

22 *THE COURT:* And you're talking about *Chao* now?

23 *MR. KRUCKENBERG:* Let me make sure I have the right
24 case name.

25 *THE COURT:* Or *Chao*.

1 MR. KRUCKENBERG: *Chao*, yes. So in that case the rule
2 that was at issue only applied to direct contractors with
3 contracts of more than \$100,000 with the United States
4 Government. And so whatever precedential value or whatever
5 persuasive value that case has, it obviously doesn't apply in
6 this kind of situation. This is not a direct contract
7 situation.

8 And I think the government is -- they can't find a
9 case, and I certainly haven't found one, that says that -- that
10 approves of a rule under the Procurement Act that affects
11 special use permits or non-procurement contracts. When you
12 look at all of these other cases, these are pure procurement
13 activities. And I think that's really an important distinction
14 because we're not ever saying the President has no authority
15 over direct procurement. I mean, that appears in the statute.
16 What we are saying is this isn't within whatever statutory
17 authority exists.

18 THE COURT: It's true that you don't find that fact
19 situation as I alluded to before, but on the other hand, you
20 could read *Chao* not to really require some type of direct
21 benefit that you would expect when you were dealing with
22 federal contractors because, you know, they are federal
23 contractors. They are providing a service to the government.

24 So if you don't have -- if the cases don't require a
25 direct benefit, then why do you need a situation like a federal

1 contractor in order to apply -- in order to find that the
2 Procurement Act has the scope that you suggest?

3 MR. KRUCKENBERG: I think *Chao* is an outlier there.
4 Because if you look at the other cases, and frankly I don't see
5 how you could reconcile that case with the *Kahn* decision from
6 the D.C. Circuit, because the *Kahn* decision, first, it was an
7 *en banc* decision. And the Court said very specifically the
8 President has to show the nexus with cost savings. That's what
9 they required. That is a quote, cost savings. So to read that
10 decision and then if *Chao* comes later and suggests otherwise, I
11 don't think that's consistent. And I think perhaps that is the
12 court writing in dicta something that I think was nonessential
13 to its holding about whether or not there is a direct cost
14 saving or not.

15 But if we look at other cases from different circuits,
16 I mean, if we look at the *Kahn* decision, we look at the *Liberty*
17 *Mutual* decision from the Fourth Circuit and now the decision
18 from the Sixth Circuit, all of those courts say in no uncertain
19 terms if you don't show cost savings, it's not good enough. I
20 mean, that is literally what the *Kahn* court said. They just
21 happened to say, well, and there are cost savings here.

22 But here that is not what the government is saying.
23 They are not trying to prove cost savings. They are trying to
24 say this is somehow going to benefit workers in an abstract
25 sense. This will improve their well-being, their peace of

1 mind. They are not saying that this will actually save the
2 government any money. And it certainly is not true that it
3 will save the government money with respect to my clients with
4 special use permits.

5 So it really is a very novel position, at least in
6 this context, at least with respect to my clients, that the
7 government is staking out. And I will just point out even in
8 general procurement, even through a standard procurement, the
9 rule here says that government expenditures may rise. I mean,
10 that is a quote from the rule itself as well. And I think the
11 department at least took the position in the rule that it
12 doesn't have to save costs. It can somehow be economical and
13 efficient procurement even if it costs the government more
14 money. And I don't think as a legal matter that's correct. I
15 think the cases state otherwise.

16 And, Your Honor, I do want to mention -- I know this
17 Court talked about deference to the President's factual
18 determination. And I think on the one end courts have been
19 willing to say that is not good enough. They have provided a
20 meaningful check on the President's assertion of savings or
21 value or something like that.

22 But I also want to distinguish any factual deference
23 that might be owed or that this Court believes is appropriate
24 with legal deference. That's not really something that has
25 come up. That's not something the government has argued. But

1 certainly if we are looking at just statutory questions, if we
2 are looking at what the Procurement Act means, I don't think
3 there is any dispute that it's this Court's job to look at the
4 Act and to say as a strictly legal matter whether this rule
5 accords with the limits that are in that statute.

6 *THE COURT:* Well, that has some -- that argument has
7 some appeal because, of course, that's what courts typically do
8 and that's been, you know, a principle of jurisprudence for a
9 long time. But even if we look at *Kahn*, the *Kahn* court didn't
10 think that it was limited to simply the words of the statute,
11 but rather, you know, says "This survey of the terms of the
12 Procurement Act, its legislative history, and Executive
13 practice since its enactment suggests that," and then it goes
14 on. And it talked earlier about the fact that looking at the
15 Executive practice, while not certainly dispositive, had some
16 interpretive purpose. Do you disagree with the D.C. Circuit's
17 conclusion in *Kahn* about that history of Executive practice?

18 *MR. KRUCKENBERG:* I do. And the reason I do is that
19 is no longer the case. If you look at the *Alabama Association*
20 *of Realtors* case from the United States Supreme Court this last
21 year, that talks about when rules exercise vast economic
22 significance, the Major Questions Doctrine cuts against any
23 sort of interpretive deference, any sort of practice deference
24 to the agency or to the executive, and instead we look for a
25 clear statement. And the Court was very specific. The Court

1 said we are not going to afford any measure of deference to
2 their interpretation because of the economic significance.

3 And so respectfully I think the only rule that is
4 appropriate in light of that decision here is if there is some
5 uncertainty, we have to look for a clear statement and we have
6 to air on the side of disallowing the rule. If it's not clear,
7 then there is no clear statement and the rule is not allowed.
8 And that's because of its significance. And I will also point
9 out we made that argument in our opening brief. The government
10 did not address it. And I believe that the law is very clear
11 on that.

12 And for what it's worth, Your Honor, the *Kentucky*
13 decision again from the Sixth Circuit, that's something they
14 also discuss. They discuss that and they invoke *Alabama*
15 *Association of Realtors* looking for a clear statement.

16 Briefly, I also want to talk about the balance of
17 equities. That is obviously another one of the factors that we
18 have to prove. But this is a somewhat unique instance where we
19 are arguing and we have argued the government doesn't have this
20 power. And --

21 *THE COURT:* Mr. Kruckenberg, sorry to interrupt, but
22 just while I think of it, I divided the time since we started
23 after the break equally. And you are just about out of time,
24 so if you wanted to have the last word, it might be a good idea
25 to try to wrap up as quickly as you can. Sorry, I should have

1 given you a heads-up a few minutes before.

2 *MR. KRUCKENBERG:* Thank you, Your Honor.

3 And I will just say this very briefly. As we have
4 argued, the public interest, I mean, these factors merge, and
5 the public interest is always seeing that the law is followed.
6 And because it is our position the Department of Labor has no
7 authority here, the President had no authority, if this Court
8 agrees with that conclusion, then that means the public
9 interest favors an injunction moving forward. And I will
10 reserve the rest if there is --

11 *THE COURT:* A few minutes, but that will still give
12 you the last word.

13 *MR. KRUCKENBERG:* Sure. Thank you, Your Honor.

14 *THE COURT:* Thank you very much, Mr. Kruckenberg.

15 Argument on behalf of the defendants?

16 *MS. GOODNATURE:* Good morning, Your Honor, and may it
17 please the Court. My name is Taisa Goodnature and I represent
18 defendants in this action. It's sufficient to deny Plaintiffs'
19 preliminary injunction motion because plaintiffs failed to
20 present concrete evidence of irreparable harm.

21 Your Honor noted that CROA's evidence of irreparable
22 harm rests on a single permit that is up for renewal in
23 February, but two points are relevant with respect to that
24 permit. First, Mr. Costlow had no knowledge of the wages that
25 are already being paid to the workers under that permit and

1 whether or not they exceed \$15 an hour. And more
2 fundamentally, and this applies to both witnesses' testimony
3 this morning and their conclusions with respect to the
4 irreparable harm that this rule may cause, both witnesses'
5 testimony rests on the misapprehension that the 2021 minimum
6 wage rule in some way changes the manner in which overtime is
7 calculated for purposes of either federal or state law.

8 So both witnesses discussed a change between
9 compensation on a trip salary basis to an hourly basis. The
10 rule has no such effect. And I would direct the Court's
11 attention to 86 Fed. Reg. Page 67,178 which makes this
12 explicit.

13 *THE COURT:* Let me just stop you there because other
14 than you providing that citation now and other than the fact
15 that the question was asked of the witnesses, there is no --
16 there doesn't seem to be any briefing whatsoever about the
17 applicability of that rule or that regulation under the new
18 rule. So why would I consider it now?

19 *MS. GOODNATURE:* Well, the plaintiffs' argument in
20 their opening brief with respect to irreparable harm did not
21 make clear as their witnesses testimony did this morning that
22 their conclusions, which is all that were included in the
23 declarations that plaintiffs submitted with their motion and on
24 which the argument in their opening brief were based, rested on
25 this understanding that the reason their costs would increase

1 is because of a change in the way in which minimum wage laws
2 apply.

3 *THE COURT:* Yes, I understand that. But the
4 defendants have known that ever since they got the
5 declarations, right? I mean, that's been an operative
6 assumption of the plaintiffs from the beginning. So why would
7 I now look up this -- try to figure out whether or not the
8 56-hour rule or whatever actually does apply in order to
9 determine whether or not plaintiffs have shown irreparable
10 harm?

11 *MS. GOODNATURE:* Your Honor, that was not an operative
12 assumption underlying either the declarants' declarations that
13 were submitted alongside the motion or Plaintiffs' irreparable
14 harm arguments in either their opening or their reply briefs.
15 Those are based on the change that the minimum wage rule will
16 apply in base salary between Colorado's minimum wage rule --
17 excuse me, Colorado's state minimum wage of \$12.56 per hour to
18 the rate under the new rule when it takes effect with respect
19 to particular permits of \$15 -- excuse me, \$15.

20 And the Court must legally acknowledge how the rule
21 works. That's not part of the factual record, but rather the
22 legal operation of the rule which is clear from the
23 administrative record and from all of the briefing in this
24 case.

25 *THE COURT:* Okay. Keep going.

1 MS. GOODNATURE: So I would like to make one more
2 point with respect to irreparable harm, and then I will turn to
3 the merits. In my colleague's argument just now, he seemed in
4 light of this confusion of the witnesses regarding the
5 application of the minimum wage laws which changes -- you know,
6 it renders their declarations and much of the testimony, if not
7 all of the testimony that they gave this morning incorrect as a
8 legal matter, plaintiff noted that counsel will incur certain
9 compliance rules. But again since the rule doesn't apply, it
10 can't be the case that a plaintiff can consult with an attorney
11 to understand whether or not a rule applies to them as a basis
12 for irreparable harm. If that were true, a plaintiff would be
13 able to show irreparable harm in any challenge to an agency
14 action because he or she needed to understand how the rule
15 worked. So those costs of understanding the application to
16 their business model cannot be the basis for their irreparable
17 harm.

18 And because plaintiffs have failed to present any
19 concrete evidence of irreparable harm as a result of this rule
20 in the time before this case can be adjudicated on the merits,
21 that is sufficient reason to deny Plaintiffs' preliminary
22 injunction motion.

23 Turning now to the merits, I would like to make a few
24 points first regarding what Your Honor noted is somewhat
25 limited precedent under the FPASA, but it is perhaps broader

1 than my colleague's argument suggested. So first I would like
2 to direct the Court's attention to the partial dissent in the
3 case on which plaintiffs relied principally for their
4 understanding of the scope of the FPASA, and that's the Fourth
5 Circuit decision in *Liberty Mutual*. That was a divided panel.

6 And as the judge who concurred in part and dissented
7 in relevant part here noted in his dissent, *Liberty Mutual*
8 itself is an outlier case. It is out of step with the
9 decisions of all four other Courts of Appeals that have decided
10 whether the Executive Order at issue in that case was
11 authorized under the FPASA. Those courts are the Fifth
12 Circuit, the Seventh Circuit, the D.C. Circuit and the Third
13 Circuit. And all of those citations are in the dissent in
14 *Liberty Mutual*.

15 Moreover, the Fourth Circuit itself in a case called
16 *Trinity Industries, Inc. v. Herman*, 173 F.3d 527, characterized
17 the *Liberty Mutual* case as, quote, "irrelevant to any cases
18 involving contracts directly between the regulative entity and
19 the government here." In this case there is no dispute that
20 there is a direct contractual relationship with the government
21 and the permittees.

22 Moreover, I would like to address the *Chao* case that
23 my colleague discussed. As an initial matter, that case is
24 necessarily consistent with *Kahn* by virtue of the fact that it
25 was also a decision of the D.C. Circuit. So unless *Chao* would

1 have violated D.C. Circuit rules had it somehow overruled *Kahn*
2 without taking the court *en banc*, but more significantly for
3 our purposes, *Chao* noted -- give me just a moment, Your Honor.
4 I apologize. *Chao* noted that -- so my colleague argued that
5 this case exceeds the scope of the FPASA because the
6 government -- the agency acknowledged in the rule that
7 government expenditures may rise as a result of the rule.

8 Not only did this D.C. Circuit in *Chao* note explicitly
9 that the FPASA may authorize Executive actions that cause costs
10 to rise -- for example, in *Chao* the challenged Executive Order
11 required employers to post a notice of employees' right not to
12 join a union, but moreover, the opinion in *Chao* noted that in
13 fact as a result of the Executive Order that was at issue in
14 *Kahn* regarding anti-inflationary wage and price controls,
15 procurement costs did, in fact, increase in the short term. So
16 in short, there is no on point precedent that supports the
17 notion that unless there is a direct cost savings to the
18 government, the FPASA does not authorize agency action.

19 *THE COURT:* But I suppose what you could say about
20 those two opinions is that at least whether it went up or down
21 there was some cost impact. But what about a situation like
22 here where there is -- it's difficult to identify any cost
23 impact to the government as opposed to some cost impact that
24 may take place to the outfitters or to their customers. What
25 about Mr. Kruckenberg's point that what we're talking about

1 here doesn't really seem to fit the Procurement Act scope?

2 *MS. GOODNATURE:* So in response to that, Your Honor, I
3 would like to first note one factual point with respect to this
4 morning's testimony which was Mr. Bradford's testimony
5 regarding the fact that the permitting fees that plaintiffs are
6 required to pay to the Federal Government, they are a direct
7 relationship to the profits of the companies themselves. So
8 that itself establishes a direct link between the financial
9 operations of these outfitters and guides and the fiscal
10 interests of the Federal Government itself.

11 But, Your Honor, that's not our primary argument with
12 respect to economy and efficiency. Rather --

13 *THE COURT:* Let me just ask if you don't mind, has any
14 President or even the Department of Labor cited those permits
15 fees and the effect that the rule may have on that revenue to
16 the government as a economic justification or rationale for the
17 Executive Order or the rule?

18 *MS. GOODNATURE:* Not to my knowledge, Your Honor. And
19 the government is not invoking *Chevron* deference with respect
20 to that conclusion, but simply noting that it's a necessary
21 result of the testimony of the plaintiffs today and supports
22 the conclusion that there is a nexus between economy and
23 efficiency and the rule that plaintiffs challenge.

24 But again turning more directly to the rationale that
25 the President did articulate in the Executive Order, I would

1 like to direct the Court's attention to Section 1 of Executive
2 Order 14026 which notes that "Raising the minimum wage enhances
3 worker productivity and generates higher quality work" -- and I
4 am skipping ahead a little bit here -- "by reducing absenteeism
5 and turnover and lowering supervisory and training costs."

6 So those are four effects of the rule. Enhancing
7 worker productivity plainly goes to efficiency. Generating
8 higher work, again efficiency -- higher quality work, excuse
9 me, again efficiency. Reducing absenteeism and turnover
10 illustrates -- I am sorry, goes to both economy and efficiency.
11 And lowering supervisory and training costs at least pertains
12 to economy, likely to efficiency as well.

13 With respect to the government's interest in those
14 benefits for the particular plaintiffs at interest here, the
15 government has an interest in ensuring that recreators on
16 federal lands receive safe, high quality recreational services
17 that comply with the safety and conservation objectives of the
18 government's agencies. And I would like to make two points
19 with respect to this link, Your Honor.

20 The first is that plaintiffs argue in their papers
21 that -- in their reply brief in particular that they are liable
22 for any injuries to the plaintiff -- or to any participants on
23 their trips and that the Federal Government is not. The court
24 would like to note that without getting into the details which
25 are fact specific as to how the Federal Court Claim Act would

1 apply to any such incident on a trip, under some circumstances
2 the United States may be liable for negligent conduct of
3 special use permittees in national parks or national forests,
4 so the District of Colorado held in *Paxton v. United States*,
5 which is at 2021 Westlaw 5628918 at Pages 20 to 21. And that
6 stands in contrast to Plaintiffs' argument at Page 2 of their
7 reply brief which states, "If a client is injured on an
8 excursion, AVA and not the government is responsible."

9 Moreover, with respect to the conservation objectives,
10 this -- the way that the agencies govern their permitting
11 processes make clear that this is an interest that the agencies
12 are very attuned to. This is clear both from those special
13 objective from the missing pages of the permit that my
14 co-counsel went over with a witness today that will be
15 introduced into evidence as Defense Exhibit 1. They are also
16 clear from the CRS report that we cited in our opposition brief
17 at Page 8, particularly at Pages 3 to 4, 10 to 11 and Page 12
18 of that report which, as we noted in our brief, the Court may
19 take judicial notice.

20 So just to tie these two pieces together, the
21 government has an interest in order to serve those objectives
22 of providing safe and high quality services that comply with
23 their conservation objectives in ensuring that the special use
24 permittees that provide recreational services on their land are
25 not fly-by-night operations, that they will comply with all of

1 those rules. And the President concluded in his policy
2 judgment in Executive Order 14026 that because of those four
3 economy and efficiency effects that are noted, that the
4 interests of the Federal Government are served by the increase
5 in the federal minimum wage for permittees.

6 I also would like to clarify on that score, my
7 colleague made a few arguments with respect to whether or not
8 President Biden sufficiently addressed the conclusions of
9 President Trump. First as we noted in our brief, the Court can
10 infer what's clear from the administrative record even if it's
11 not made explicit. And here it is implied within the
12 President's finding with respect to workers generally that he
13 made the same conclusions with respect to recreational service
14 providers. It would be absurd to require the President to note
15 that every single category of worker category by category that
16 is subject to a rule explicitly will reap the benefits of the
17 rule.

18 Moreover, I would like to note that as we noted in our
19 brief, plaintiffs' focus on the sufficiency of DOL's
20 explanation and not of the President's explanation, that is for
21 good reason because a President's action cannot be challenged
22 under the Administrative Procedure Act as arbitrary and
23 capricious. The President is not subject to the APA.

24 Moreover, a President in general is not required to
25 support his policy determinations with findings unless

1 expressly stated in the statute. And the FPASA requires no
2 such written findings. And the President's actions are
3 entitled to a presumption of regularity. Among other cases
4 that was the holding of the *American Federation of Government*
5 *Employees, AFL-CIO v. Reagan* at 870 F.2d 723.

6 And with respect to the DOL's explanation for the
7 rule, as we argued in our brief, not only did DOL adequately --
8 more than adequately engage with the policy arguments raised by
9 plaintiffs here, and those findings again which we cited in our
10 brief are entitled to *Chevron* deference, but as we also noted
11 in our brief, DOL was required to revoke the exception for
12 minimum wage workers as a result of the Executive Order. And
13 therefore, the *DHS v. Regents* case in which plaintiffs rely is
14 inapposite.

15 The purpose of requiring agencies to explain their
16 actions in choosing between a range of alternatives is to
17 provide the Court with a means of determining whether that
18 selection among various policy alternatives was arbitrary and
19 capricious or not in order to enforce the APA, but where action
20 is required, that simply does not apply. And a case that
21 illustrates this well is the District of DC's holding in
22 485 F.Supp.3d 145. That's a case called *Gomez v. Trump* where
23 the Court held that the State Department had incorrectly
24 defended its administrative action on the ground that it was
25 provided by a presidential proclamation and gave no other

1 explanation. That was arbitrary and capricious because the
2 only explanation for the decision was incorrect.

3 Here by contrast plaintiffs don't argue that DOL was
4 incorrect to conclude that it was required to revoke the
5 exemption for recreational service providers that President
6 Trump imposed. And therefore its analysis was correct, not
7 merely reasonable, which is all that's required under the APA.
8 *Gomez v. Trump* also illustrates that this proposition is not a
9 blank check for agencies to blame the President as plaintiffs
10 argue because this only applies when in fact the President does
11 require the agency to take an action which, to circle back
12 again, is not subject to the arbitrary and capricious
13 requirements of the APA.

14 One brief point on this score. As Your Honor noted,
15 President Trump understood the FPASA to permit the regulations,
16 but merely disagreed with the policy judgments of President
17 Obama, which in turn President Biden agreed with. That is the
18 policy judgments of Obama, and this is made especially clear
19 because President Trump exempted lodging and food service
20 providers associated with seasonal and recreational services
21 which spoke of the rule which shows that, in fact, that
22 President Trump did consider the authority of the President to
23 regulate these types of permittees by virtue of that exemption
24 from the exemption, if you will.

25 Next I would like to address my colleague's arguments

1 with respect to various canons of interpretation in this case.
2 As an initial matter, those canons do not apply where the text
3 of the statute is clear. Just recently the Supreme Court held
4 in *Bostock v. Clayton County, Georgia*, which is at 140 S.Ct.
5 1731, "When the express terms of a statute give us one answer
6 and extratextual considerations suggest another, it's no
7 contest." That was a six justice majority of the Supreme
8 Court.

9 Therefore, extratextual considerations regarding the
10 likely intent of Congress in promulgating the FPASA which may
11 be based on speculation based on the legislative history or
12 other sources that are used in decreasing -- by the Supreme
13 Court don't apply nor do the canons of interpretation on which
14 plaintiffs rely. And I would just like to make a few brief
15 points on this score, if Your Honor will permit me. The first
16 is with respect to the Major Questions Doctrine or the Clear
17 Statement Rule that plaintiffs invoke.

18 First, plaintiffs argue that we did not respond to
19 this argument. Plaintiffs did not plead in their complaint
20 that there was a Major Questions Doctrine violation here.
21 Their claims are very clear. They fall under Section 706(2) (A)
22 of the APA. That's Count One -- excuse me, that's Count Two.
23 Section 706(2) (B) of the APA is Count One. And then their
24 third count is very expressly framed as a separation of powers
25 claim that is based solely on the Non-Delegation Doctrine to

1 which we responded at length in our opposition brief in
2 Section 2C. We also responded to their arguments regarding
3 preemption in Note 8 of our opposition brief.

4 But I would like to note very briefly with respect to
5 each of these canons. First, the Non-Delegation Doctrine,
6 plaintiffs respond in their reply brief that there would be a
7 delegation problem with the statute if it were interpreted to
8 permit the rule, the Executive Order that the President
9 promulgated and that DOL implemented. That is out of step with
10 the analysis under the Non-Delegation Doctrine of both the 10th
11 Circuit in the *City of Albuquerque v. the U.S. Department of*
12 *Interior* which we cited in our brief and of the Supreme Court
13 in Non-Delegation Doctrine cases throughout the Court's
14 history.

15 So first the *City of Albuquerque* case is directly
16 controlling 10th Circuit precedent that goes to both the
17 breadth of the statute and the requisite connection to economy
18 and efficiency and also to the manner in which courts analyze
19 delegation claims. And the focus here is on the
20 constitutionality of the statute itself and not on the
21 constitutionality of any particular exercise of delegated
22 authority. This is the critical distinction that plaintiffs
23 fail to make in their briefing.

24 As the 10th Circuit analyzed in the *City of*
25 *Albuquerque* case, the first question was whether the statute

1 provided an intelligible principle. The 10th Circuit held that
2 it did. Economy and efficiency are the limited principles.
3 And by virtue of that binding determination, the FPASA does not
4 violate the Non-Delegation Doctrine. It's a separate question
5 whether the President exceeded the scope of that authority
6 which is limited by the intelligible principle here. For the
7 reasons that we stated in our brief and argued today, it does
8 not.

9 Again, the *City of Albuquerque* case distinguishes
10 between those two inquiries. And moreover, that is not dictum
11 because the determination that the Executive Order at issue was
12 authorized by the statute was necessary to the 10th Circuit's
13 holding that plaintiffs had prudential standing. This analysis
14 focusing on the constitutionality of the statute itself as
15 distinct from the question of whether a particular exercise of
16 authority under that statute exceeds the scope of that
17 intelligible principle is consistent with the Supreme Court's
18 analysis in the recent *Gundy* case we cited, as well as the
19 other Supreme Court Non-Delegation Doctrine cases that are
20 cited therein.

21 I also would like to just note one more point on the
22 FPASA precedent that the Eastern District of Washington held
23 that it was clear that the recent vaccine mandate did not
24 exceed the scope of the FPASA. And so it's not correct to --
25 my colleague I believe was mistaken in arguing that courts that

1 have considered this question have uniformly held that the
2 vaccine requirement exceeded the scope of the FPASA. Moreover,
3 not to state the obvious, but that's a different rule than we
4 have at issue here.

5 Finally just very briefly with respect to preemption
6 and the Major Questions Doctrine, my colleague argued that the
7 government misunderstands Plaintiffs' argument. Perhaps so.
8 But just to flesh this out, there are really two possible --
9 oh, first I should just note briefly for the Court as we noted
10 in our opposition brief that any preemption claim is forfeited.
11 The closest plaintiffs come in their complaint is at
12 Paragraph 28 where they note that the 2021 minimum wage rule
13 applied only if Congress had already imposed certain wage
14 requirements, but when it did apply, it added new requirements.

15 Adding new requirements to an existing scheme does not
16 meet the requirements of the preemption doctrine. So to the
17 extent that plaintiffs argue that the -- excuse me, that there
18 is a preemption issue here, that cannot be the case because it
19 is possible to comply with both a lower and a higher minimum
20 wage. That is evident from the fact that Congress itself
21 regularly passes minimum wage requirements that impose
22 different levels on the same employer based on their various
23 activities. And there is no conflict. It's very clear that an
24 employer simply must pay at least the highest minimum wage,
25 federal or state, that applies.

1 Finally, the plaintiffs -- to the extent that the
2 plaintiffs argue that there was some sort of implicit denial of
3 authorities under the FPASA to impose a minimum wage because
4 Congress later enacted the SCA, that argument -- and this is
5 fleshed bed out in Page 13 of Plaintiffs' motion and was also
6 argued this morning -- that argument violates the Doctrine
7 Disfavoring Repeals by Implication, which requires an extremely
8 clear statement before a court will hold that a later enacted
9 statute curtails the authority under a previously enacted
10 statute to take any action that would otherwise be committed.
11 A citation for that proposition is the Supreme Court's decision
12 in *Epic Systems Corp. v. Lewis* in 2018. That is at 138 S.Ct.
13 1612.

14 Finally, just to wrap up very briefly with the Major
15 Questions Doctrine and Clear Statement Rule that plaintiffs
16 invoke now for the first time, which was not pleaded in their
17 complaint, that rule is specific to cases involving *Chevron*
18 deference and is not relevant here where the government relies
19 on the plain text of the statute to support the scope of the
20 statutory authority at issue as distinct from the policy
21 judgments and factual findings that underlie the various
22 Presidents' exercises of authority pursuant to that statute.

23 But even on its own terms, the Major Questions
24 Doctrine is simply not applicable here. I would cite *Alabama*
25 *Association of Realtors v. Department of Health and Human*

1 Services, which addressed the CDC's extension of the eviction
2 moratorium pursuant to what the CDC understood to be its
3 authority under Section 361(a) of the Public Health Service
4 Act.

5 As an initial matter, as I noted, this doctrine only
6 applies when the text is unclear. In *Alabama Association of*
7 *Realtors*, the Court's primary holding was the text was clear.
8 This is at Page 2488. And the extension of the eviction
9 moratorium was not permitted within the scope of the plain text
10 of the statute. The Court went on to say even if the text were
11 ambiguous, it would adopt a narrow holding in light of the
12 scope of that eviction moratorium extension.

13 For a bit of context here, that moratorium affected --
14 this comes from the Supreme Court's decision at Page 2489 --
15 affected at least 80 percent of the country including between 6
16 and 17 million tenants at risk of eviction. The financial
17 burdens on landlords were approximately \$50 billion. And
18 moreover, that agency action unlike the administrative -- the
19 executive actions at issue here intruded into traditional areas
20 of state law, namely the landlord/tenant association.

21 Likewise, in the other case that Plaintiffs invoke,
22 *Utility Air Regulation Group*, millions of small sources of
23 greenhouse gas emissions were at issue. Here by contrast, and
24 this is in the final rule at Pages 67,194 to 67,195, there are
25 estimated to be 327,300 total affected employees by the 2021

1 minimum wage rule. That already pales in comparison to the
2 scope of the agency actions that were considered in the cases
3 that plaintiffs invoked.

4 Moreover, and this leads me to my final point, the
5 number of seasonal recreational workers who are currently
6 exempt who will be covered under the rule in the agency's
7 analysis was only 1200. That's at 86 Fed. Reg. Page 67,010.
8 And moreover, as the agency discussed and as my colleague
9 explored with counsel earlier, again the agency's discussion is
10 entitled to deference. That -- not all of those workers are
11 already paying less than \$15, so the actual effect is much
12 smaller.

13 And again that brings me to my final point which is
14 that to the extent the Court were to grant any relief, such
15 relief should be narrowly tailored because the particular
16 issues with respect to both the irreparable harm and especially
17 with respect to the merits in this case are very particular to
18 seasonal recreational workers and not to other employees who
19 are regulated under the rule, including many -- in fact -- I
20 won't say the majority, but many employees who are traditional
21 procurement contractors like plaintiffs, I don't believe there
22 is any dispute. I believe plaintiffs would concede that the
23 Act is valid as it applies to those traditional procurement
24 contractors.

25 Unless the Court has any other questions, the

1 government requests that the Court deny Plaintiffs' motion for
2 preliminary injunction.

3 *THE COURT:* All right. Thank you very much,
4 Ms. Goodnature.

5 Mr. Kruckenberg, you have got five minutes.

6 *MR. KRUCKENBERG:* Yes, Your Honor, thank you. And
7 hopefully, I won't take five minutes.

8 I think first I just want to clarify a factual issue
9 because of the nature of the testimony today. I think it is a
10 new argument and it is a new position that the government is
11 taking about what overtime rules apply. And I think it's just
12 not clear. And certainly the testimony today was that there is
13 a lot of work going on on these trips. We don't know what's
14 covered under overtime rules. We don't know what is covered.
15 And frankly, I think my clients would love the government to
16 say in writing somewhere that they don't have to pay for that
17 amount of time because I don't think the government would
18 always take that position.

19 And I just stay that to the extent that we don't
20 really know, but we know that there is going to be an impact.
21 And I think that's what the testimony was. There is going to
22 be some impact and we're sort of left to see how much it's
23 going to be.

24 On the statutory argument, I think really this case
25 comes down to direct versus indirect contracting. What is it

1 that we are really talking about here? And I think it's very
2 instructive to look at Exhibit 1. That's the contract. That's
3 the agreement that we're talking about and that is an agreement
4 between special use permit operators and the land agency.
5 Those conditions that are set by the agency, it's a totally
6 different grant of authority. It's a totally different
7 statute. It's not the Procurement Act. I don't doubt for a
8 second that the Bureau of Land Management has a statutory
9 authority to condition the use of federal lands. What I do
10 doubt is that the President has authority under the Procurement
11 Act to impose a wage restriction for people who also use
12 federal lands. That's not clear. That's not in the land
13 management statutes and it's certainly not in the Procurement
14 Act.

15 Because again the statutory text that the government
16 is relying on today is that the President may set policy for
17 "procuring and supplying property and nonpersonal services."
18 And we know that supplying property in that context the way
19 it's defined is not about federal property.

20 The government is not procuring or supplying any
21 nonpersonal services here. My clients are providing rafting
22 services to their clients, to their customers. The land
23 agency is very clear. They say in the conditions you're not
24 even allowed to imply that we're providing services to your
25 customers because they don't want the liability. But that

1 means that that cannot be the hook. That can't be the reason
2 that the President acting through the Department of Labor can
3 set wage conditions on my client. And I think that's really as
4 simple as it is.

5 Just briefly on the arbitrary and capriciousness
6 question, it is incumbent on the agency, not the President, but
7 the agency to explain what it's doing. If you look at the *DHS*
8 *v. Regents* case, there are shocking similarities. In that case
9 the Attorney General had ordered the agency head to rescind
10 that. They said it's unlawful. Rescind it. The agency had
11 said, okay. I am following orders. I am doing what the AG
12 told me. It's unlawful. I am rescinding it. The Supreme
13 Court vacated that decision because the agency head didn't
14 explain why it was unlawful. We have the same situation here.

15 The agency is just saying the President told us to do
16 this, so we're doing it. That's not in compliance with the
17 Administrative Procedure Act. And just for that, even without
18 getting into these really more difficult questions about the
19 Procurement Act scope, that's enough to find the rule invalid.
20 That's enough to remand it to the agency and that question is
21 enough to warrant an injunction here.

22 Ultimately we have testimony that my clients will
23 suffer some imminent harm that cannot be repaid. And legally
24 it is far from clear that the President has the authority to
25 issue this rule and quite the opposite.

1 Finally, just with respect to the scope of any
2 injunction, we would urge this Court to follow the statutory
3 text of Section 706. It says a court shall hold unlawful and
4 set aside an agency rule not in compliance with this statute.
5 That's all we're asking for. The statute doesn't contemplate
6 picking and choosing. It says that an agency has to follow the
7 rules, and if not, the rule must be set aside.

8 And for all those reasons, Your Honor, we are asking
9 the Court impose the injunction. Thank you.

10 *THE COURT:* Thank you very much, Mr. Kruckenberg.

11 All right. I will take the matter under advisement
12 and issue a written opinion before obviously the rule takes
13 effect.

14 Anything else on behalf of plaintiffs that we should
15 take up today?

16 *MR. KRUCKENBERG:* No, Your Honor. Thank you.

17 *THE COURT:* Thank you.

18 Anything on behalf of defendants that we should take
19 up today?

20 *MS. GOODNATURE:* No, Your Honor.

21 *THE COURT:* All right. Then the Court will be in
22 recess. Thank you.

23 (Recess at 12:02 p.m.)

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EXHIBITS

Exhibit	Offered	Received	Refused	Reserved	Withdrawn
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REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 14th day of January, 2022.

S/Janet M. Coppock

DUKE BRADFORD, et al., v. U.S. DEPARTMENT OF LABOR, et al., 1:21-cv-03283
Motion for Summary Judgment

EXHIBIT

C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

<p>DUKE BRADFORD, <i>et al.</i>,</p> <p>Plaintiffs/Petitioners - Appellants,</p> <p>v.</p> <p>U.S. DEPARTMENT OF LABOR, <i>et al.</i>,</p> <p>Defendants/Respondents – Appellees.</p>	<p>CIVIL ACTION NO.:</p>
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DECLARATION OF DAVID COSTLOW

I, David Costlow, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a resident of the State of Colorado.
2. I am the Executive Director for the Colorado River Outfitters Association (CROA), a plaintiff in this matter.
3. CROA is a trade association representing river rafting outfitters who operate in Colorado. It has up to 50 independently operating members, some of whom also operate in states without state minimum wages, including Utah and Wyoming.
4. CROA’s mission includes advocating for its members’ interests with respect to legislative and regulatory developments that affect the commercial rafting industry, and promoting river rafting as an accessible and affordable activity for the public.
5. For example, after President Obama issued the executive order creating a minimum wage for federal contractors, CROA advocated with congressional representatives and executive

officials for President Trump’s administration to issue an exemption to that rule. That exemption has now been revoked by President Biden.

6. The vast majority of CROA’s members operate on federal lands under special use permits with federal agencies, such as the Bureau of Land Management or the U.S. Forest Service. These members could not operate on federal lands without these permits. One of CROA members who operates on federal lands under special use permits with federal agencies is Arkansas Valley Adventure, which is also a plaintiff in this matter.

7. CROA’s members generally employ guides on their river tours who are covered employees under wage provisions of the Fair Labor Standards Act (FLSA) and the McNamara-O’Hara Service Contract Act (SCA). Relevant CROA members’ guides are non-exempt employees under the FLSA, and their members’ federal permits constitute contracts with a primary purpose of providing service under the SCA.

8. CROA’s members typically pay their employee guides a flat fee on a per-trip basis. The fees are typically calculated based on the number of days a trip is expected to take. The work is seasonal, and many guides work as many hours as they can through the busy season—almost always working more than 40 hours in a week.

9. CROA advocates that members aim to pay their guides in accordance with minimum wage requirements. When accounting for tips and uncompensated breaks, their guides’ wages generally should exceed minimum thresholds for the current federal minimum wage even though they are generally paid in flat fees.

10. Increasing 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. The only way many of these outfitters—especially those operating in states without state minimum wages—could continue to

operate would be to significantly raise the costs of their services to customers and eliminating some multi-day trips.

11. The Department of Labor's rule *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 23, 2021), will significantly harm CROA's members.

12. Some CROA members will need to renew or amend their existing special use permits in order to operate for the upcoming 2022 season. Almost all will need to obtain an Annual Authorization from the relevant agency this spring before beginning operations. CROA members are concerned that the administration may attempt to implement the new wage requirements as part of the Annual Authorizations. Without these permits and Annual Authorizations, CROA's members could not provide services on federal lands, which is a key component of their businesses. At least one CROA member expects to be issued a new special use permit in February 2022 as part of purchasing part of another CROA member's operations. CROA and the purchasing CROA member expect the renewal will subject the permit to the new rule's minimum wage requirements. Because the purchasing CROA member does not currently pay every employee \$15/hr plus applicable overtime, the rule will imminently increase this member's wage costs as described below.

13. After the rule's effective date and once they have renewed or entered into new special use permits, CROA's members will be required to pay higher wages to their employees. Wage costs for multi-day trips in particular will rise because of the rule's overtime provisions. Additionally, CROA's members will need to pay new implementation and compliance costs to ensure that they comply with the new requirements.

14. The rule's wage increases will make the current service offerings from many of CROA's members financially unviable. As a result, these members will be forced to change their business

practices, such as by reducing the duration of many of their guided trips and limiting the hours their guides can work in a workweek in an effort to mitigate losses caused by the rule's overtime provisions. Many of CROA's members would not be able to offer their guides as many hours of work as they have in past seasons. Many of CROA's members also expect to need to increase their costs to customers, pricing out at least some consumers.

15. CROA members operating on federal lands will also be at a competitive disadvantage with outfitters that are not affected by the new rule. Competitors who operate on lands not owned by the federal government will be able to offer more multi-day trips at lower rates than these members of CROA. Competitors will also have a hiring advantage because they will be able to offer guides more work hours than members of CROA operating on federal lands, because competitors not operating on federal lands will not be required to pay the same federal overtime wages.

16. Raising the minimum wage for employees currently paid below \$15/hr plus applicable overtime is expected to cause a ripple effect on wages across CROA members' operations. Specifically, CROA and at least some CROA members expect members to have to raise wages for more senior employees who currently make more than \$15/hr plus applicable overtime, because such employees will expect their wages to be increased to reflect their greater degree of experience relative to more junior employees. Failure to do so may result in employee turnover.

17. None of the costs that will be incurred by CROA's members will be recoverable from the U.S. Government, and CROA and its members do not receive any compensation from the government from their special use permits.

Executed on February 1, 2022

 Recoverable Signature

X David Costlow

David Costlow

Signed by: S-1-12-1-672632377-1155413092-1124199329-1110528233/81007a2-2c8a-4a54-b9e6-099156b66f94

David Costlow
Executive Director
Colorado River Outfitters
Association

DUKE BRADFORD, et al., v. U.S. DEPARTMENT OF LABOR, et al., 1:21-cv-03283
Motion for Summary Judgment

EXHIBIT

D

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 17, 2022

Christopher M. Wolpert
Clerk of Court

DUKE BRADFORD, et al.,

Plaintiffs - Appellants,

v.

U.S. DEPARTMENT OF LABOR, et al.,

Defendants - Appellees.

No. 22-1023
(D.C. No. 1:21-CV-03283-PAB-STV)
(D. Colo.)

ECONOMIC POLICY INSTITUTE, et al.,

Amici Curiae.

ORDER

Before **PHILLIPS** and **KELLY**, Circuit Judges.

Plaintiffs move for an injunction pending appeal to suspend the effect of the government’s recent rule requiring federal contractors to pay a minimum wage of \$15.00/hour and ending an exemption for parties, like plaintiffs, whose relationship with the federal government comes by way of special-use permits to provide outfitting services on federal lands (“Minimum Wage Order”). *See generally* Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021).

We “may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.” 5 U.S.C. § 705. We evaluate a motion for an injunction pending appeal

using the preliminary injunction standard. *See Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015). Thus, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). “As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (internal quotation marks omitted).

Plaintiffs have demonstrated an entitlement to relief from the Minimum Wage Order in their particular circumstances. Accordingly, applying the Minimum Wage Order’s severance clause, 29 C.F.R. § 23.80, we enjoin the government from enforcing the Minimum Wage Order 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. This injunction shall remain in force until further order of this court.

We deny plaintiffs’ alternative request for expedited merits consideration as moot.

We grant the motion filed by the National Employment Law Project, the Communications Workers of America, the Service Employees International Union, the National Women’s Law Center, and the Economic Policy Institute to submit an amicus brief in support of the government.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

Kiren Mathews

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Motion for Summary Judgment

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District of Colorado

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Case Number: [1:21-cv-03283-PAB-STV](#)
Filer: Arkansas Valley Adventures, LLC
Duke Bradford
Colorado River Outfitters Association

Document Number: [56](#)

Docket Text:

MOTION for Summary Judgment by Plaintiffs Arkansas Valley Adventures, LLC, Duke Bradford, Colorado River Outfitters Association. (Attachments: # (1) Exhibit A, # (2) Exhibit B, # (3) Exhibit C, # (4) Exhibit D)(Kruckenberg, Caleb)

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[STAMP dcecfStamp_ID=1071006659 [Date=6/15/2022] [FileNumber=8670496-0]
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Document description: Exhibit A

Original filename:n/a

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Document description: Exhibit B

Original filename:n/a

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Document description: Exhibit C

Original filename:n/a

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Document description: Exhibit D

Original filename:n/a

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