IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DUKE BRADFORD, ET AL.,	:	
	:	No. 22-1023
	:	
Plaintiff-Appellants	:	
	:	
v.	:	
	:	
U.S. DEPT. OF LABOR, ET AL.,	:	
	:	
	:	
Defendant-Appellees	:	

APPELLANTS' BRIEF IN CHIEF

INTERLOCUTORY APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 1:21-cv-3283
THE HONORABLE PHILIP A. BRIMMER
CHIEF DISTRICT JUDGE

Oral Argument Is Requested

March 14, 2022

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

In their complaint Appellants argued that the challenged rule was invalid under 5 U.S.C. § 706(2)(A) and (C) and the U.S. Constitution's Non-Delegation Provisions in Article I, §1, and Article II, §3. *See* App. at 11 Appellants also moved for a preliminary injunction pursuant to 28 U.S.C. §§ 2201, 2202 and Rule 65(a) of the Federal Rules of Civil Procedure. *See* App. at 31.

The district court had jurisdiction pursuant to 5 U.S.C. § 702 and 28 U.S.C. § 1331 because Appellants challenged the statutory and constitutional validity of the rule. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States" "refusing . . . injunctions." 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Department of Labor's minimum wage rule for all contractors and possessors of "contract-like instruments," even non-procurement permittees, exceeded the limited grant of authority in the Procurement Act.

A. Whether the President and DOL have the authority under the Procurement Act to regulate permittees who neither provide nor receive any nonpersonal services to or from the government.

B. Whether the wage rule has a sufficient nexus to economical and efficient government procurement when it broadly raises government expenditures and applies to non-procurement permittees.

II. Whether DOL's rescission of the prior exemption for outfitters and guides was arbitrary and capricious.

SUMMARY OF ARGUMENT

Appellants Duke Bradford, Arkansas Valley Adventure, LLC d/b/a AVA Rafting and Zipline (AVA), and the Colorado River Outfitters Association (CROA), are not federal contractors in any meaningful sense. They don't provide anything to the government. The government also doesn't pay them anything. And they aren't protected by the substantial body of law regulating government contracting.

Instead, Appellants simply use federal lands as a part of their businesses of guiding their clients on overnight river rafting trips and other recreational outings. Appellants pay the government for the privilege.

Nevertheless, Appellees Pres. Joseph R. Biden, Sec'y Martin J. Walsh, Acting Admin. Jessica Looman, the U.S. Dept. of Labor, and the Wage & Hour Division (collectively DOL or the Department) have declared that Appellants must comply with rigid, agency-created minimum wage rules that simply don't make sense for their business models. With their rule, *Increasing the Minimum Wage for Federal Contractors*, 86 Fed. Reg. 67,126 (Nov. 23, 2021), Appellees have insisted that by paying for access to federal lands outfitters and guides like

Appellants have given themselves over to strict wage requirements affecting their employees, and, in fact, the employees of anyone with whom Appellants subcontract.

The problem for DOL though is that there is no source of authority for this audacious rule. The President and the agency have invoked the federal Procurement Act as a pretext for regulating what is undeniably non-procurement activity. The Act carefully limits the areas where the President is allowed to act, and permittees like Appellants, who don't provide or receive any goods or services to or from the government do not fall within the statute's reach.

Moreover, even if the Act *could* reach permittees, the rule fails an additional statutory requirement that any such regulation must be necessary for economic and efficient procurement policy. The rule here would raise government expenditures, offset only by DOL's claims that it might provide non-economic benefits to a small subset of workers, and, with respect to outfitters and guides, has no relationship to *procurement* policy or costs.

The stakes here are high—not only for Appellants but for hundreds of thousands of putative "contractors" affected by the rule. Congress

already set out various laws carefully regulating wages for all types of businesses who enter contracts with the government. But it did not do so through the Procurement Act. Given the intrusion into this area, the significant impact this rule will have, and respect for constitutional limits on the President's authority, this Court must also resolve any doubts about the scope of the Procurement Act against the rule.

The rule is therefore likely to be unlawful, and the district court should have enjoined it. Without an injunction, Appellants will suffer irreparable and unrecoverable harms from the agency's actions. In order to prevent this inequitable outcome, this Court should reverse the district court and order entry of the injunction.

FACTS AND PROCEDURAL HISTORY

As set out in their Complaint, Appellants have been ordered to implement a minimum wage requirement of $15/hr. plus overtime based on a rule that took effect on January 30, 2022. *See* App. at 11.

I. Prior Agency Action

On February 12, 2014, President Obama issued Executive Order 13658, *Establishing a Minimum Wage for Contractors*, putatively 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.

DOL then issued a rule mandating a $10.10/hr. minimum wage. *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634 (Oct. 7, 2014); 29 C.F.R. §§ 10.5(a), 10.24(a). It applied to all new "contracts or contract-like instruments," which was an "intentionally all-encompassing" definition that included employers with "special use permits" for federal lands. 79 Fed. Reg. at 60,652; 29 C.F.R. § 10.2.

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

25,341 (May 24, 2018). As the President explained, the rule applied "to outfitters and guides operating on Federal lands," but

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

Id.

DOL issued a rule implementing the order, noting that:

> Lowering the cost of business for outfitter providers could incentivize small outfitters to enter the market. Likewise, it could also incentivize existing outfitters to hire more guides and to increase the hours of current employees. What all this translates into is more affordable guided tours and recreational services for visitors to Federal lands. And ultimately, greater access to outfitter services affords ordinary Americans a greater opportunity to experience "the great beauty of America's outdoors." E.O. 13838.

83 Fed. Reg. 48,537, 48,540 (Sept. 26, 2018).

II. The New Rule

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. for covered employees. 86 Fed. Reg. 22,835. The EO also revoked the exemption for recreational services on federal lands but provided no explanation why. *See id.* at 22,836–37.

On November 23, 2021, DOL issued its final rule implementing the order, effective January 30, 2022. 86 Fed. Reg. 67,126. DOL confirmed that the rule's $15/hr. minimum wage applied to recipients "of special use permits." *Id.* at 67,147.

DOL estimated the rule would affect more than 500,000 private firms, including approximately 40,000 firms that provide concessions or recreational services pursuant to special use permits on federal lands. *Id.* at 67,194–96. DOL also estimated the rule would 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. Unsurprisingly, the "final rule is economically significant[.]" *Id.*

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

The repercussions for recreational firms holding permits to use federal lands, however, were far more severe. As DOL recognized, such firms are "[n]on-procurement," as they do not sell goods or services to the government. *Id.* Thus, these firms "cannot as directly pass costs along to the Federal Government." *Id.* 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.* DOL also recognized that the rule could cause "disemployment" amongst companies operating on federal lands. *Id.* at 67,211. The rule might also place permittees at a competitive disadvantage with competitors not operating on federal lands. *Id.* at 67,208. And because permittees will be forced to raise prices, and permit fees are pegged to prices, permit fees will also rise. *Id.*

Despite these repercussions, the rule provided no justification for revoking the exemption. It did not even discuss its former rationale for

exempting permittees, nor did it consider alternatives for permittees, or discuss its legal authority to regulate admittedly "non-procurement" firms. *See id.* at 67,129, Instead, because the "purpose of this rulemaking is to implement Executive Order 14026," DOL viewed itself as having no discretion to consider these issues. *Id*. at 67,129, 67,216.

Likewise, DOL did not explain how the revocation of the recreational-industry exemption benefited the economy and efficiency of government procurement. Indeed, while it asserted that the rule would improve government services for procurement firms, the Department acknowledged that this benefit would "not apply to the outfitters and guides industry." *Id*. at 67,212.

III. The Plaintiffs-Appellants

AVA is a licensed river outfitter headquartered in Buena Vista, CO. App. at 52, Bradford Decl. ¶¶ 2–3. AVA has been in business for over 20 years and relies on special use permits to operate its business. *Id*. ¶ 3.

Every season AVA employs about 250 people. *Id*. ¶ 5. AVA recruits experienced guides who typically negotiate fixed rates based on the number of days a trip is expected to take. *Id*. If paid hourly, these rates would typically exceed $15/hr. *Id*. However, because the trips last for

multiple days, the guides work far more than 40 hours in a typical week. *Id.*

Should it go into effect, AVA would need to expend resources immediately to ensure compliance with the rule. As Mr. Bradford testified, he expects to expend "between five and $10,000" just on attorney costs prior to the effective date. App. at 156. He also explained that his company 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 156–57. He would also need to eliminate overnight rafting trips entirely or else the "price would go beyond what our public could afford." *Id.* at 157–58. The rule would further make AVA less competitive with other outfitters not subject to the rule. *Id.* at 157–59. Ultimately, "costs would go up and revenue would go down," under the new rule. *Id.* at 159.

CROA is a trade association representing as many as 50 independently operating river outfitters, including AVA. App. at 55, Costlow Decl. ¶¶ 3, 6. Most of CROA's members operate on federal lands under special use permits. *Id.* ¶ 6. The outfitters typically pay the

government a fixed percentage of any fees they charge for services, regardless of profit or loss. *Id.* ¶ 8.

Like AVA, CROA's members typically pay their guides a flat fee on a per-trip basis. *Id.* ¶ 8. The work is seasonal, however, so many guides work as many hours as they can through the busy season—almost always working more than 40 hours in a week. *Id.* Increasing the minimum wage for guides to $15/hr. and paying overtime based on that wage would dramatically increase wage costs. *Id.* ¶¶ 10, 14. To continue to operate, many of these outfitters would be forced to significantly raise the costs of their services to customers and eliminate many multi-day trips. *Id.*

CROA members would also need to comply with the rule immediately should it go into effect. *Id.* ¶ 12. For instance, CROA members expect to pay new implementation and compliance costs to ensure they meet the new rule's requirements. *Id.* ¶ 13.

IV. Procedural History

Appellants filed a Complaint for declaratory relief on December 7, 2021, challenging the rule. App. at 11. They then moved for a preliminary injunction on December 9, 2021. App. at 31. Defendants-Appellees filed

an opposition on December 27, 2021, App. at 58, to which Appellants replied on December 29, 2021, App. at 79.

The district court held an evidentiary hearing on January 6, 2022, and then on January 24, 2022, it denied the request for a preliminary injunction in a written opinion. App. at 90.

The district court addressed only one of the relevant factors—"likelihood of success on the merits." *Id.* at 105. Because it concluded that Appellants were wrong in their legal theory, the court denied the "motion for a preliminary injunction without addressing the remaining preliminary injunction factors." *Id.* at 135.[1]

[1] The district court determined that AVA and Mr. Bradford had standing to maintain this suit, and DOL has not cross-appealed that conclusion. *See* App. at 103. However, the district court also concluded that Appellants "have not shown CROA's associational standing" because the hearing testimony "about a CROA member being potentially harmed by the Biden Rule was limited to" a discussion of a specific member's transfer of a permit, and thus it had not shown "that a CROA member will suffer even a dollar of economic harm." *Id.* at 104–05 (citation omitted). Because it is only necessary to show standing for *one* plaintiff, even if this were correct, it would present no impediment to this lawsuit. *See Massachusetts v EPA*, 549 U.S. 497, 518 (2007) ("Only one of the petitioners needs to have standing to permit us to consider the petition for review."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) (allowing suit to proceed based on "one individual plaintiff who has demonstrated standing" without considering standing of remaining plaintiffs).

Appellants filed a notice of interlocutory appeal on January 26, 2022, and, the next day filed a motion for an injunction pending appeal with the district court. The district court denied that motion on February 28, 2022.

Meanwhile, Appellants filed a motion for injunction pending appeal with this Court.

On February 17, 2022, Judges Phillips and Kelly granted the injunction pending appeal in an order. Noting that this Court must evaluate a motion for injunction pending appeal "using the [four-factor] preliminary injunction standard," and that "the right to relief must be

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Nevertheless, the district court's conclusion as to CROA appears to have been error. Proof of standing is shown "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Often this is in the form of "sworn statements" presented as exhibits to pleadings. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). In a sworn declaration CROA's president averred that "[m]any of CROA's members will need to renew or amend their existing special use permits in order to operate for the upcoming 2022 season," and that "[a]fter the rule's effective date, CROA's members will be required to pay higher wages to their employees, particularly to guides who lead multi-day trips in the backcountry. Additionally, CROA's members will need to pay new implementation and compliance costs to ensure that they comply with the new requirements." App. at 56, ¶¶ 8, 10. Moreover, Mr. Bradford and AVA, which is a member of CROA, have standing, in part, because of the costs that AVA would incur under the new rule. *See* App. at 156–58. CROA certainly has standing to advocate for its member's interests here.

clear and unequivocal," this Court concluded that Appellants "have demonstrated an entitlement to relief from the Minimum Wage Order." Order at 1–2 (citations omitted). Accordingly, this Court "enjoin[ed] 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," pending "further order of this court." *Id.* at 2.

ARGUMENT

A litigant is entitled to a preliminary injunction if they show: (1) a likelihood of success on the merits; (2) a likelihood that they will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 21 (2008).

On appeal, this Court reviews the denial of a preliminary injunction for an abuse of discretion. *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014). "Under this standard of review, [the Court must] examine the district court's legal determinations de novo, and its underlying factual findings for clear error," but "a district court abuses

its discretion by denying a preliminary injunction based on an error of law." *Id.* (cleaned up). Because the remaining equities are often tied up in the ultimate odds of success, a court often can "begin (and, in essence, end)" its review by looking to the "likelihood of success on the merits." *Id.*

The district court committed legal error by concluding that Appellants were unlikely to succeed on their challenge to the wage rule. Contrary to the district court's conclusion, the rule likely exceeds the limited grant of authority set out by the Procurement Act. Moreover, the rule is likely arbitrary and capricious. Thus, the district court's error of law must be reversed. *See id.*

I. The Rule Likely Exceeds the Limits of the Procurement Act

As two members of this Court have already determined, Appellants have clearly demonstrated that the rule is likely unlawful. *See* Order at 1–2.[2] That was because DOL has distorted the Procurement Act beyond any rational limits. Its rule tries to regulate businesses that neither

[2] While decisions made in unpublished orders from a motions panel are not binding precedent, "a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal[.]" *Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1544 (10th Cir. 1996) (citation omitted).

procure nor supply anything to or from the government, and the rule will likely raise government expenditures. If the statute can be bent to such an illogical extreme, then it has no limits. Given the existence of comprehensive parallel regulatory regimes that were not used here, and the major economic and constitutional implications of DOL's rule, this Court should read the Procurement Act narrowly and reject DOL's reading.

A. The Rule Is Not a Permissible Regulation of Procurement Policy

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). Likewise, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). An agency's rule that is "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" "provide the Federal Government with an economical and efficient system for" four government procurement "activities." 40 U.S.C. §§ 101(1), 121(a). The

four "activities" are: (1) "procuring and supplying property and nonpersonal services[;]" (2) "[u]sing available property[;]" (3) "[d]isposing of surplus property[;]" and (4) "[r]ecords management." *Id.* at §§ 101(1)–(4).

The district court sustained the rule as a permissible regulation over "supplying . . . nonpersonal services," but that does not fit with the rule at issue. *See* App. at 107. As Appellants argued below, regardless of the scope of *what* a nonpersonal service is, the Act only empowers the President to control the "procur[ement] and supply[]" of nonpersonal services by "*the Federal Government*." 40 U.S.C. § 101(1) (emphasis added). However, the government does not supply the relevant recreational services; AVA and CROA members do. And the government is not procuring anything.

Appellants engage with consumers on their own behalf, and the consumers have no economic relationship with the government. In fact, and somewhat ironically, the district court determined that the relevant permits dealt with "nonpersonal services" precisely because they did "not subject [Appellants] to the supervision and control of the government" in providing services to their customers. App. at 108. But because the

government merely *permits* AVA to provide its services on federal land, that does not mean the government is providing services. After all, a public school that allows a religious group to use its facilities does not provide religious services itself. *See Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 684–85 (2010). So too here.

The most natural, and indeed the only rational, reading of the statute suggests that the government is on one end of the transaction—either *procuring* or *supplying* nonpersonal services. It makes no sense 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. There is no single economic transaction with the government that is within the statute's reach, and instead, DOL has simply cobbled together pieces of different transactions. If DOL's reading were correct, then it is difficult to imagine any economic transaction that falls outside the statute's reach.

This is different from a situation in which the government provides services with the aid of a contractor, which falls within the scope of § 101(1). For example, § 101(1) might govern if the federal government

provided the public with access to a federal campground while contracting with AVA to act as the camp host and assist campers on the government's behalf. In such arrangements, the consumer's relationship is with the government, not the outside firm, which merely acts on the government's behalf.

It makes sense that the Act encompasses this sort of arrangement: the government may supply services to the public with the assistance of outside firms, which it *procures*. And the Act enables the government to supply those services efficiently by procuring assistance economically. Only in this context is the D.C. Circuit's focus on a sufficient "nexus between . . . wage and price standards and *likely savings to the Government*" sensible. *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1979) (en banc) (emphasis added). But here the government has not procured Appellants' services to supply to the public on the government's behalf, and the Act is inapplicable.

The district court sidestepped these arguments. Resting only on the fact that "the government is concerned with the ways in which outfitters supply recreational services to the public," the district court concluded that the government supplies recreational services through contracts

with Appellants. App. at 107. But the government'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 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). Indeed, as the district court emphasized, the permits did "not subject [Appellants] to the supervision and control of the government." App. at 108. Thus, it can't be said that *the government* is supplying services *through* Appellants.

The district court's reading would construe the government to be supplying every service requiring a permit—trucking services, aviation services, financial services, broadcasting services, and more—simply because the government *allows* the actual provisioners of such services to operate pursuant to permits. Such a reading would then grant the President extraordinary unilateral power over these sectors under the provisions of the Act. That cannot be the case.

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

Even in traditional procurement contexts courts have 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. *Kahn*, 618 F.2d at 788. "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 City of 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 v. Biden*, 23 F.4th 585, 607, 609 (6th Cir. 2022). 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 "important[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 ordinary meanings of the statutory terms. The Act limits the President to actions he "considers necessary" for "economical and efficient" "[p]rocuring and supplying property." 40 U.S.C. §§ 101(1), 121(a). Necessary means "more than something merely helpful or conducive." *Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (citation omitted). "It suggests instead something indispensable, essential, something that cannot be done without." *Id.*

The terms "economical and efficient" also have an understood meaning. "Economical" implies the use of fewer resources. *Economical*, Merriam-Webster.com, 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, https://www.merriam-webster.com/ dictionary/efficient.

The President's authority is therefore limited to actions that he considers "essential" or "indispensable" to provide the "prudent use" of government resources "without wasting materials." *See* 40 U.S.C. §§ 101(1), 121(a). Or, as the Court in *Kahn* said, actions that "likely have

the direct and immediate effect of holding down the Government's procurement costs." 618 F.2d at 792.

DOL's invocation of the Procurement 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 Appellants, 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, Appellants 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 Kahn*, 618 F.2d at 792.

The Executive Branch itself 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. Instead, 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.* 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 doesn't even try to show cost savings from the rule, listing instead factors that won't apply to those with special use permits or that have nothing to do with efficiency or economy in government expenditures. The Department 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, who merely have 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 purported benefits bear a striking resemblance to the benefits deemed too attenuated from procurement

economy and efficiency 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 Procurement 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 Cinnamon Hills*, 685 F.3d at 924.

According to the district court though, even though it might be inefficient and uneconomical for *Appellants*, the "relevant savings is not to individual contractors or contractors as a whole, but rather to the government." App. at 115–16. But that conflicts with DOL's own analysis that for typical procurement contractors "Government expenditures may rise." 86 Fed. Reg. at 67,206. Moreover, even if the factual 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). Perhaps the district court's view implicated concerns about potential severance of the rule, but if "only one part of one subsection" of a rule is invalid, then, at minimum, a court must vacate *that* provision. *See Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985), *aff'd sub nom. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). The district court improperly allowed the arguably lawful part of the rule to make up for the unlawful.

C. This Court Must Read the Statute Narrowly

This Court can resolve this case by simply 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 Appellants.

1. This Court Should Not Discover Agency Authority Hidden in the Procurement Act When Other Statutory Schemes Explicitly Govern Contractor Wages

"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 . . . [courts] 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. NRDC*, 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).

"[W]hen Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007). "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. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

Congress has long since waded into the general issue of what constitutes the federal minimum wage, and even into the specific issue of

how much federal *contractors* should 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). Further, 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). Indeed, 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—and it decided that only some contractors have legal obligations to do so. *See* 40 U.S.C. § 3142; 41 U.S.C. §§ 6502(1), 6702(a). But Congress also carefully limited those requirements. The DBA only 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. And the SCA excludes contracts that do not principally furnish "services" to federal agencies. *See* 40 U.S.C. § 3142. And all three statutes require payment of a "prevailing wage," not a fixed hourly rate applicable nationwide. *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, was enacted after the Procurement Act of 1949, which has been invoked in support of the rule. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the 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 federal contractor wages cannot be read as a free pass for the agency to legislate wherever the statutes end. Indeed, the rule specifically applies *only* to employers who are already covered by the limited reach of the FLSA, the SCA or the DBA. *See* 86 Fed. Reg. at 67,225. Appellants, moreover, are required to pay prevailing wages under both the FLSA and SCA. *See* 86 Fed. Reg. 67,147–48 (special use permits "generally qualify as SCA-covered contracts"). The new rule simply makes new requirements for those already regulated by Congress, but not through those existing statutes.

The district court was "not convinced that the three statutes plaintiffs cite, which are at least 50 years old, constitute the entirety of federal contractor minimum wage requirements and leave no room for agency rulemaking." App. at 118. But that answers a different question. The issue is not whether any agency, or perhaps even DOL, may, in the abstract, wade into questions concerning federal wage laws. The question instead is whether DOL may do so *pursuant to the Procurement Act*, and whether that Act's generic grant of authority gave the President and the agency 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. 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.

2. The Procurement Act Must Be Read Narrowly Given Its Major Economic Impact

Courts will not assume that Congress has assigned to the Executive Branch questions of "deep economic and political significance" unless Congress 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 means this Court must meet DOL's 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. This Court should therefore reject DOL's recent discovery of its "unheralded power." *See id.*

The district court acknowledged the existence of the major questions doctrine but declined to apply it because it determined that the challenged rule is not major enough. It declined to apply the doctrine because even if the challenged rule was "economically significant," "the economic effect is far below the range that the Office of Management and Budget quantifies to have a measurable effect, in macroeconomic terms, on the gross domestic product," "which is $52.3 billion." App. at 120. But just a few weeks before that opinion, the Supreme Court applied the

doctrine based on its unqualified statement that it applies whenever an agency exercises "powers of vast economic and political significance." *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (citation omitted). Moreover, 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 (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) (eliminating rate-filing requirement that might affect the prices of, at most, "40% of a major sector" of long-distance carriers)). There is simply no authority for the idea that the major questions doctrine empowers agency action until it reaches a $52.3 billion 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.

3. The Procurement Act Must Be Read To Avoid Constitutional Problems

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). This rule of construction prevails even concerning an ambiguous statute or regulation over which an agency ordinarily would be entitled to interpretive deference. *Id.* at 574–75. 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 to avoid such concerns. *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 *displace* 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.

This is not a new concern. In *Kahn*, which ultimately upheld an order affecting bidding processes for procurement contracts, 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 from some members of the court, though. *See id.* at 797 (MacKinnon, J., dissenting) ("Moreover, I believe that were the majority's construction of section 205(a) correct, then the 1949 Act would amount to an unconstitutional delegation of legislative authority to the executive branch."). Judge MacKinnon also noted that the nondelegation

problem seemed to animate much of the majority's reasoning, saying, "[a]pparently concerned about the limitless nature of the power the majority describes, two judges within the majority restrict their support by attaching separate concurrences stressing the narrowness of the majority's holding. The majority itself strains to emphasize the proximity of the nexus it approves." *Id.* Furthermore, this Court likewise found the Procurement Act constitutional but only after recognizing 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.

While the district court recognized these concerns, and even cited the Sixth Circuit's recent concerns over a broad reading of the Procurement Act, it nevertheless dismissed them because the Act "grants the President specific, enumerated powers to achieve specific, enumerated goals in administering the federal procurement system." App. at 135 (quoting *Kentucky*, 23 F.4th at 608 n.14). Except the district court's opinion read those same limits to be essentially meaningless. *See id.* at 115 (applying a "'lenient' economy and efficiency nexus" requirement). It "*certainly* would present non-delegation concerns" to

read the Procurement Act in such a broad way, and this Court should reject the government's invitation to do so. *See Kentucky*, 23 F.4th at 608 n.14 (emphasis in original).

II. The Rule Is Likely Arbitrary and Capricious

A court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While this review is "necessarily narrow, it is not insubstantial"—it requires "probing, in-depth review." *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1229 (10th Cir. 2005). An agency's 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). A court may only consider the reasoning "articulated by the agency itself"; it cannot consider post hoc rationalizations. *Id.* at 50.

An agency that "changes course" must "be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (citations omitted). "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). Further, an agency must provide "a more detailed justification" when a "new policy rests upon factual findings that contradict those which underlay its prior policy." *Id.* at 515.

"[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). Moreover, consideration of alternatives must be more than a conclusory statement—"merely stating that an alternative was considered is not enough to show reasoned analysis." *Texas v. Biden,* 10 F.4th 538, 555 (5th Cir. 2021).

DOL's rule is arbitrary and capricious because the rule rescinded DOL's prior exception for non-procurement firms like Appellants without acknowledging the significant reliance interests at stake, explaining why it has disregarded its own prior conclusions, or considering alternatives to the rule. First, DOL blows past its own prior rulemaking that had specifically exempted Appellants from a minimum wage, simply noting that it was rescinding the prior rule without explaining why. Worse, DOL doesn't engage at all with President Trump's findings that applying a minimum wage rule to outfitters and guides "does not promote economy and efficiency in making these services available to those who seek to enjoy our Federal lands" because it would threaten "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" and "would generally entail large negative effects on hours worked by recreational service workers." 83 Fed. Reg. at 25,341. Nor did DOL acknowledge its *own* prior findings that exempting permittees like Plaintiffs from the rule would "lower[] the cost of business for outfitter providers," which "could incentivize small outfitters to enter the market," "incentivize existing outfitters to hire more guides and to increase the hours of current

employees" and provide "more affordable guided tours and recreational services for visitors to Federal lands." 83 Fed. Reg. at 48,540. Without even admitting to these prior findings, DOL can hardly be said to be providing an adequate explanation for why it no longer thinks they are important. *See Fox*, 556 U.S. at 515–16.

Any explanation hardly *could* justify the change though, because DOL does repeat some of its old findings, and even throws in a few new ones showing exactly why the rule harms Appellants. It admits that outfitters and guides will suffer "increased costs" that they won't 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 of existing workers, 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 won't actually apply to the industry, and any benefit will only apply to the existing workforce, which will obviously be lessened by layoffs. *See id.* at 67,211–12. But DOL never explains why these serious harms should be cast aside, why it should rescind the old

exception, and why it should lump in Appellants with procurement contractors.

DOL does admit, however, the real reason it pressed on—it had no choice. But in so doing seals the conclusion that the rule is arbitrary and capricious. By its own admission, it 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 that is the definition of arbitrary and capricious agency action, and the rule must be vacated on this basis as well.

The district countered that DOL's rule at least "acknowledged the policy change rescinding President Trump's order and rule," and insisted

that DOL had "enumerated" good reasons for the change, "including attracting higher quality workers to provide higher quality services, improved morale and productivity through increased employee retention, reduced turnover, reduced absenteeism, and reduced poverty and income inequality." App. at 124–25. But the district court made the same mistake that DOL did—it accepted the agency's justification for the *entire rule* as justifying the unexplained rescission of the prior exception for permittees. DOL candidly admitted that outfitters and guides will face "increased costs" that won't be repaid, as well as reduced profits, be competitively disadvantaged, and will likely need to reduce employment for existing workers. 86 Fed. Reg. at 67,206–08, 67,211. It also conceded that many of the rule's noneconomic benefits wouldn't actually apply to outfitters and guides. *See id.* at 67,211–12. The district court just allowed other potential benefits to make up for the harm caused to Appellants.

The district court did not contend with the fact, moreover, that DOL said it was powerless to not rescind the exception, irrespective of whether it was justified, much less whether it was good policy. 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 adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses." 86 Fed. Reg. at 67,216. That's hardly a meaningful explanation of its reasoned decisionmaking.

The district court also dismissed the agency's silence concerning its own past factual conclusions, built on those made by President Trump, that the rule applied to permittees would not be "economical or efficient." *See* App. at 125. Because the agency "reached this conclusion after considering both approving and disapproving comments for President Biden's rescission of President Trump's order," the district court decided it had adequately considered the issue. *Id*. But this ignores the fact that DOL insisted, rightly or wrongly, that it simply could not and would not consider the wisdom of its rescission because it did "not have the discretion to implement . . . [the] continued exemption of recreational businesses." *See* 86 Fed. Reg. at 67,216. Indeed, the district court agreed "that DOL did not consider excluding outfitters, which DOL believed it did not have authority to consider, in light of President Biden's clear direction." App. at 127. That's not a *real* consideration of the comments. In fact, it suggests the agency improperly predetermined the outcome,

and failed to follow its obligation to "remain[] 'open-minded' about the issues raised and engage with the substantive responses submitted." *See Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (citations omitted); *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) ("The opportunity for comment must be a meaningful opportunity, and we have held that in order to satisfy this requirement, an agency must also remain sufficiently open-minded.") (citations omitted).

The district court also dismissed any possible reliance interests on the former exemption but did so by engaging in an improper *post-hoc* analysis. According to the district court, "given that the Obama Rule imposing a $10.10 hourly minimum wage applied to outfitters from 2015 to 2018 and the Trump Rule has exempted outfitters since just September 26, 2018, the Court does not find it likely that President Trump's exemption was a 'longstanding policy' or that there has been 'serious reliance interest' on it." App. at 129. It also relied on testimony at the hearing that "Colorado's minimum wage has always exceeded the federal contractor minimum wage that President Trump preserved from

the Obama Rule," but AVA "has always paid its employees Colorado minimum wage." *Id.*

The district court made the mistake of making a subsequent rationalization for the agency's actions, instead of the required analysis of the decision actually made by DOL. As the Court in *Regents* highlighted, such factual arguments might "surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review." 140 S. Ct. at 1913–14. Regardless of whether one particular permittee actually relied on the prior rescission, the agency's seesawing position has upset reliance interests. From year-to-year permittees have had no clarity, and had to make their best guess about what rules might govern. And in *this rule* DOL never acknowledged that hardship, nor did it justify the change beyond saying that it was powerless to do anything other than rescind the exemption. *See* 86 Fed. Reg. at 67,216.

In the end, the district court deflected all of these problems by suggesting that perhaps *it* had no power to review President Biden's order, and asserting that "there is no question that a president may rescind his, or his predecessors', executive orders, and a court may not

review such discretionary action." App. at 128. That observation could be correct in certain contexts, but it is entirely irrelevant.

Appellants do not challenge President Biden's order itself under the APA, but instead challenge DOL's implementation of it. And 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.

Moreover, this Court has also held that it has jurisdiction to review the executive orders issued under the Procurement Act themselves, which suggests that *someone* must engage in a meaningful analysis of alternatives. *See City of Albuquerque*, 379 F.3d at 918. Indeed, the D.C. Circuit explained the difference in forms of reviewability, again when dealing with the Procurement Act, holding that even in the "anomalous situation" where a party challenges an Executive Order *and not* its implementing regulations under the Act, judicial review is available. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir.

1996). Moreover, the court also noted that review of the implementing regulations always "appears to us to be an available statutory cause of action." *Id.* at 1327.

DOL cannot avoid its responsibility to make reasoned decisions by claiming to be following orders. DOL never provided a meaningful explanation for its actions towards contractors and guides, and thus the rule was arbitrary and capricious.

III. This Court Should Order Entry of an Injunction Without Revisiting the Remaining Factors

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Because the district court did not consider the remaining injunction factors because of its erroneous ruling on the merits question, this Court could simply vacate that decision, continue its prior stay and remand for further proceedings in the district court. *See* App. at 135.

Nevertheless, because the motions panel already determined that Appellants had shown all four of the relevant factors in their motion for a stay, this Court should simply direct issuance of the injunction. *See* Order at 1–2. After all, this "merits panel [should] not lightly overturn [the] decision made by a motions panel during the course of the same

appeal[.]" *Stifel*, 81 F.3d at 1544. And as Appellants argued below and before the motions panel, the remaining factors justified an injunction below.

Appellants will suffer irreparable harm from the rule through unrecoverable compliance costs. "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010). Compliance costs from a government rule, such as "implementation and training expenses," coupled with the risk of future consequences for "non-compliance," constitutes irreparable injury when the government is immune from damages because of sovereign immunity. *Id.* at 756–57, 771. And Appellants will suffer significant compliance costs under the rule. *See* 86 Fed. Reg. at 67,194 (affected firms will pay direct wages increases of "$1.7 billion per year over 10 years," with "average annualized direct employer costs [] estimated to be $2.4 million" for each firm); App. at 156 (under the rule AVA will expend attorney costs, will also 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"); App.

at 56, ¶¶ 7, 10–12 (CROA members would also incur new compliance costs, new wage costs, reduced services, and have less competitiveness). None of these costs are recoverable under the APA and are thus irreparable. *See* 5 U.S.C. § 702 (permitting only relief "other than money damages").

The equities also favor the injunction. A government "does not have an interest in enforcing a law that is likely" invalid. *Edmondson*, 594 F.3d at 771. Instead, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law." *Id.* (citation omitted). Indeed, when a rule exceeds an agency's authority, the court should not "weigh [] tradeoffs" between its intended effect and harms. *NFIB*, 142 S. Ct. at 666. Because DOL has not complied with limits on its authority, the equities favor an injunction.

IV. Any Injunction Should Apply to the Entire Rule

The APA provides unequivocally, "[t]he reviewing court *shall* . . . hold unlawful and set aside agency action, findings, and conclusions found to be," arbitrary and capricious, not in accordance with law, in excess of statutory authority, or unconstitutional. 5 U.S.C. § 706(2) (emphasis added). Thus, "[w]hen a reviewing court determines that

agency regulations are unlawful, the ordinary result is that the rules are vacated." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Such has long been standard practice under the APA. *See, e.g.*, *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("If [the agency's action] is not sustainable on the administrative record made, then the [agency's] decision must be vacated."); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) ("If an appellant . . . prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's [action]."). "Justice Blackmun made a similar observation in *Lujan* [497 U.S. at 913], writing in dissent but apparently expressing the view of all nine Justices on this question: '. . . if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain 'programmatic' relief that affects the rights of parties not before the court.'" *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also Pennsylvania v. President United States*, 930 F.3d 543, 575 (3d Cir. 2019), *rev'd on other grounds sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)

("courts invalidate—without qualification—unlawful administrative rules as a matter of course").

Because the rule is likely unlawful, and the equities favor an injunction, this Court should either maintain its own injunction or remand and direct entry of an injunction against the entire rule. The presumptive remedy, commanded by the APA's plain language, requires full vacatur. Therefore, any injunction designed to effectuate the APA's goals should extend to that relief.

To be sure, this Court has suggested that it "may partially set aside a regulation if the invalid portion is severable:" "the severed parts 'operate entirely independently of one another,' and the circumstances indicate the agency would have adopted the regulation even without the faulty provision." *Arizona Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (quoting *Davis Cty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir.1997)).[3] But even for courts that engage in this

[3] This statement appears to be dicta, as this Court did not order severance in *Arizona Pub. Serv. Co.*, but instead granted an agency's request for a voluntary remand. *See* 562 F.3d at 1122. Moreover, given the mandatory nature of the APA's directive, the better reading of the statute suggests that severance is not available for agency rules. *See Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting) (the APA requires a court to vacate unlawful agency action "in the clearest

analysis, severance is not automatic, and, even if there is a severability clause, the agency faces an uphill battle to demonstrate the validity of the remainder of the rule. *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 292–93 (4th Cir. 2020) (refusing to sever rule despite severability clause). "Severance and affirmance of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) (citation omitted). Indeed, in all contexts, "a severability clause is an aid merely; not an inexorable command." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 2319 (2016) (citation omitted). Such a clause does not give a court license to "devise a judicial remedy that . . . entail[s] quintessentially legislative work."

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possible terms. The Act provides that a 'reviewing court' faced with an arbitrary and capricious decision '*shall* ... hold unlawful and set aside' the agency action.") (emphasis in original, citation omitted); *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring) ("Once a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court—in the absence of any contrary statute—to vacate the agency's action. The Administrative Procedure Act states this in the clearest possible terms. Section 706(2)(A) provides that a 'reviewing court' faced with an arbitrary and capricious agency decision 'shall'—**not may**—'hold unlawful and set aside' the agency action.") (bold in original). This Court should therefore follow the APA's language and "set aside" the complete rule without engaging in any severance analysis.

Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320, 329 (2006). Thus, "[d]espite [a] severability clause" a rule should be set aside entirely when its "major provisions" are unlawful. *Mayor of Baltimore*, 973 F.3d at 292–93.

A limited injunction against only part of the rule is not appropriate here, despite the severability clause, because this Court cannot be certain that DOL would have issued its rule without rescinding the exception for permittees. After all, EO 14026 took great pains to rescind the exception, which had been subject to its own executive order and specific rulemaking. *See* 86 Fed. Reg. at 22,836–37. And in the rule DOL emphasized the importance of its application to permittees. For instance, DOL responded to numerous comments from the outdoor industry, including from AVA and CROA, requesting exemption of such special use permits from the rule, by again insisting that "section 8(a)(i)(D) of Executive Order 14026 states that contracts in connection with Federal property and related to offering services for federal employees, their dependents, or the general public are subject to the minimum wage requirement," and thus it was essential for the final rule to include them in its coverage. 86 Fed. Reg. at 67,153. Indeed, DOL acknowledged "the

many comments received regarding its proposed coverage of contracts in connection with federal property or lands and related to offering services," but rejected them all because of the mandatory directives in EO 14026. *Id.* at 67,154. DOL also explained why it was so important for it to extend coverage to outfitters and guides—"In order to effectuate the stated intent and coverage provisions of the Executive order, the Department's definitions of both contract and contractor are thus broadly written to encompass a wide range of arrangements with the Federal Government entered into by a wide range of entities and individuals." *Id.* at 67,136.

Given the professed importance of these provisions, this Court should not assume that DOL would have issued the rule without the offending provision. Any equitable relief in the form of an injunction, moreover, should not rely on such an assumption. Instead, rather than risk performing an essentially regulatory act of severance, this Court should order an injunction as to the entire rule and allow the agency to make its own decision about future rulemaking once a final judgment has been issued. *See Mayor of Baltimore*, 973 F.3d at 292–93.

CONCLUSION

The district court's denial of a preliminary injunction must be vacated, and, instead, this Court should order entry of an injunction prohibiting enforcement of DOL's rule until a final judgment on the merits.

DATED: March 14, 2022.

Respectfully,

/s/ Caleb Kruckenberg

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ORAL ARGUMENT STATEMENT

Oral argument is requested. This case presents an issue of first impression concerning the authority of the President and Department of Labor to regulate wages under the federal Procurement Act. The challenged rule, moreover, is estimated to affect hundreds of thousands of businesses nationwide, with an annual direct cost of more than $1.7 billion. Given the novelty of the issues and the significant importance of this Court's ultimate ruling, oral argument would help the Court decide this matter.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this document complies with Fed. R. App. P. 32(a)(5) and (7), as it is printed in Century Schoolbook 14-point, a proportionately spaced font, and includes 11,140 words, excluding items enumerated in Rule 32(f)). I relied on my word processor, Microsoft Word, to obtain the count.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

DATED: March 14, 2022.

Respectfully,

/s/ Caleb Kruckenberg

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

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

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

Plaintiffs,

v.

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

Defendants.

ORDER

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

I. BACKGROUND

On February 12, 2014, President Obama issued an executive order establishing a minimum wage for federal contractors under the Federal Property and Administrative Services Act, 40 U.S.C. §§ 101, *et seq*. (the "Procurement Act" or "FPASA"). *See* Exec. Order No. 13,658, 79 Fed. Reg. 9,851 (Feb. 12, 2014) ("E.O. 13658" or the "Obama Order"). E.O. 13658 applies, in relevant part, to (1) new "contract[s] or contract-like instrument[s] for services covered by the Service Contract Act" and those "with the

Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public," if (2) "the wages of workers under such contract[s] or contract-like instrument[s] are governed by the Fair Labor Standards Act [("FLSA")], the Service Contract Act [("SCA")], or the Davis-Bacon Act [("DBA")]." *Id.* at 9,853. The Department of Labor ("DOL") implemented E.O. 13658 through notice-and-comment rule-making, establishing a $10.10 per hour minimum wage plus overtime in excess of 40 hours in a workweek for federal contractors. *See Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 60,634 (Oct. 7, 2014) (29 C.F.R. pt. 10) (the "Obama Rule"). Pursuant to the Obama Rule, a "[c]ontract or contract-like instrument" includes "licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form." *Id.* at 60,722. The Obama Rule defines a "[n]ew contract" as "a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015," or a contract entered into before then that is "renewed," "extended," or "amended pursuant to a modification that is outside the scope of the contract" on or after January 1, 2015. *Id.*

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

> These individuals often conduct multiday recreational tours through

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

Id. DOL implemented E.O. 13838 on September 26, 2018 without notice and comment. *See Minimum Wage for Contractors; Updating Regulations to Reflect Executive Order 13838*, 83 Fed. Reg. 48,537 (Sept. 26, 2018) (29 C.F.R. pt. 10) (the "Trump Rule"); 83 Fed. Reg. at 48,538 (DOL "promulgates this final rule without notice or an opportunity for public comment because this action is limited to implementing E.O. 13838.").

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

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

> The use of the term "contract-like instrument" in Executive Order 14026 reflects that the order is intended to cover all arrangements of a contractual nature, including those arrangements that may not be universally regarded as a "contract" in other contexts, such as special use permits issued by the Forest Service, Commercial Use Authorizations issued by the National Park Service, and outfitter and guide permits issued by the Bureau of Land Management and the U.S. Fish and Wildlife Service.

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

The Biden Rule mandates overtime pay for compensable work beyond 40 hours per workweek at $22.50 per hour, which is one and one-half times the minimum wage. *Id.* at 67,176. In rescinding President Trump's exemption for recreational service workers, the Biden Rule states that, with respect to contracts entered into between January 1, 2015 and January 29, 2022, contracting agencies shall "take steps . . . to

exercise any applicable authority to insert the Executive Order 13658 contract clause" into the existing contracts "and to ensure that those contracts comply with the requirements of Executive Order 13658 on or after January 30, 2022." *Id.* at 67,155. With respect to new contracts entered into on or after January 30, 2022, the Biden Rule states that E.O. 14026 will apply. *Id.*

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

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

AVA has provided outdoor excursions in central Colorado since 1998. AVA offers, either itself or in partnership with other companies, activities including rafting,

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

ziplining, fishing, horseback riding, stand-up paddle boarding, and all-terrain vehicle tours. AVA also offers train rides, cabin and campsite rentals, gear rentals, and other services. Most of AVA's activities last part of a day or a full day. However, some AVA trips are multi-day, overnight trips. AVA operates on both federal and non-federal land. Approximately 30% of AVA's revenue is from activities that take place on federal land, and less than 10% of AVA's revenue is from overnight trips on federal land.

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

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

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

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

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

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

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

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

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

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

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

CROA members will expend resources to comply with the Biden Rule, including

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

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

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

II. LEGAL STANDARD

A. Preliminary Injunction

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

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

III. ANALYSIS

A. Standing

The party seeking redress bears the burden of establishing standing. *Colo.*

Outfitters Ass'n v. Hickenlooper, 823 F.3d 537, 544 (10th Cir. 2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). To carry this burden, plaintiffs must show "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 543 (internal quotation marks and alteration marks omitted); *Lujan*, 504 U.S. at 560–61. Organizations with members can establish standing either in their own right or on behalf of their members. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

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

1. Duke Bradford and AVA

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

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

The Supreme Court has held that, "[f]or standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("Economic harm to a business clearly constitutes an injury-in-fact. And the amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes."). Moreover, Mr. Bradford and AVA have already begun the process of renewing the Eagle River Permit. Thus, their injury is not speculative or hypothetical, and, given that they have begun the renewal process and that the renewed Eagle River Permit will be subject to the Biden Rule, Mr. Bradford and AVA's future harm is "certainly impending." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (holding that "fears of hypothetical future harm that is not certainly impending" are insufficient to create Article III standing); *Lujan*, 504 U.S. at 564 n.2 (while "'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is 'certainly impending.'" (quoting *Whitmore v. Arkansas*, 495 U.S. 149,

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

158 (1990)).

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

"In addition to Article III standing requirements," a plaintiff "must (i) identify some final agency action and (ii) demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008) (quoting *Catron County Bd. of Comm'rs v. Fish & Wildlife Serv.*, 75 F.3d 1429, 1434 (10th Cir. 1996)). The prudential standing inquiry asks whether plaintiffs "fall[] within the class of plaintiffs whom Congress has authorized to sue," or, in other words, whether plaintiffs have a cause of action under the statute. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Standing under the APA is unavailable if a statute precludes judicial review of the agency action. *City of Albuquerque v. Dep't of Interior*, 379 F.3d 901, 915–16 (10th Cir. 2004) (citing 5 U.S.C. § 701(a)(1)). The Procurement Act does not "explicitly den[y] standing or a private right of action to any plaintiffs." *Id.* at 916. Nor does the Biden Order or Rule. In the Tenth Circuit, however, prudential standing is "not a jurisdictional limitation and may be waived." *The Wilderness Society v. Kane Cnty.*, 632 F.3d 1162, 1168 n.1 (10th Cir. 2011); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). Because defendants do not address prudential standing, the issue has been waived, and the Court does not address it.

2. CROA

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

There is no indication that the Biden Rule will impair CROA in fulfilling an essential purpose or goal of its mission or that the Biden Rule will harm CROA's financial resources. Mr. Costlow did not testify how CROA advocates for its members' interests, and there is no evidence on how or whether CROA itself expends any resources, as Mr. Costlow did not testify that CROA provides advice or counsel to its members in any way, such that CROA's ability to carry out its mission would be affected by the Biden Rule. CROA, therefore, does not have organizational standing. *See Havens Realty*, 455 U.S. at 378.

Moreover, plaintiffs have not shown CROA's associational standing. The

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

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

B. Likelihood of Success on the Merits

As previously mentioned, plaintiffs bring three claims: (1) the Biden Rule exceeded President Biden's authority in violation of the APA, 5 U.S.C. § 706(2)(C) ("APA"); (2) the Biden Rule is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A); and (3) President Biden violated the Constitution's separation of powers

and non-delegation doctrines. Docket No. 1 at 15–19, ¶¶ 51–77. The Court considers plaintiffs' likelihood of success for each claim.

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

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

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

Plaintiffs first argue that the Procurement Act does not permit the President to "use or dispose of *federal lands*." Docket No. 7 at 6. They argue that the Biden Rule is not authorized because the Procurement Act defines "property" to exclude land in the "public domain" and "land reserved or dedicated for national forest or national park purposes." Docket No. 7 at 6–7 (quoting *id.* at § 102(9)). Thus, according to plaintiffs, because the other "activities" in the Act, such as records management, do not apply, President Biden has no authority under the Procurement Act over activities on the federal lands where plaintiffs operate. *Id.* E.O. 14026 states that it applies to contracts "related to offering services for Federal employees, their dependents, or the general

public," *see* 86 Fed. Reg. at 22,837, and the Biden Rule explains that, "for purposes of the minimum wage requirements of [E.O. 14026], the term contract included contracts covered by the SCA, contracts covered by the DBA, concessions contracts not otherwise subject to the SCA, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public, as provided in" E.O. 14026. *Id.* at 67,133. Although the Procurement Act defines "property" narrowly, as plaintiffs note, *see* 40 U.S.C. § 102(9), plaintiff's argument is not persuasive because the Procurement Act also covers "supplying . . . nonpersonal services," *see* 40 U.S.C. § 101(1), which, as the Court discusses below, courts historically construe broadly. *See, e.g.*, *AFL-CIO v. Kahn*, 618 F.2d 784, 790, 787–92 (D.C. Cir. 1979) (en banc) (detailing presidents' use of the Procurement Act).

Plaintiffs next argue that, "[c]ertainly[,] the government's provision of permits is not the 'supply[of] non personal services,'" and plaintiffs' use of federal lands "has nothing at all to do with procurement." Docket No. 7 at 7 (quoting 40 U.S.C. § 102). Although plaintiffs are correct that outfitters are not procurement contractors, *see* 86 Fed. Reg. at 67,152 (describing outfitters as "non-procurement contractors"), plaintiffs provide no additional argument or support beyond their say-so that outfitters operating on federal lands pursuant to permits or licenses like plaintiffs do not supply nonpersonal services.

The Procurement Act defines "nonpersonal services" as "contractual services . . . other than personal and professional services." 40 U.S.C. § 102(8). Courts interpreting "nonpersonal services" in the Procurement Act have considered the phrase as it is defined in the context of the Federal Acquisition Regulations. *See, e.g.*, *Kentucky v.*

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

Moreover, the Court agrees with defendants that plaintiffs' argument that they "don't supply any services (or goods) to the government, and the government doesn't supply any services (or goods) to them," *see* Docket No. 7 at 8, is not persuasive because the Procurement Act provides an economical and efficient system for, among

other things, "[p]rocuring *and supplying* . . . nonpersonal services." 40 U.S.C. § 101(1) (emphasis added). Defendants argue that the government, here, the Forest Service and BLM, contract with outfitters to supply recreational services to the public. Docket No. 21 at 11. As the stipulations in the Eagle River Permit show, the government is concerned with the ways in which outfitters supply recreational services to the public. *See* Exh. 1 at 4–5. For instance, if outfitters do not use hardened trails within riparian areas, they may damage the land leading to costly remediation. Plaintiffs have not shown that the government does not contract with them and other outfitters to supply services on federal lands.

Next, plaintiffs argue that the Biden Rule exceeds President Biden's authority because it is not "necessary for economical and efficient procurement policy." Docket No. 7 at 8–11. Plaintiffs' argument is not persuasive. First, the Procurement Act does not require that the policy or directive must be necessary for economical and efficient procurement, but rather only that the President considers the policy or directive to be necessary. *See* 40 U.S.C. § 121(a) ("The President may prescribe policies and directives that the President considers necessary to carry out this subtitle."). Second, historical precedent shows that plaintiffs are mistaken in their view of what constitutes "economical and efficient procurement policy." The Procurement Act "provide[s] the Federal Government with an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services," "[u]sing available property," "[d]isposing of surplus property," and "[r]ecords management." 40 U.S.C. § 101. Courts have interpreted this language to mean that a president's policy or directive issued under the Procurement Act must have a "sufficiently close nexus to the values of providing the

government an economical and efficient system for . . . procurement and supply." *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (citation and internal quotation omitted). Courts have not viewed "economy" and "efficiency" narrowly; "economy" and "efficiency" "encompass those factors like price, quality, suitability, and availability of goods or services." *See Kahn*, 618 F.2d at 789. As a result, courts have held that the Procurement Act "grants the President particularly direct and broad-ranging authority over those larger . . . issues that involve the Government as a whole." *Id.*; *see also City of Albuquerque*, 379 F.3d at 914 ("Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act]. However, Congress did instruct the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property."). Courts have recognized the "necessary flexibility and broad-ranging authority" granted to the President under the Act, and courts will find a nexus even where the connection seems attenuated or where arguments may be advanced that the order will have the opposite effect than it intends. *Chao*, 325 F.3d at 366 (quotation omitted).

In *Chao*, President Bush used the Procurement Act to require federal contractors to post notices at their facilities informing employees that they could not be forced to join a union or to pay mandatory dues unrelated to representational activities. *Id.* at 362. President Bush explained the economies and efficiencies as follows: "When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its

procurement contracts." *Id.* at 366 (quoting 66 Fed. Reg. 11,221, 11,221). Although the court noted that the "link may seem attenuated" between the rule and economy and efficiency to the government and that "one can with a straight face advance an argument claiming opposite effects or no effects at all," the court ultimately held that President Bush had shown "enough of a nexus" to the requirements of economy and efficiency under the Procurement Act. *Id.* at 366–67.[5]

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

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

The court in *Kahn* detailed the sorts of presidential directives that courts have upheld under the Act. In 1961, for instance, President Kennedy used the Procurement Act to direct contractors to hire minority workers. *Id.* at 791.[6] According to *Kahn*, presidents used the Procurement Act – and only the Procurement Act – for authority to enact anti-discrimination requirements for government contractors between 1953 and 1964. *Id.* at 790–91. Later, "President Johnson directed by Executive Order that federal contractors not 'discriminate (against persons) because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.'" *Id.* at 790 (quoting 3 C.F.R. § 179). In 1967, the General Services Administrator issued a regulation under the Procurement Act requiring goods used in procurement and supplies to be produced in the United States. *Id.* In 1973, President Nixon used the Procurement Act to exclude certain state prisoners from employment on federal contract work. *Id.* The *Chao* court, citing *Kahn*, described the standard of showing the economy and efficiency nexus as "lenient." *Chao*, 325 F.3d at 367.

In determining the limits of an agency's congressional mandate, courts may look to historical practice. *See, e.g.*, *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, No. 21A244, 21A447, 2022 WL 120952, at *4 (U.S. Jan. 13, 2022) ("It is telling that OSHA, in its half

[6] Plaintiffs argued at the hearing and in their reply brief that the President "does not have, for example, the power to order federal subcontractors to prevent racial discrimination and take affirmative action in hiring." Docket No. 22 at 4 (citing *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981)). The Court finds *Liberty Mutual*'s persuasiveness minimal given the numerous anti-discrimination measures described in *Kahn* that have been upheld and the Sixth Circuit's recent statement that anti-discrimination orders have a "close nexus" to the management of labor. *See Kentucky*, 2022 WL 43178, at *14 (finding that governments' requirement that federal contractors "could not discriminate" has a "'close nexus' to the ordinary hiring, firing, and management of labor").

century of existence, has never before adopted a broad public health regulation of this kind . . . . This 'lack of historical precedent,' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach."); *Kentucky*, 2022 WL 43178, at *15 n.11 ("It is telling that none of the history from 1949 to present supplied by the government involves the imposition of a medical procedure upon the federal-contractor workforce under the rationale of 'reducing absenteeism.' The dearth of analogous historical examples is strong evidence that [the Procurement Act] does not contain such a power." (citing *In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 284 (6th Cir. 2021) (Sutton, C.J., dissenting) ("A 'lack of historical precedent' tends to be the most 'telling indication' that no authority exists."))).

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

Federal parks and other Federal lands . . . ." 83 Fed. Reg. at 25,341.

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

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

The Court finds that the Biden Rule meets the "lenient" economy and efficiency nexus. *See Chao*, 325 F.3d at 367; *Kahn*, 618 at 790–92. The Biden Order states that President Biden's goal is to "promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers." 86 Fed. Reg. at 22,835. The Order also states that "ensuring that [f]ederal contractors pay their workers an hourly wage of at least $15.00 will bolster economy and efficiency in [f]ederal procurement" because raising the minimum "enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs." *Id.* President Biden's statement of economy and efficiency is similar to President Bush's in *Chao*, which was held to be sufficient. *See Chao*, 325 F.3d at 366 (President Bush's statement was that, "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." (quoting 66 Fed. Reg. at 11,221)).

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

Plaintiffs argue that the Biden Rule will actually result in more costs to non-procurement contractors who are unable to pass along the costs to the government in higher priced bids, which plaintiffs argue is the opposite of the Procurement Act's goal. Docket No. 7 at 9–10. DOL has disputed this, concluding that "there is no evidence to suggest that the[] benefits" of "improved government services, increased morale and productivity, reduced turnover, reduced absenteeism, increased equity, and reduced poverty and income . . . would not apply to the outfitters and guide industry as well" as to other federal contract workers. 86 Fed. Reg. at 67,212. The relevant savings is not to individual contractors or contractors as a whole, but rather to the government. *Kahn*, 618 F.2d at 793 (emphasizing "the importance . . . of the nexus between [President Carter's] wage and price standards and the likely savings to the [*g*]*overnment*"

(emphasis added)). Regardless, even if the portion of the rule concerning outfitters and guides does not result in savings to the government, plaintiffs, who seek to enjoin enforcement of the entire rule, have not shown that the remainder of the rule, which concerns procurement and non-procurement contractors across industries, will not yield savings to the government through the benefits that DOL enumerated.

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

In support of their first argument, which is that the Biden Rule displaces congressional action on federal contractors, plaintiffs contend that Congress has already directly addressed federal minimum wage in the FLSA, and federal contractor

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

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

Plaintiffs' second argument is that the Procurement Act must be read to avoid "major questions." Docket No. 7 at 14. "The Supreme Court has said in a few cases that sometimes an agency's exercise of regulatory authority can be of such 'extraordinary' significance that a court should hesitate before concluding that Congress intended to house such sweeping authority in an ambiguous statutory provision." *Am. Lung Ass'n v. E.P.A.*, 985 F.3d 914, 959 (D.C. Cir. 2021) (citing *King v. Burwell*, 576

U.S. 473, 485–486 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 262, 266–267 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Utility Air Regul. Group v. EPA (UARG)*, 573 U.S. 302, 324 (2014); *MCI Telecommc'ns v. AT&T*, 512 U.S. 218, 231 (1994)). "Where there are special reasons for doubt, the doctrine asks whether it is implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." *Id.* (citing *UARG*, 573 U.S. at 324 (considering whether the challenged rule would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization")); *Brown & Williamson*, 529 U.S. at 161 (holding that the FDA could not regulate tobacco because it was "plain that Congress ha[d] not given the FDA the authority that it s[ought] to exercise") (citing Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L. Rev. 363, 370 (1986) ("Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.")).

First, the "major questions" doctrine does not apply to this case because plaintiffs have identified no "special reasons for doubt" or that the Procurement Act is "an ambiguous statutory provision." *See Am. Lung Ass'n*, 985 F.3d at 959. Plaintiffs argue that courts cannot "assume that Congress has assigned to the Executive Branch questions of 'deep economic and political significance' unless Congress has done so 'expressly,'" which it has not done here. Docket No. 7 at 14 (quoting *King*, 576 U.S. at 486). Plaintiffs cite DOL's finding that the Biden Rule is "economically significant," *see* 86 Fed. Reg. at 67,194 (indicating that "economically significant" rules or "significant regulatory action" has an annual effect on the economy of at least $100 million),

because the rule will affect 327,300 employees, and because wage increases will amount to $1.7 billion per year over 10 years. *Id.* Although the Biden rule may meet that definition, the economic effect is far below the range that the Office of Management and Budget quantifies to have a measurable effect, in macroeconomic terms, on the gross domestic product. *See* 86 Fed. Reg. 67,224 (regulations have no measurable effect below 0.25% of the GDP, which is $52.3 billion). Moreover, the Supreme Court's decision in *King* also shows how different this case is from *King*. The relevant question in *King* was whether courts should defer to the Internal Revenue Service ("IRS") in the rule implementing the tax credit provision of the Affordable Care Act. The Court held that the IRS was not entitled to deference because the issue "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people." *King*, 576 U.S. at 485. The Court found it "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort." *Id.* at 486 (emphasis in original). The Biden Rule on minimum wages, on the other hand, is not "unusual agency action" or a rule of "extraordinary" significance such that the Court should "hesitate before concluding that Congress intended to house such sweeping authority in an ambiguous statutory provision." *See Am. Lung Ass'n.*, 985 F.3d at 959. It also does not "significantly alter the balance between federal and state power." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *Forest Service v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1850 (2020)). Rather, the Biden Rule would have a small economic impact and is clearly within DOL's area of expertise.

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

2. Whether the Biden Rule is Arbitrary and Capricious

Plaintiffs' second claim is that the Biden Rule violates the APA because it is arbitrary and capricious. Docket No. 1 at 17–18, ¶¶ 60–65. Plaintiffs allege that DOL rescinded the Trump Rule "without acknowledging the significant reliance interests at stake or explaining why it has disregarded its own evidence, and while refusing to consider alternatives to the rule." *Id.* at 18, ¶ 63; Docket No. 7 at 16–18.

Under the APA, a court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Nat'l Ass'n of Clean Air Agencies v. E.P.A.*, 489 F.3d 1221, 1228 (D.C. Cir. 2007). The Court "determine[s] only whether the [agency] examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Supreme Court has called this a "narrow" standard of review. *Id.* (quoting *State Farm*, 463 U.S. at 43); *F.C.C. v. Fox*

Television Stations, Inc., 556 U.S. 502, 513 (2009) *Blanca Tel. Co. v. F.C.C.*, 991 F.3d 1097, 1110 (10th Cir. 2021). "An agency's decision need not be 'a model of analytic precision to survive a challenge' under this standard," *United Airlines, Inc. v. Transp. Sec. Admin.*, 20 F.4th 57, 62 (D.C. Cir. 2021) (quoting *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1404 (D.C. Cir. 1995)), and the Court "will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *Id.* (quoting *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). "Judicial review under [the arbitrary and capricious] standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *F.C.C. v. Prometheus Radio Proj.*, 141 S. Ct. 1150, 1158 (2021).

The Tenth Circuit has held that the "arbitrary or capricious" standard requires an agency's action to be supported by "'substantial evidence in the administrative record,' meaning 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *N.M. Farm & Livestock Bureau v. Dep't of Interior*, 952 F.3d 1216, 1226 (10th Cir. 2020) (quoting *Colo. Wild, Heartwood v. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006)); *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). "This is something more than a mere scintilla but something less than the weight of the evidence." *Foust v. Lujan*, 942 F.2d 712, 714 (10th Cir. 1991); *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1152 (10th Cir. 2016). "Evidence is generally substantial under the APA if it is enough to justify, if the trial were to a jury, refusal to direct a verdict on a factual conclusion." *Hoyl v. Babbitt*, 129 F.3d 1377, 1383 (10th Cir. 1997); *Heartwood*, 435 F.3d at 1213.

The review is "[h]ighly deferential" and "presumes the validity of agency action." *Nat'l Ass'n of Clean Air Agencies*, 489 F.3d at 1228 (citing *AT&T Corp. v. F.C.C.*, 349 F.3d 692, 698 (D.C. Cir. 2003)); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1283 (D.C. Cir. 2019) ("Our review is, as always, highly deferential and presumes the validity of agency action." (quotation and citation omitted)). The agency may rely on comments submitted during the notice and comment period as justification for the rule, so long as the submissions are examined critically. *See Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 516 (D.C. Cir. 2020) (citing *Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1125 (D.C. Cir. 1984)).

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

The Supreme Court has stressed that there is "no basis in the Administrative Procedure Act or in [the Court's] opinions for a requirement that all agency change be subjected to more searching review." *Fox Television*, 556 U.S. at 514. The Court has "neither held nor implied that every action representing a policy change be justified by reasons more substantial than those required to adopt a policy in the first instance." *Id.* However, "[a]n agency may not, for example, depart from a prior policy *sub silentio* or

simply disregard rules that are still on the books." *Id.* at 515 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). An agency must "'display awareness that it is changing position' and 'show that there are good reasons for the new policy'" when it does change its policy. *Renewable Fuels Ass'n v. E.P.A.*, 948 F.3d 1206, 1255 (10th Cir. 2020) (quoting *Fox Television*, 556 U.S. at 515), *rev'd on other grounds sub nom. HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021).

Plaintiffs cannot show that DOL changed the policy *sub silento*, given that the Biden Rule includes an entire section on rescission of the Trump Rule. *See* 86 Fed. Reg. at 67,154–55. The agency thus acknowledged the policy change rescinding President Trump's order and rule, and it did not "simply disregard" President Trump's directives. *See Fox Television*, 556 U.S. at 515. Thus, plaintiffs are mistaken in their claim that the Biden Rule "blows past [DOL's] own prior rulemaking" and that DOL promulgated the Biden Rule with "mere *silence.*" *See* Docket No. 7 at 17.

Moreover, DOL "show[s] that there are good reasons for the new policy," *see Fox Television*, 556 U.S. at 515, even if plaintiffs or the Court may disagree with those reasons. *See Prometheus Radio*, 141 S. Ct. at 1158 (noting that courts should not substitute their policy judgments for the agency's). DOL "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute," *see Fox Television*, 556 U.S. at 515, which the Court has found the Biden Rule to be, "that there are good reasons for it," *see id.*, which DOL has enumerated, including attracting higher quality workers to provide higher quality services, improved morale and productivity

through increased employee retention, reduced turnover, reduced absenteeism, and reduced poverty and income inequality, *see* 86 Fed. Reg. at 67,212–15, "and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *See Fox Television*, 556 U.S. at 515. The Biden Rule, by explicitly rescinding the Trump Rule, "adequately indicates" that President Biden and DOL believe the Biden Rule to be better.

Plaintiffs argue that, because the Biden Rule "rests upon factual findings that contradict those which underlay its prior policy," a "more detailed justification" is required. Docket No. 7 at 16 (quoting *Fox Television*, 556 U.S. at 515). Assuming that the Biden and Trump rules rely upon contradictory factual findings – i.e., President Biden's Administration determined that increased minimum wage for outfitters would have salutary effects, while President Trump's Administration concluded the opposite – plaintiffs have not shown why DOL's substantial justification for the Biden Rule is not sufficiently detailed. DOL concluded, contrary to President Trump's finding, that "there is no evidence to suggest that the[] benefits" of "increased morale and productivity and decreased turnover," which "tend to be general rather than industry specific," "would not apply to the outfitters and guide industry as well" as to other federal contract workers. 86 Fed. Reg. at 67,212. DOL reached this conclusion after considering both approving and disapproving comments for President Biden's rescission of President Trump's order. *See id.* at 67,151–52. DOL acknowledged that non-procurement contractors, such as plaintiffs and other outfitters, "may [face] particular challenges and constraints . . . that do not exist under more traditional procurement contract" and considered comments that E.O. 14026 will "significantly increase the labor costs of entities

performing overnight and/or multi-day excursions in national parks, where overtime costs will be substantial and are unavoidable." *Id.* at 67,152. DOL explained that such comments were not persuasive because the comments "generally do not account for several factors that [DOL] expects will substantially offset any potential adverse economic effects on their businesses arising from application of the" Biden Order. *Id.* at 67,152–53 ("In particular, these commenters do not seem to consider that increasing the minimum wage of their workers can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory and training costs, and increase the quality of services provided to the [f]ederal [g]overnment and the general public. These commenters similarly do not account for the potential that increased efficiency and quality of services will attract more customers and result in increased sales. Such benefits may be realized even where the contractor has limited ability to transfer costs to the contracting agency or raise prices of the services that it offers."). Thus, DOL carefully considered these positive and negative comments in issuing the final rule, and the Court finds that the agency provided a sufficiently detailed explanation for departing from President Trump's rule. *See Nat'l Ass'n of Regul. Util. Comm'rs*, 737 F.2d at 1125 (noting that an agency may rely on comments submitted during the notice and comment period as justification for the rule, so long as the submissions are examined critically).

Plaintiffs argue that the Biden Rule is arbitrary and capricious because DOL did not "consider . . . alternatives." Docket No. 7 at 16–17 (quoting *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912–13 (2020) (noting that *State Farm*, one of the "leading modern administrative law cases," "teaches that when an

agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' 'that are within the ambit of the existing [policy].'" (quoting *State Farm*, 463 U.S. at 51)). Plaintiffs argue that the statements in the Biden Rule that DOL had "no authority to exempt small businesses from the minimum wage requirements of the order," 86 Fed. Reg. at 67,223, and that DOL "notes that[,] due to the prescriptive nature of [E.O. 14026], [DOL] does not have the discretion to implement alternatives that would violate the text of [E.O. 14026], such as the adoption of a higher or lower minimum wage rate, or continued exemption of recreational businesses," *id.* at 67,216, indicate that DOL did not consider alternatives. Plaintiffs are not entirely correct, however, as DOL did consider several alternatives. First, DOL considered defining the term "United States" to exclude contracts performed outside of the 50 states and the District of Columbia. *Id.* at 67,216–17. Second, DOL considered excluding contractors who perform less than 20% of their workweek performing "in connection" with covered contracts. DOL rejected these alternatives. *Id.* It is correct, however, that DOL did not consider excluding outfitters, which DOL believed it did not have authority to consider, in light of President Biden's clear direction. Plaintiffs do not argue that DOL had authority to contradict the President's direction or that President Biden's decision to rescind President Trump's exemption is reviewable under the APA. Nor could they. Because the President is not an "agency" for purposes of the APA, his actions generally are not subject to review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 799–801 (1992) (holding that, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," the President's actions are not subject to the APA's requirements and that the determinative consideration is whether "the

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

Plaintiffs' final argument is that DOL failed to acknowledge the "significant reliance interests" at stake. Docket No. 7 at 16–17. It is true that, where a policy change impacts "longstanding polic[y that] may have 'engendered serious reliance

interests,'" the agency enacting the change generally must take those interests into account. *Regents*, 140 S. Ct. at 1913. However, given that the Obama Rule imposing a $10.10 hourly minimum wage applied to outfitters from 2015 to 2018 and the Trump Rule has exempted outfitters since just September 26, 2018, the Court does not find it likely that President Trump's exemption was a "longstanding policy" or that there has been "serious reliance interest" on it. Moreover, Mr. Bradford testified that AVA has always paid its employees Colorado minimum wage. While the Trump Rule has been in effect, the Colorado's minimum wage has always exceeded the federal contractor minimum wage that President Trump preserved from the Obama Rule, and minimum wage has increased annually. *See Minimum Wage History*, Colo. Dep't of Labor & Emp., http://cdle.colorado.gov/wage-and-hour- law/minimum-wage (last visited Jan. 23, 2022). Thus, AVA has not shown how it has relied on the Trump or Obama rules when AVA apparently has always paid higher wages than provided in those rules.

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

1087-88 (D.C. Cir. 1978) (holding that an agency's sudden, unexplained shift in the kind of data that a regulated party was required to submit was arbitrary); *Verizon Tel. Cos. v. F.C.C.*, 570 F.3d 294, 304 (D.C. Cir. 2009). ("[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past."); *Fed. Energy Regul. Comm'n v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984) ("The Commission may not abuse its discretion by arbitrarily choosing to disregard its own established rules and procedures in a single, specific case. Agencies must implement their rules and regulations in a consistent, evenhanded manner.")). Finally, President Biden issued E.O. 14026 on April 27, 2021. 86 Fed. Reg. at 22,835. DOL issued its proposed rule on July 22, 2021. 86 Fed. Reg. at 38,816. DOL promulgated the final Biden Rule on November 24, 2021. 86 Fed. Reg. at 67,126. Far from being a "sudden and unexplained" change, AVA and others have known that the Trump Rule could be rescinded for nearly nine months and, as discussed previously, President Biden and DOL have explained the policy change.

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

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

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

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

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

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

or applying the law." *Whitman*, 531 U.S. at 474–475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

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

[9] Even if plaintiffs' non-delegation argument were posed properly, it would fail, as the Court has found a "sufficiently close nexus" between President Biden's directive and the "values of providing the government an economical and efficient system for procurement and supply." *See Chao*, 325 F.3d at 366; *see also Kahn*, 618 F.2d at 793. Moreover, plaintiffs have not shown that the Biden Rule *displaces* Congress's past legislation on federal contractor minimum wage. As discussed previously, DOL

Plaintiffs' alternative argument is that, if Congress delegated to the President authority to regulate contractors' minimum wage, such delegation "would be an unlawful delegation of legislative authority." Docket No. 1 at 19, ¶¶ 74, 76. Although this argument asks the right question under the non-delegation doctrine, it is no more successful. First, in their complaint, plaintiffs rely almost exclusively on *Schechter Poultry* and *Panama Refining*; however, the Supreme Court in *Gundy* explained that those two cases, from 1935, are the only instances in the Court's history that it has found Congress to have delegated impermissibly its legislative authority. *Gundy*, 139 S. Ct. at 2129. Plaintiffs cite no court that has found the Procurement Act to be a third instance, and *City of Albuquerque* forecloses such an argument. In that case, the court held that the Procurement Act provides a sufficiently intelligible principle. *City of Albuquerque*, 379 F.3d at 914–15 ("It is well established that Congress may delegate responsibility to the executive branch so long as Congress provides an 'intelligible principle' to guide the exercise of the power . . . . Congress chose to utilize a relatively broad delegation of authority in the [Procurement Act]. However, Congress did instruct the President's exercise of authority should establish 'an economical and efficient system for . . . the procurement and supply' of property." (quoting 40 U.S.C. § 471, now codified at 40 U.S.C. § 101)). The Sixth Circuit recently held similarly. *See Kentucky*, 2022 WL 43178, at *14 n.14 ("We thus disagree with the district court that the [Procurement] Act likely presents non-delegation concerns. Those might arise if the

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recognized that SCA, DBA, and PCA "establish 'minimum' wage . . . wage floors," meaning that DOL's efforts "to establish a higher minimum wage rate" would not be inconsistent with those statutes. *See* 86 Fed. Reg. at 67,129.

[Procurement] Act had 'merely announce[d] vague aspirations" and then gave "the executive *carte blanche*' to do whatever the President saw fit. The [Procurement] Act instead grants the President specific, enumerated powers to achieve specific, enumerated goals in administering the federal procurement system." (quoting *Gundy*, 139 S. Ct. at 2133, 2144 (Gorsuch, J., dissenting)).

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

Because plaintiffs have not shown a likelihood of success on the merits of any of their claims, they have failed to demonstrate a "clear and unequivocal" right to relief. *Cf. Dalkita, Inc. v. Distilling Craft, LLC*, 356 F. Supp. 3d 1125, 1140–41 (D. Colo. 2018) (denying preliminary injunction where movants failed to show likelihood of success on the merits without considering remaining preliminary injunction factors) (citing *Beltronics*, 562 F.3d at 1070). The Court will therefore deny plaintiffs' motion for a preliminary injunction without addressing the remaining preliminary injunction factors. *See Vill. of Logan v. Dep't of Interior*, 577 F. App'x 760, 766 (10th Cir. 2014) (unpublished) (noting that party's "failure to prove any one of the four preliminary injunction factors renders its request for injunctive relief unwarranted"); *Sierra Club, Inc.*

v. Bostick, 539 F. App'x 885, 888 (10th Cir. 2013) (unpublished) (stating that "[a] party seeking a preliminary injunction must prove that all four of the equitable factors weigh in its favor").

IV. CONCLUSION

For the foregoing reasons, it is

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

DATED January 24, 2022.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

Kiren Mathews

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[10898508] Appellant/Petitioner's brief filed by Arkansas Valley Adventures, LLC, Duke Bradford and Colorado River Outfitters Association. Served on 03/14/2022 by email. Oral argument requested? Yes. Word/page count: 11140. This pleading complies with all required privacy and virus certifications: Yes. [22-1023] CK

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