

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

KRISTI NOEM, in her official capacity
as the Governor of South Dakota, *et al.*,
Plaintiffs-Appellants,

v.

DEB HAALAND, in her official capacity as
United States Secretary of the Interior, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the District of South Dakota (No. 21-CV-3009-RAL)
Honorable Roberto A. Lange, United States District Judge

**AMICUS BRIEF OF KANSAS, ALABAMA, ARIZONA,
ARKANSAS, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI,
MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH
CAROLINA, TENNESSEE, TEXAS, AND WEST VIRGINIA
IN SUPPORT OF GOVERNOR NOEM AND REVERSAL**

DEREK SCHMIDT
KANSAS ATTORNEY GENERAL

120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
brant.laue@ag.ks.gov
dwight.carswell@ag.ks.gov
kurtis.wiard@ag.ks.gov

Brant M. Laue
Solicitor General
Dwight R. Carswell
Deputy Solicitor General
Kurtis K. Wiard
Assistant Solicitor General

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INTEREST OF AMICI CURIAE

The States of Kansas, Alabama, Arizona, Arkansas, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia file this amicus brief under Fed. R. App. P. 29(a)(2).

The 2020 Fourth of July fireworks display at Mount Rushmore drew thousands of visitors from across the country, including from amici States, while many more people watched the event on television. Given the importance of the Fourth of July holiday and the special role of Mount Rushmore as a national monument, amici States have an interest in ensuring that a fireworks display at Mount Rushmore is allowed to take place in future years, an interest that is threatened by the Department of Interior's arbitrary and capricious refusal to allow a display this year.

Amici States also have an interest in ensuring that the Department, which manages land within the States, makes reasoned permitting decisions more generally. If an event with such a rich history and tradition like Independence Day at Mount Rushmore can be foreclosed on the arbitrary and capricious bases offered by the

Department, then amici are concerned that events and experiences in their States will be the next victims of the Department's erratic decision-making.

ARGUMENT

I. There is a strong public interest in holding a Fourth of July fireworks display at Mount Rushmore.

The Fourth of July is perhaps the most important secular holiday for many Americans. It celebrates not only the independence of our country, but also the values that unite us as Americans. As Thomas Jefferson wrote about the holiday, “let the annual return of this day forever refresh our recollections of [our] rights, and an undiminished devotion to them.” Thomas Jefferson, *Letter to Roger Weightman* (June 24, 1826).¹

And there is a long history of commemorating the Fourth of July with fireworks displays, going back to the first anniversary of the signing of the Declaration of Independence celebrated at Philadelphia on July 4, 1777. According to one account of the festivities, “at night there was a grand exhibition of fireworks (which began and concluded

¹ <https://www.loc.gov/exhibits/jefferson/214.html>

with thirteen rockets) on the commons, and the city was beautifully illuminated. Everything was conducted with the greatest order and decorum, and the face of joy and gladness was universal.” *How the First Anniversary of the Declaration of Independence Was Celebrated in Philadelphia*, 35 Pa. Mag. of Hist. & Biography 372, 373 (1911) (quoting a Pennsylvania Evening Post story from July 5, 1777). The tradition of celebrating the Fourth “eventually spread to other towns, both large and small, where the day was marked with processions, oratory, picnics, contests, games, military displays and fireworks.”² Fireworks “would become an increasingly important part of the festivities in the years to come, as public safety concerns caused cannon and gunfire to be gradually phased out of celebrations.”³ Fireworks displays are now a well-established element of the holiday celebrations.

“[T]he significance of Independence Day holds special meaning at Mount Rushmore.” *Memorandum of Agreement Between the Department of the Interior of the United States of America and the State of South*

² <https://www.pbs.org/a-capitol-fourth/history/history-independence-day/>

³ <https://www.history.com/news/july-4-fireworks-independence-day-john-adams>

Dakota, 1 (May 6, 2019) (JA 282). After all, the memorial includes carvings of George Washington, who played such an important role in our country’s fight for independence, and Thomas Jefferson, the author of the Declaration of Independence. The Fourth of July has been celebrated in the park for many years, with fireworks displays occurring from 1998 to 2009 (except in 2002, when there were no fireworks due to fire risk), and again in 2020. Given the traditional role of fireworks in Fourth of July celebrations and the special role of Mount Rushmore as a “national shrine . . . to independence” and “self-government,” Calvin Coolidge, *Speech at Mount Rushmore* (Aug. 10, 1927),⁴ there is a strong public interest in allowing a fireworks display to take place each year.

II. The Department of Interior’s flimsy and unsupported rationale for refusing to allow a fireworks display was arbitrary and capricious.

In light of this strong public interest, it is particularly important that any decision not to allow a fireworks display be well-reasoned and supported by the facts. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 19, 43 (1983) (under the

⁴ <https://coolidgefoundation.org/resources/speech-at-mount-rushmore/>

arbitrary and capricious standard, an agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation omitted)). But in rejecting South Dakota’s permit, the Department of the Interior offered only the flimsiest of rationales, unsupported by any evidence or reasoned explanation.

Much of the letter refusing to grant South Dakota’s permit was focused on the COVID-19 pandemic. But South Dakota held a fireworks display at Mount Rushmore in 2020—when the pandemic was even worse and before vaccines were available—which more than seven thousand visitors attended, and contact tracing failed to identify even *one* case of COVID-19 tied to the event. And the same day as the Department’s letter refusing to allow a fireworks display at Mount Rushmore this year, President Biden announced that every adult would be eligible to be vaccinated by the end of May 2021, well in advance of the July 4 holiday.⁵ The pandemic did not provide an excuse for refusing

⁵ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/11/remarks-by-president-biden-on-the-anniversary-of-the-covid-19-shutdown/>

to allow a fireworks display. Indeed, COVID-19 concerns did not prevent the National Park Service from holding a fireworks display on the National Mall in Washington, D.C.⁶ It was arbitrary and capricious to rely on the same concerns to refuse to allow a fireworks display at Mount Rushmore.

The Department's letter also raised concerns about perchlorates in the water and the potential for wildfire. But before the 2020 fireworks display, the National Park Service published a Finding of No Significant Impact that concluded the event would not have any significant adverse effect. JA 136-70. The Department did not provide any evidence that conditions changed since then. Instead, the Department speculated that fireworks *may* have increased perchlorate levels, but the only evidence the Department provided shows perchlorate levels consistent with natural fluctuations in non-fireworks years.⁷ JA 585. The Department also noted that the area is experiencing

⁶ <https://www.nps.gov/subjects/nationalmall4th/things-to-do.htm>

⁷ For instance, perchlorate levels at the L7 site rose by 4 ppb after the 2020 event, but they also rose by 5 ppb in 2016, when there was no fireworks display. Perchlorate levels at the L3 site initially dropped by 2 ppb following last year's event and then rose by 5 ppb, but that is

a drought but provided no new analysis of the wildfire risks of a fireworks display, which the 2020 environmental assessment determined to be minimal. JA 244-50 (“Experience with extensive aerial fireworks in the analysis area, including large mortar-fired displays, has demonstrated that fireworks can be safely and successfully performed over a wide variety of changing weather conditions, in both average and dry years.”). And South Dakota committed to taking extensive precautions, as in 2020, including only going forward with the event if environmental conditions were favorable.

The rest of the Department’s letter was devoted to other vague and unsupported assertions, none of which were sufficient to support the agency’s decision. For instance, the letter cited unspecified opposition from Indian tribes, but to the extent the tribes have reasons for their opposition, those reasons should be considered on their own terms. The mere fact that some people may oppose a fireworks display

consistent with a 7 ppb rise in 2017 and a 6 ppb rise in 2018. And perchlorate levels at the L5 site actually dropped by 3.5 ppb following last year’s fireworks display. JA 585.

is not a sufficient justification for cancelling an important national celebration.

Likewise, the Department referred to a construction project scheduled to be completed in June 2021, before the event would have taken place. But the letter offered no explanation of what the project was, the likelihood that it would not be finished on time, or whether the event could be accommodated if the project was not complete by then. By the time it filed its brief in opposition to the motion for a preliminary injunction, the Department believed that the project would be completed by June 18, 2021, over two weeks before the proposed fireworks display. JA 215. The Department expressed concern that attendees at a fireworks display might damage newly laid concrete, but that concern was inconsistent with the Department's argument that holding a fireworks display would prevent even larger crowds from visiting the park that day.

Likewise, the Department's claim that the 2020 fireworks display prevented "tens of thousands" of people from visiting the memorial, JA 131, was inconsistent with its asserted concerns about the COVID pandemic as well as its claim that a fireworks event would pose crowd

control problems. The Department argued that it would need additional staff to handle the crowds from a fireworks display but never explained why the same staffing increase would not be necessary for the even larger crowds it expected without a fireworks display. The Department's concern about limiting attendance for a fireworks display also ignored the fact that South Dakota planned to hold the fireworks event on July 3 so everyone could visit the park on July 4.

The States have a right to expect that the Department of the Interior's permitting decisions will be reasoned and supported by the evidence, particularly when those decisions infringe on our national traditions. This Court should hold that the Department's refusal to allow South Dakota to hold a fireworks show at Mount Rushmore was arbitrary and capricious.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

DEREK SCHMIDT
KANSAS ATTORNEY GENERAL

/s/ Brant M. Laue
Brant M. Laue
Solicitor General of Kansas

Dwight R. Carswell
Deputy Solicitor General
Kurtis K. Wiard
Assistant Solicitor General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
brant.laue@ag.ks.gov
dwight.carswell@ag.ks.gov
kurtis.wiard@ag.ks.gov
Attorneys for Amici Curiae

STEVE MARSHALL
ALABAMA ATTORNEY GENERAL

DOUGLAS J. PETERSON
NEBRASKA ATTORNEY GENERAL

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL

DAVE YOST
OHIO ATTORNEY GENERAL

LESLIE RUTLEDGE
ARKANSAS ATTORNEY GENERAL

JOHN M. O'CONNOR
OKLAHOMA ATTORNEY GENERAL

THEODORE E. ROKITA
INDIANA ATTORNEY GENERAL

ALAN WILSON
SOUTH CAROLINA ATTORNEY
GENERAL

JEFF LANDRY
LOUISIANA ATTORNEY GENERAL

HERBERT SLATERY
TENNESSEE ATTORNEY GENERAL

LYNN FITCH
MISSISSIPPI ATTORNEY GENERAL

KEN PAXTON
TEXAS ATTORNEY GENERAL

ERIC S. SCHMITT
MISSOURI ATTORNEY GENERAL

PATRICK MORRISEY
WEST VIRGINIA ATTORNEY
GENERAL

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 1,606 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-count feature of Microsoft Word 2016.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

This brief has been scanned for viruses and is virus-free.

/s/ Brant M. Laue

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Brant M. Laue