IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF WYOMING, et al., Petitioners/Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents/Appellees, and WYOMING OUTDOOR COUNCIL, et al., Intervenors/Appellants.	)))))))))))))	No. 18-8027
STATE OF WYOMING, et al., Petitioners/Appellees, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Respondents/Appellees and STATE OF CALIFORNIA, et al., Intervenors/Appellants.	)))))))))))))	No. 18-8029

STATE OF WYOMING AND STATE OF MONTANA'S RESPONSE TO APPELLANTS' MOTIONS FOR STAY PENDING APPEAL

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INTRODUCTION

The present appeal arises from an election. The underlying litigation arose from the Bureau of Land Management's (BLM) promulgation of a rule purporting to reduce the waste of methane from oil and natural gas production activities on federal and Indian land, and to regulate air quality by controlling emissions from existing oil and gas sources. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation, 81 Fed. Reg. 83008 (Nov. 18, 2016) (Waste Prevention Rule). After the election, in light of the new administration's priorities, the BLM reconsidered the rule. That process is nearing completion, and replacement of the Waste Prevention Rule is imminent.

All the original parties to the litigation challenging the Waste Prevention Rule agreed that the proceedings should be stayed until the replacement rule is promulgated. The District Court agreed. In order to avoid harm from wholesale changes in the governing regulatory regime twice in a matter of months and the loss of unrecoverable capital needlessly invested to meet standards that will likely disappear, the District Court also stayed certain provisions of the Waste Prevention Rule until the BLM promulgates the replacement rule. Appellants, intervenors in the proceedings below, opposed the stay, and now seek to stay the stay while this appeal is pending. The stay Appellants request is likely to last less than four months, at which time the substantive outcome they oppose will become the established policy of the United States.

Thus, the present motion is fundamentally a request for the Court to interfere with an ongoing agency rulemaking, because the Appellants disagree with the economic, social, and

political choices of the executive branch. The district court wisely chose to stay its hand until the ongoing rulemaking is completed at which time it can render a full and final decision on the merits of the Waste Prevention Rule. This Court should do the same.

BACKGROUND

The BLM promulgated the Waste Prevention Rule on November 18, 2016. The States of Wyoming and Montana and two industry groups immediately challenged the rule in the District of Wyoming. The States of North Dakota and Texas intervened as Petitioners, while the States of California and New Mexico intervened as Respondents along with about a dozen private environmental groups. "On January 16, 2017, the day before the rule became effective, [the District] Court denied the Petitioners request for preliminary injunctive relief, in part because significant portions of the Rule would not become effective until January 17, 2018 ('phase-in provisions')." (Doc. 215 at 2).[1] The District Court then set an expedited briefing schedule to ensure that the matter would be decided before these phase-in provisions became effective. But events transpired to thwart this schedule.

First, on February 3, 2017, the U.S. House of Representatives passed a Congressional Review Act resolution to disapprove of the Waste Prevention Rule. H.R.J. Res. 36, 115th Cong. (2017-2018). The U.S. Senate considered but failed to pass a similar resolution on May 10, 2017. Then on June 15, 2017, the BLM, consistent with the policies of the new administration, postponed the compliance dates for the phase-in provisions pursuant to 5 U.S.C. § 705. Waste Prevention, Production Subject to Royalties, and Resource

[1] References to pleadings filed in the District Court are to documents filed in 16-CV-285.

Conservation; Postponement of Certain Compliance Dates, 82 Fed. Reg. 27430 (June 15, 2017). The BLM also announced its intention to promulgate a rule suspending or extending the compliance dates for the phase-in provisions. *Id.* As a result, the BLM requested and received and an extension of the briefing deadlines. (Doc. 133). At that time, the District Court concluded, "To move forward on the present schedule would be inefficient and a waste of both the judiciary's and the parties resources in light of the shifting sand surrounding the Rule and certain of its provisions, making it impossible to set a foundation upon which the Court can base its review under the Administrative Procedure Act." *Id.* at 3.

On July 5, 2017, some of the Intervenors, including the States of California and New Mexico, challenged the BLM's decision to postpone the phase-in provisions in the Northern District of California. *See California and New Mexico v. BLM*, No. 3:17-CV-03804-EDL (N.D. Cal.); *Sierra Club v. Zinke*, No. 3:17-CV-03885-EDL (N.D. Cal.). That court held that the BLM's postponement of the phase-in provisions was unlawful and vacated the action. That reinstated the phase-in provisions, but only temporarily.

On December 8, 2017, the BLM followed through on its intent to promulgate a rule suspending or delaying the majority of the provisions in the Waste Prevention Rule. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Delay and Suspension of Certain Requirements, 82 Fed. Reg. 58050 (Dec. 8, 2017) (Suspension Rule). This rule postponed the implementation of the compliance requirements for certain provisions of the Waste Prevention Rule for one year. *Id.* As grounds for the suspension, BLM explained it, "has concerns regarding the statutory authority, cost, complexity,

feasibility, and other implications of the 2016 final rule, and therefore intends to avoid imposing likely considerable and immediate compliance costs on operators for requirements that may be rescinded or significantly revised in the near future." *Id.* BLM also announced that it intended to replace portions of the Waste Prevention Rule through notice and comment rulemaking. In light of this development, BLM, along with the States of Wyoming and Montana and the industry Petitioners, requested that the District Court stay the litigation. Because the ongoing rulemaking process would "materially impact the merits of the [] challenges to the Waste Prevention Rule," (Doc. 215 at 5), the District Court stayed the proceedings pending promulgation of a replacement rule or while the Suspension Rule remained in effect. (Doc. 189).

The Intervenors immediately challenged the Suspension Rule in the Northern District of California. *See State of California v. BLM*, No. 3:17-CV-07186-WHO (N.D. Cal.); *Sierra Club. v. Zinke*, No. 3:17-CV-07187-MMC (N.D. Cal.). On February 22, 2018, the California court preliminarily enjoined enforcement of the Suspension Rule, which arguably made the phase-in provisions effective immediately, as the original compliance deadline of January 17, 2018 had passed. On the same day, the BLM published a proposed Revision Rule to replace the Waste Prevention Rule, which initiated a sixty-day public comment period. *See* Waste Prevention, Production Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain Requirements, 83 Fed. Reg. 7924 (Feb. 22, 2018).

Because the California court's preliminary injunction abruptly changed the status quo, the States of Wyoming and Montana promptly moved the District Court to lift the litigation

stay and then stay the core provisions of the Waste Prevention Rule pursuant to its authority under 5 U.S.C. § 705 pending promulgation of the Revision Rule. (Doc. No. 195). For their part, the industry Petitioners moved the District Court to issue a preliminary injunction enjoining the Waste Prevention Rule until the BLM promulgated the Revision Rule. (Doc. 196). The States of North Dakota and Texas took a different tack and asked the District Court to proceed immediately to the merits of the original challenges to the Waste Prevention Rule. (Doc. 194). The BLM agreed that Wyoming and Montana offered the best interim resolution and urged the District Court to stay both the litigation and "the Waste Prevention Rule's implementation deadlines to preserve the status and rights of the regulated parties and avoid entanglement with the administrative process." (Doc. 215 at 7). The States of California and New Mexico and the environmental groups opposed either a stay or a preliminary injunction.

Faced with a wealth of options, the District Court agreed that the stay proposed by Wyoming and Montana and unopposed by the BLM offered the best course for the interim. The District Court noted that 5 U.S.C. § 705 authorizes a court reviewing an agency decision "[o]n such conditions as may be required and to the extent necessary to prevent irreparable harm ... [to] issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." (Doc. 215 at 9). The District Court found that, "particularly Industry Petitioners, will be irreparably harmed by full and immediate implementation of the 2016 Waste Prevention Rule, magnified by temporary implementation of significant provisions meant to be phased-in over time that will be eliminated in as few as four months." (Doc. 215 at 9-10). It further found that the BLM anticipates completing the

Revision Rule in August 2018 and that this imminent development will likely affect the determination of the merits of the case.

> Accordingly, in order to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns, the Court [found] the most appropriate and sensible approach is to exercise its equitable discretion to stay implementation of the Waste Prevention Rule's phase-in provisions and further stay these cases until the BLM finalizes the Revision Rule, so that this court can meaningfully and finally engage in a merits analysis of the issues raised by the parties.

(Doc. 215 at 10). The District Court expressly denied the industry Petitioners' request for a preliminary injunction. Additionally, while the District Court explained that the doctrine of prudential mootness was "implicated here," it did not find that the case was prudentially moot.[2] (Doc. 215 at 8).

The States of California and New Mexico and the environmental groups immediately filed the present appeals from the District Court's stay order. Both groups of Appellants assert that this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), and both mischaracterize the District Court's order as an injunction rather than a stay. The States of Wyoming and Montana promptly moved to dismiss these appeals for lack of appellate jurisdiction and the industry Appellees filed a similar motion shortly thereafter.

Both groups of Appellants moved to stay the stay entered by the District Court during the pendency of the appeal. These requests are tantamount to a decision on the merits of the appeal, because the District Court's stay order will likely only last until August.

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[2] Appellants misstate that the District Court found the case to be prudentially moot. *See* Citizen Groups' Mot. at 20; States' Mot. at 15. Arguments flowing from these misstatements do not warrant a response.

ARGUMENT

I. Legal Standard

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citations and quotations omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

A party seeking a stay pending appeal must demonstrate: (i) the Court has jurisdiction; (ii) a likelihood of success on appeal; (iii) the threat of irreparable harm if the stay is not granted; (iv) the absence of harm to opposing parties if the stay is granted; and (v) any risk of harm to the public interest. *See* 10th Cir. R. 8.1. The requirements for a stay pending appeal are "arguably even more rigorous[] than they are for a motion for a preliminary injunction." *Dine Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 U.S. Dist. LEXIS 143519, at *3 (D.N.M. Sep. 16, 2015). "Because the [movants] are, in essence, requesting that the Court grant it the relief, pending appeal, that the Court recently decided they were not entitled to receive, 'the burden of meeting the standard is a heavy one.'" *Id.* Thus, a party seeking a stay must show a likelihood of reversal, not just a possibility of success on the merits. *Pueblo of Pojoaque v. New Mexico*, 233 F. Supp. 3d 1021, 1116 (D.N.M. 2017).

The first two factors are the most critical, and simply showing the possibility of irreparable injury fails to satisfy the second factor. *Nken*, 556 U.S. at 344-35. "Once an

applicant satisfies the first two factors, the traditional inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party." *Id.* at 435.

II. The Appellees are not likely to succeed in their appeal.

The Appellees are not likely to succeed in their appeal because the Court does not have jurisdiction and, even if it did, the District Court did not abuse its discretion when it stayed the Waste Prevention Rule and the litigation.

First, this Court is not likely to hear the merits of this appeal, because the District Court's stay order is not an appealable order under either 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1). Currently pending before the Court are two motions to dismiss for lack of appellate jurisdiction. These States will not repeat the contents of those motions, but assert that they are well founded and likely to be granted. Appellants cannot demonstrate a likelihood of success on the merits when their appeal is likely to be dismissed before the Court reaches the merits.

Even if this Court does hear the merits, it is unlikely to reverse the District Court's decision. In this appeal, Appellants bear the burden of proving that the District Court abused its discretion in granting the stay. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009). That bar is far higher than the bar at issue when the District Court entered the stay. This Court has characterized an abuse of discretion as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009) (citation and quotation omitted).

The determination to enter the stay was not arbitrary, capricious, whimsical, or unreasonable. It was an eminently reasonable response to the circumstances of the case. The merits of the rule under review could be substantially affected by an imminent action by the BLM. The Court reasonably concluded that because of the evident irreparable harm caused to the industry Petitioners in particular, it would be in the interests of justice and judicial economy to allow a short delay that maintained the status quo thereby permitting the Court to assess the merits fully and finally.

Rather than argue with the obvious wisdom of the District Court's course of action, Appellants assert that the District Court employed the wrong standard in granting the stay. They contend that the District Court erred when it failed to apply the traditional four factors courts review when deciding whether to grant stays and preliminary injunctions. They are incorrect.

It is important to recall that the District Court rejected the request for a preliminary injunction and instead granted a stay under 5 U.S.C. § 705. Pursuant to § 705, a court reviewing an agency decision "[o]n such conditions as may be required and to the extent necessary to prevent irreparable harm ... may issue all necessary and appropriate process to ... preserve status or rights pending conclusion of review proceedings." A stay of agency action under § 705 is a provisional remedy in the nature of a preliminary injunction. *See Winkler v. Andrus*, 614 F.2d 707, 709 (10th Cir. 1980). But a § 705 stay is not a preliminary injunction. While courts typically recite that the availability of a § 705 stay turns on the same four factors considered under a traditional Federal Rule of Civil Procedure 65(a) analysis, there is

nothing in the language of § 705 or its legislative history suggesting that "it is limited to those situations where preliminary injunctive relief would be available." (Doc. 215 at 9, fn.10 citing *California v. BLM*, 277 F. Supp. 3d 1106, 1124-25 (N.D. Cal. 2017)). The statute does not say that, and the statute would serve little purpose, if it merely restated the existing authority of the courts to issue preliminary injunctions.

In fact, two of the bills Congress considered when it was developing the Administrative Procedure Act authorized preliminary injunctive relief among an array of actions. *See* Administrative Procedure, Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the House Judiciary Comm., 79th Cong., at 146 and 179 (1945). Those bills authorized the courts to "issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review ... ." *Id.* These early bills sought to arm the courts with every available method to prevent injustice pending review. The final bill more elegantly conveys this same intention in the words "all necessary and appropriate process." 5 U.S.C. § 705. Congress was obviously familiar with preliminary injunctions in 1946, and had it desired to limit § 705 to provide only traditional preliminary injunctive relief, it could have easily said so. Instead, it gave the courts the broadest possible discretion to prevent irreparable injury through "all necessary and appropriate process."

Congress did not limit § 705, because while a "preliminary injunction is an extraordinary remedy never awarded as of right," *Winter v. NRDC*, 555 U.S. 7, 24 (2008), a

stay under § 705 was not intended to be extraordinary. The House Report on the Administrative Procedure Act explained § 705 as follows:

> This section permits either agencies or courts, if the proper showing be made, to maintain the status quo. The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency action **are to be construed to extend rights pending judicial review** and the exclusiveness of the administrative remedy is diminished so far as this section operates. While the section would not permit a court to grant an initial license, **it provides intermediate judicial relief for every other situation in order to make judicial review effective**. The authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy.

H.R. Rep. No. 1980, at 277 (1946) (emphasis added). Thus, Congress intended the intermediate relief provided by § 705 to be an ordinary, rather than an extraordinary, remedy. And while courts generally are not free to relax one of the prongs for traditional preliminary relief, *Dine Citizens Against Ruining our Environment v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016), they are free to apply a sliding scale or no scale at all when considering whether to grant a stay under § 705.

In fact, the pragmatic approach employed by the District Court in this case is exactly what occurred in *Rochester-Genessee Regional Transportation Authority v. Hynes-Cherin*, 506 F. Supp. 2d 207 (W.D.N.Y. 2007). There the Federal Transit Administration (FTA) issued a cease and desist order to the plaintiff regional transportation authority barring it from providing school bus services on certain routes in the City of Rochester shortly before the school year began. 506 F. Supp. 2d at 209. The plaintiff appealed the administrative decision and asked for a stay under § 705. *Id.* While not convinced that the plaintiff was entitled to a

permanent stay during the appeal, the court found a brief stay was warranted "to avoid the potential chaos and disruption in the transportation of students that could ensue should the FTA's decision be given immediate effect." *Id.* The court found "the most important concern ... is the effective and orderly transportation of students to and from school. Thousands of students utilize bus service, and they and their families need to know *immediately* all of the details of the bus service." *Id.* (emphasis in original).

In granting the stay, the court explicitly found that; but for the harm to students and families, plaintiff would not be entitled to a stay. *Id.* at 215. In fact, the court found that the plaintiff was not likely to prevail on the merits such that a permanent stay would be warranted. *Id.* at 213. Moreover, the court concluded the plaintiff had not demonstrated irreparable harm to itself in the absence of a stay. *Id.* Even so, the court found that the public interest compelled a temporary stay. *Id.* The Court found "that these circumstances present precisely the kind of 'irreparable injury' that § 705 of the APA was intended to give courts the power to prevent." *Id.* at 214.

The current morass similarly presented the District Court precisely the kind of irreparable injury § 705 was designed to prevent. Regardless of the relative merits of the parties' arguments on the likelihood of success on the merits of their challenge to the Waste Prevention Rule, the fact remains that the rule will be replaced in the very near future. Switching back and forth between competing regulatory regimes for a period of perhaps four months presents exactly the kind of chaos and disruption that a Court can and should act to prevent. At this point, strict adherence to the outcome that might result from application

traditional four-factor analysis is less important than avoiding the significant harm and uncertainty that will be borne by all parties by immediate and dramatic flip-flops in the regulatory regime. The public interest in certainty and stability simply outweighs all other considerations for the brief period before the Waste Prevention Rule is replaced.

The District Court can, and in many cases should, consider a request for a stay by resorting to the traditional four-factor preliminary injunction analysis, but it does not have to do so in every circumstance. Because the District Court is empowered by § 705, and frankly has the same inherent equitable authority, to take all necessary action to preserve rights pending review, it did not abuse its discretion by focusing on the public interest when it granted the stay. Absent an abuse of discretion, the Appellants cannot prevail in their appeal, or, consequently, in their request for a stay pending appeal.

III. There is no threat of irreparable harm absent a stay.

Appellants contend that without the provisions of the Waste Prevention Rule, they will suffer significant irreparable environmental and public health harms. These assertions are hardly credible. The District Court's stay maintains the status quo that has existed for decades, and will continue to exist after the Replacement Rule takes effect. While reducing methane emissions for three months may have some imperceptible salutary effects, the impact on health and global climate is de minimus.

The District Court's view on the relative harms is instructive here. When considering the Petitioners' requests for a preliminary injunction, the District Court said:

> The Court finds the balance of harms in this case does not tip decidedly in either side's favor. Though Petitioners have not shown a likelihood of

> irreparable harm justifying an injunction, neither have Respondents shown substantial harm if an injunction were granted. BLM has been regulating oil and gas waste pursuant to NTL-4A for 30 years. **The asserted need to update BLM's rules to account for technological advances does not seem so pressing that appreciable harm will result to BLM if the Rule's effective date is delayed pending this Court's ruling on the merits**. **The asserted benefits of the Rule are found largely in the social benefits of reducing emissions of methane and other pollutants, which is already subject to EPA and state regulations.**
>
> Finally, public interest factors also support both sides of the issue. ... A preliminary injunction would not be adverse to the public interest in resource conservation because the **BLM already has regulations in place to prevent waste** and many of the Rule's provisions do not take effect for a year; nor would an injunction be adverse to the public interest in clean air because the **EPA and State Petitioners already regulate emissions from oil and gas production**, albeit not as broadly as the Rule contemplates. A preliminary injunction would also sidestep the costly implementation of duplicative and potentially unlawful regulations. So, while the Rule itself is arguably in the public's interest in resource conservation and air quality, a preliminary injunction would not necessarily be adverse to those interests.

Wyoming v. United States DOI, 2017 U.S. Dist. LEXIS 5736, at *40-42 (D. Wyo. Jan. 16, 2017) (emphasis added).

The District Court properly took a jaundiced view of the imminence and magnitude of Appellants' harms in light of the existing regulations at both the state and federal level governing waste and emissions. These States respect the concerns and allegations of harm raised by the Appellants but, by their nature, they are not emergent concerns warranting emergency relief pending appeal.

IV. There will be harm to opposing parties if a stay is granted.

Turning to the next factor, Appellants assert that the Appellees will not be harmed by a stay pending appeal.[3] This is demonstrably untrue.

The District Court properly concluded that the industry Petitioners in particular would be irreparably harmed in the absence of a stay. (Doc. 215 at 9-10). The industry Petitioners submitted substantial materials demonstrating their harm to the District Court, and those materials apply with equal force here. Appellants attempt to trivialize the harms incurred by Appellees by characterizing them as ordinary compliance costs, *see* States' Mot. at 13, but these are not ordinary costs. Ordinary compliance costs are justified, in part, because they last, these will not, and similar costs have been found to be more than sufficiently harmful to support a stay. *See, e.g., Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) (granting a stay after finding industry should not have to build expensive new containment structures until the standard is finally determined).

When BLM promulgates the replacement rule, industry can properly be expected to incur whatever compliance costs are required by the rule. But until then, forcing businesses and, ultimately, the consuming public to pay to come into compliance with a rule that has been stayed, suspended, and is on the verge of being rescinded is not merely harmful, but punitive. Accordingly, Appellants are not entitled to stay pending appeal.

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[3] The State Appellants mistakenly assert that the non-moving parties must demonstrate "irreparable harm" if a stay is granted. States' Mot. at 21. That high burden is not what the rule provides. *See* 10th Cir. R. 8.1.

V. The public interest will be harmed by a stay.

Appellants argue that the public interest will be served if the Court forces Appellants policy views on the public for three months to avoid imperceptible harm. In these proceedings, however, the federal government represents the public interest. After the election, the federal government decided to reconsider the Waste Prevention Rule because it "has concerns regarding the statutory authority, cost, complexity, feasibility, and other implications of the 2016 final rule." 82 Fed. Reg. 58050. As the District Court explained, "Wish as they might, neither the States, industry members, nor environmental groups are granted authority to dictate oil and gas policy on federal public lands." (Doc. 210 at 8). Accordingly, the public interest is served by allowing the ongoing rulemaking process to proceed expeditiously without interference from the judiciary. Appellants have the opportunity to participate in that rulemaking process and they can advocate for the adoption of their social, economic, and political priorities in a forum better suited to address those policy concerns. In the interim, as the District Court previously noted, the federal and state governments have regulations in place governing waste and emissions that protect the public from harm.

CONCLUSION

The Appellants' motions for a stay pending appeal should be denied.

SUBMITTED this 30th day of April, 2018.

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CERTIFICATES OF VIRUS SCANNING AND PRIVACY REDACTIONS

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CERTIFICATE OF WORD COUNT

I hereby certify that this response complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) applicable to dispositive motions because this brief contains 4482 words, excluding parts of the brief exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2018, the foregoing was served by the Clerk of Court through the Court's CM/ECF system on all attorneys of record.

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