No. 19-5055

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. MIKE HUNTER,
in his official capacity as Attorney General of Oklahoma, et al.,
Plaintiffs/Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants/Appellees,

and

WATERKEEPER ALLIANCE, et al.,
Intervenor Defendants/Appellees.

Appeal from the U.S. District Court for the Northern District of Oklahoma,
Nos. 15-CV-0381-CVE-FHM, 15-CV-0386 (Hon. Claire V. Egan)

PRINCIPAL BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2(C)(3), the prior or related appeals are as follows:

- *Pruitt v. EPA*, 10th Cir. No. 15-9551;
- *Chamber of Commerce of the United States of America v. EPA*, 10th Cir. No. 15-9552;
- *Chamber of Commerce of the United States of America v. EPA*, 10th Cir. No. 16-5038; and
- *Hunter v. EPA*, 10th Cir. No. 16-5039.

STATEMENT REGARDING SEPARATE BRIEFS

It is not feasible for the federal appellees (the Agencies) to file a single brief with Intervenors/Appellees Waterkeeper Alliance, et al. (together, Waterkeeper). Waterkeeper is opposed to the Agencies' Repeal Rule (discussed below), and the Agencies and Waterkeeper present different arguments in their briefs.

GLOSSARY

Agencies	U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
APA	Administrative Procedure Act
App.	Plaintiffs' Appendix
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency

INTRODUCTION

Plaintiffs the State of Oklahoma and industry organizations asked the district court for a preliminary injunction against the 2015 rule defining "waters of the United States" under the Clean Water Act. The district court denied the request, and Plaintiffs appealed. Defendants U.S. Environmental Protection Agency (EPA), U.S. Army Corp of Engineers (the Corps), and agency officials (together, the Agencies) have now finalized a rule repealing the 2015 rule (Repeal Rule). 84 Fed. Reg. 56,626 (Oct. 22, 2019). The Repeal Rule goes into effect December 23, 2019. *Id.* at 56,626.

This Court should dismiss the appeal and remand for resolution of Plaintiffs' claims for permanent injunctive and declaratory relief, including an assessment of the impact of the Repeal Rule, because the appeal is prudentially moot. All of the bases for the pending appeal have been overtaken by events.

STATEMENT OF JURISDICTION

(A) The district court has subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the United States Constitution and under federal statutes, namely, the Clean Water Act, 33 U.S.C. §§ 1251 et seq.; the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.; and the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq. 1 Plaintiffs' Appendix (App.) 63-69.

(B) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because Plaintiffs have appealed from the denial of their motions for a preliminary injunction.

(C) The district court denied the motions for a preliminary injunction on May 29, 2019. 2 App. 323-37. Plaintiffs filed their notice of appeal on June 11, 2019, or 13 days later. 2 App. 338-40. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

(D) The appeal is from the denial of motions for a preliminary injunction.

STATEMENT OF THE ISSUE

Whether this appeal should be dismissed because the appeal has become prudentially moot.

STATEMENT OF THE CASE

A. Statutory and regulatory background

Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1251 et seq., to afford federal protection for certain of the Nation's waters, *id.* § 1251(a), while declaring its policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," *id.* § 1251(b). Central to the Act is its general prohibition against "the discharge of any pollutant by any person," *id.* § 1311(a), unless the discharger "obtain[s] a permit and compl[ies] with its terms," *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (citation omitted); *see also* 33 U.S.C. §§ 1342, 1344 (establishing permitting programs). There is a "discharge of a pollutant" when a person adds "any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "[N]avigable waters," in turn, are "the waters of the United States." *Id.* § 1362(7).

EPA and the Corps are jointly charged with implementing the Clean Water Act. These Agencies "must necessarily choose some point at which water ends and land begins," but "[w]here on this continuum to find the limit of 'waters' is far from obvious." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 132 (1985). The Corps first promulgated regulations defining "waters of the United States" in the 1970s. *See, e.g.*, 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). In the late 1980s, the Agencies adopted regulatory definitions of that statutory phrase substantially similar to the 1977 definition. At that time, such waters included:

> All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ; All interstate waters including interstate wetlands; . . . . Tributaries of waters identified in paragraphs (a)(1) through (4) of this section; The territorial seas; [and] Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a) (1987); *see also* 40 C.F.R. § 232.2(q) (1988) (nearly identical text).

Over time, the Agencies refined their application of the regulatory definition of "waters of the United States," as informed by the Supreme Court's decisions in *Rapanos v. United States*, 547 U.S. 715 (2006) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Though "imperfect," this decades-old program provides a measure of certainty and predictability to those subject to the Clean Water Act. *In re EPA & Department of Defense Final Rule*, 803 F.3d 804, 808 (6th Cir. 2015) (describing the "familiar" pre-2015 Rule regime), *vacated*, 713 Fed. Appx. 489 (6th Cir. 2018).

B. The 2015 Rule

The 2015 Rule revised the regulatory definition of "waters of the United States." *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). The 2015 Rule generally places waters into three categories: (1) waters that are categorically "waters of the United States" in all instances (i.e., without the need for additional analysis); (2) waters that are subject to case-specific analysis to determine whether they are "waters of the United States"; and (3) waters that are categorically excluded from being "waters of the United States." *Id.* at 37,057. The 2015 Rule added definitions of certain terms including, for example, "tributaries" and "neighboring" (within the definition of "adjacent") in describing waters that are "jurisdictional by rule." *See id.* at 37,105.

Waters within the second category ("case-specific waters") include waters that are not jurisdictional by rule but nonetheless are subject to a case-specific analysis to determine if they have a "significant nexus," as defined in the rule, to traditional navigable waters, interstate waters, or the territorial seas. *Id.* at 37,104-06.

The 2015 Rule retained exclusions for prior converted cropland and waste treatment systems and codified other exclusions from the definition of "waters of the United States." *Id.* at 37,096-98, 37,105.

C. Proceedings below and related cases and agency actions

Plaintiffs here are among the many parties that sought judicial review of the 2015 Rule. Plaintiffs filed complaints in district court. 1 App. 42-94. In July 2015,

they filed motions for a preliminary injunction. 1 App. 95-173. Other parties filed challenges to the rule in various district courts across the country as well. 2 App. 213 (listing cases). Plaintiffs and others also filed petitions for review directly in the courts of appeals in light of uncertainty at the time about whether their challenges fell within the exclusive grant of jurisdiction to the court of appeals set forth in 33 U.S.C. § 1369(b)(1). 1 App. 48-49, 74. All of the petitions filed in the courts of appeals were consolidated in the Sixth Circuit, and in October 2015 that court granted a motion for a nationwide stay of the 2015 Rule. *See In re EPA & Department of Defense Final Rule*, 803 F.3d at 808. The Agencies thereafter returned to their longstanding practice of applying, nationwide, the definition of "waters of the United States" set forth in their 1980s regulations, consistent with Supreme Court decisions and as informed by applicable agency guidance documents. *See* 83 Fed. Reg. 5200, 5201 (Feb. 6, 2018).

Deferring to the Sixth Circuit, the district court here took no action on the preliminary injunction motions and stayed all further proceedings. 1 App. 174-82. In so doing, the district court concluded that the "State has not shown that a limited stay of these cases will cause irreparable harm," and that "the proposed uses of property by members of Plaintiffs' organizations are simply planned activities for which no substantial steps have been taken, and a limited stay will not cause immediate harm to the planned used of any person's property." 1 App. 180-81.

In February 2016, the Sixth Circuit held that it had exclusive jurisdiction to review all challenges to the 2015 Rule. *In re U.S. Department of Defense & EPA Final*

Rule, 817 F.3d 261 (6th Cir. 2016). Immediately thereafter, the district court dismissed Plaintiffs' actions without prejudice, 1 App. 183-88, and Plaintiffs appealed to this Court. In January 2018, the Supreme Court reversed the Sixth Circuit's jurisdictional determination, ruling that any challenges to the 2015 Rule must be brought in district courts. *National Ass'n of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 624 (2018). In February 2018, the Sixth Circuit relinquished jurisdiction and vacated its nationwide stay of the 2015 Rule. 713 Fed. Appx. at 489. This Court then reversed the order dismissing Plaintiffs' case and remanded to the district court. *Chamber of Commerce of the United States of America v. EPA*, 709 Fed. Appx. 526 (10th Cir. 2018).

In February 2018, shortly before the Sixth Circuit vacated its nationwide stay of the 2015 Rule, the Agencies finalized a rule adding a 2020 applicability date to the 2015 Rule. 83 Fed. Reg. 5200 (Feb. 6, 2018) (Applicability Date Rule). As a result of this rule, the 2015 Rule did not go into effect in Oklahoma following the dissolution of the Sixth Circuit's nationwide stay. The district court then issued an order administratively closing the case on the ground that the 2015 Rule was not in effect and in light of the Agencies' proposed repeal of the 2015 Rule. 1 App. 189-91.

Various parties filed lawsuits challenging the Applicability Date Rule. On August 16, 2018, a district court enjoined and vacated the Applicability Date Rule nationwide. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018); *see also Puget Soundkeeper Alliance v. Wheeler,* No. 2:15-cv-1342, 2018 WL

6169196 (W.D. Wash. Nov. 26, 2018) (also vacating rule nationwide). As a result, the 2015 Rule went into effect in Oklahoma.

The district court here re-opened the case, and the parties made supplemental filings addressing the motions for a preliminary injunction. 2 App. 207-09, 222-322. The district court denied Plaintiffs' motions for a preliminary injunction on May 29, 2019. 2 App. 323-37. The court focused on irreparable harm. 2 App. 330-31. In particular, the court discussed the Plaintiffs' declarations and concluded that they did not establish the required "certain and great" irreparable harm. 2 App. 333.

Plaintiffs filed a notice of appeal on June 11, 2019. 2 App. 338-40. While this appeal has been pending, the Agencies finalized the Repeal Rule, as explained next.

D. The Repeal Rule

In 2017, the Agencies began reviewing the 2015 Rule, which was stayed nationwide at the time by the Sixth Circuit. *See* 82 Fed. Reg. 12,497 (Mar. 3, 2017). The Agencies outlined a two-step rulemaking process. In Step One, the Agencies proposed to repeal the 2015 Rule and reinstate the preexisting regulations. Definition of "Waters of the United States"—Recodification of Preexisting Rule, 82 Fed. Reg. 34,899 (July 27, 2017); Definition of "Waters of the United States"—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking). In Step Two, the Agencies proposed—and are presently considering—a revised definition of "waters of the United States." *See* Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (Feb. 14, 2019).

After conducting the Step One notice-and-comment rulemaking process, including the review of hundreds of thousands of public comments, the Agencies issued a final rule repealing the 2015 Rule and reinstating the pre-2015 Rule regulatory definition of "waters of the United States." 84 Fed. Reg. 56,626 (Oct. 22, 2019). This is the Repeal Rule. The Agencies determined that, consistent with various court decisions, the 2015 Rule is unlawful and should be rescinded for four reasons.

First, the Agencies concluded that "the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*." *Id.* at 56,626.

Second, the Agencies concluded that the 2015 Rule "failed to adequately consider and accord due weight to the policy of the Congress in Section 101(b) of the CWA to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution' and 'to plan the development and use . . . of land and water resources.'" *Id.* (quoting 33 U.S.C. § 1251(b)).

Third, the Agencies concluded that repeal of the 2015 Rule was necessary to "avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority." *Id.*

Fourth and finally, the Agencies concluded that the "2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support." *Id.*

The Agencies further concluded that it was appropriate to reinstate the pre-existing regulations. Such reinstatement was warranted because (1) it would provide regulatory certainty as the Agencies proceed with the Step Two rulemaking on a proposed revised definition of "waters of the United States"; and (2) because "as implemented, those regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law." *Id.* at 56,661.

The Repeal Rule will go into effect on December 23, 2019. *Id.* at 56,626.

SUMMARY OF ARGUMENT

This appeal has been overtaken by events and is prudentially moot. The Agencies have unconditionally repealed the 2015 Rule. Moreover, a premise of the district court's order denying Plaintiffs' motions was that the Agencies had declined to take a position on the merits of Plaintiffs' claims. But now the Agencies have set forth their position in the Repeal Rule, taking a position largely *favorable* to Plaintiffs on the merits of many of Plaintiffs' claims. Finally, the on-the-ground facts described in Plaintiffs' 2015 and early-2019 declarations are stale and premised on a different legal landscape.

Given these developments, the prudent course is to remand the case to the district court to determine whether Plaintiffs' claims for permanent injunctive and

declaratory relief necessitate further proceedings in light of the Agencies' Repeal Rule and, if so, to resolve those claims. Prudential mootness favors a remand because significant developments have occurred since the district court denied the motions for a preliminary injunction.

STANDARD OF REVIEW

The finalization of the Repeal Rule occurred during this appeal, and so the district court did not address the impact of the Repeal Rule or mootness. Even if the district court had addressed mootness, this Court would review the issue de novo. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010) ("We review questions of mootness de novo.").

This Court "review[s] the decision to deny a motion for a preliminary injunction for abuse of discretion." *DTC Energy Group, Inc. v. Hirschfeld*, 912 F.3d 1263, 1269 (10th Cir. 2018). "An abuse of discretion occurs when a decision is premised on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* The Court reviews "the district court's factual findings for clear error and its conclusions of law . . . de novo." *Id.*

ARGUMENT

The appeal is prudentially moot.

A central premise of Plaintiffs' motions for a preliminary injunction was that "the 2015 WOTUS Rule will expand the reach of the Agencies' CWA regulations," and that the State will incur "increased regulatory and compliance costs . . . associated

with implementing the 2015 WOTUS Rule." Plaintiffs' Principal Brief at 17, 18. A premise of the district court's order denying Plaintiffs' motions was that the Agencies had "decline[d] to take a position on the merits of plaintiffs' claims." 2 App. 329. In assessing the putative irreparable harm to Plaintiffs, the court focused on four declarations submitted in 2015 and briefly addressed supplemental declarations filed in 2019. 2 App. 331-33.

All of these bases for the pending appeal have been dramatically overtaken by events, and therefore this appeal from the preliminary-injunction denial is prudentially moot. Principally, the Agencies have unconditionally repealed the 2015 Rule on the ground (first among others) that it was substantively unlawful—it "did not implement the legal limits on the scope of the agencies' authority under the Clean Water Act (CWA) as intended by Congress and reflected in Supreme Court cases." 84 Fed. Reg. at 56,626; *see also supra* pp. 8-9 (summarizing the three other grounds for repeal).

In accord with this conclusion, reached after thorough consideration of approximately 770,000 public comments, the Agencies now *do* take a position—a largely *favorable* position for Plaintiffs, although the Agencies do not endorse all of their theories—on the merits of Plaintiffs' claims. Similarly, the Repeal Rule returns the reach of the Agencies' Clean Water Act regulations "to the longstanding and familiar distribution of power and responsibilities that existed under the CWA for many years prior to the 2015 Rule." 84 Fed. Reg. at 56,626. Finally, the on-the-ground facts described in the 2015 and early-2019 declarations are both stale and

premised on a different legal landscape. In these circumstances, the prudent course is to remand the case to the district court to determine whether Plaintiffs' claims for permanent injunctive and declaratory relief necessitate further proceedings in light of the Agencies' Repeal Rule and, if so, to resolve those claims.

Remanding is supported by the doctrine of prudential mootness. Under longstanding precedent of this Court, an appeal may be "moot under the doctrine of 'prudential mootness' even if there is no constitutional mootness problem. Courts generally invoke this doctrine in the context of a request for preliminary injunction, where it seems that the defendant (usually the government) is in the process of changing its policies such that any repeat of the actions in question is unlikely." *American Constitutional Law Foundation, Inc. v. Davidson*, No. 99-1142, 2000 WL 488460, at *2 (10th Cir. Apr. 26, 2000) (unpublished) (citing *Building & Construction Department v. Rockwell International Corp.*, 7 F.3d 1487, 1492 (10th Cir. 1993)). To paraphrase then-Judge Gorsuch, "if events so overtake a lawsuit that the anticipated benefits of a [decision] no longer justify the trouble of deciding" the appeal, "equity may demand not decision but [remand]." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (describing the circumstances in which this Court will find a matter "prudentially moot"). That describes the very situation here.

Judge Gorsuch explained that "claims for equitable relief"—including the very preliminary injunction sought by Plaintiffs here—"appeal to the 'remedial discretion' of the courts." *Id.* (citing *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727

(10th Cir. 1997)). That discretion "necessarily includes the power to 'mould each decree to the necessities of the particular case.'" *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)). And "inhering in that power is the concomitant power to deny relief altogether unless 'the moving party [can] satisfy the court that relief is needed.'" *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

It is far from clear that *preliminary* relief is urgently needed now. After all, a "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A bedrock requirement is that the "applicant must demonstrate that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*." *Id.* at 22 (internal quotation marks omitted; emphasis added). Indeed, this Court has reiterated that a showing of irreparable harm prior to a merits decision is "the single most important prerequisite" to preliminary relief. *DTC Energy*, 912 F.3d at 1270 (quoting *First Western Capital Management Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017), in turn quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004)). Plaintiffs likewise acknowledge that a "purpose of a preliminary injunction is . . . to 'preserve the status quo *pending a final determination of the case on the merits*.'" Plaintiffs' Principal Brief at 49 (emphasis added; quoting *Keirnan v. Utah Transit Authority*, 339 F.3d 1217, 1220 (10th Cir. 2003)).

Moreover, as the October 7, 2019 Order directing the parties to file memorandum briefs explained, the statutory exception allowing for appeals from the

denial of a preliminary injunction "implies an urgent need for immediate appellate review of the district court's order." Order at 2 (citing 28 U.S.C. § 1292(a)(1)). That urgency is now diminished because of the Repeal Rule.

We do not suggest that this appeal is now *constitutionally* moot, i.e., beyond the jurisdiction of the federal courts to adjudicate under Article III. The "crucial question" with respect to constitutional mootness is whether adjudicating the dispute "will have some effect in the real world." *Ind v. Colorado Department of Corrections*, 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010)). Mootness is a high bar, and a case "becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin,* 568 U.S. 165, 172 (2013) (emphasis added). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* (citations and quotations omitted).

By its terms, the Repeal Rule becomes effective on December 23, 2019, 84 Fed. Reg. at 56,626, and consequently it is not yet in effect. And considering the complex administrative and litigation history of the 2015 Rule, *see supra* pp. 4-7, there is reason to believe the Repeal Rule might not take effect at that time. Both environmental and industry groups have either filed new complaints or sought to supplement existing complaints to challenge the Repeal Rule in whole or in part, and it is possible that a party will seek a preliminary injunction against the Repeal Rule in one of those cases

or in a not-yet-filed case.[*] While it often comes to pass that a legally effective rescission of a rule or other agency action will moot a pending challenge, *see, e.g.*, *Wyoming v. U.S. Department of Agriculture*, 414 F.3d 1207, 1212 (10th Cir. 2005); *Rio Grande Silvery Minnow*, 601 F.3d at 1115, there is no reason for this Court to speculate about what will happen regarding the Repeal Rule. It is precisely to determine the present "effect in the real world" of the Repeal Rule and of the inevitable legal challenges thereto, *Ind*, 801 F.3d 1213, that this case ought to be returned to the district court.

[*] *See also South Carolina Coastal Conservation League v. Wheeler*, No. 2:19-cv-3004 (D.S.C. complaint filed Oct. 23, 2019); *New Mexico Cattle Grower's Ass'n v. EPA*, No. 1:19-cv-988 (D.N.M. complaint filed Oct. 22, 2019); *Pierce v. EPA*, No. 0:19-cv-2193 (D. Minn. supplemental complaint filed October 22, 2019); *Washington Cattlemen's Association v. EPA*, No. 2:19-cv-00569 (W.D. Wash. motion to supplement complaint filed Oct. 24, 2019); https://www.nrdc.org/experts/nrdc/trump-administration-kicks-clean-water-protections-out-door (Sept. 12, 2019) (vowing that the Rule "will certainly be challenged in court"); Scott Dance, Maryland AG Frosh Says He Plans to 'Vigorously Challenge' Trump Rollback of Clean Water Rule, *Baltimore Sun*, Sept. 12, 2019, https://www.baltimoresun.com/news/environment/bs-md-wotus-20190912-2haqlcozpvhazfovkdkvuhniqi-story.html.

CONCLUSION

For the foregoing reasons, this case should be remanded for resolution of Plaintiffs' claims for permanent injunctive and declaratory relief.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Agencies submit that the need for a remand is straightforward and that oral argument is unnecessary.

CERTIFICATE OF DIGITAL SUBMISSION, PRIVACY REDACTIONS, AND TYPE-VOLUME AND TYPEFACE

I hereby certify that

- there is no information in this filing subject to the privacy redaction requirements of 10th Cir. R. 25.5;
- the required paper copies of this brief are exact copies of the version of the brief submitted electronically;
- the filing was scanned with Windows Defender Antivirus, Threat Definition Version 1.305.2798.0, updated November 25, 2019, and according to the program the filing is free of viruses;
- the brief complies with applicable type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it has 3,840 words; and
- the 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 this document has been prepared in 14-point Garamond, a proportionally spaced typeface using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the using the appellate CM/ECF system. All case participants registered as CM/ECF users will be served by the CM/ECF system.

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