No. 17-72922

In the United States Court of Appeals for the Ninth Circuit

AMAZON.COM, INC. AND SUBSIDIARIES,

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES TAX COURT
DOCKET NO. 31197-12, HONORABLE ALBERT G. LAUBER

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Regulations

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This case presents a question of significant importance to the Chamber and its members: Whether the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) may evade their obligation to comply with the Administrative Procedure Act (APA) and related administrative law doctrines. Here, the IRS failed to comply in a

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[*] All parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the Chamber certifies that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

number of critical respects. Such arbitrary and capricious action imposes tremendous negative consequences for the Nation's business community and the national economy.

The business community has a particular interest in the interpretation and application of the rules governing the administrative process. Many businesses face a growing array of regulations, with tax regulations being among the most complex. When planning their operations and investing for the future, businesses have no choice but to rely on those regulations. Businesses, moreover, critically depend on the procedures and protections that the APA and related administrative law doctrines provide against arbitrary or otherwise unlawful agency action. Given the breadth of its membership and its long history of challenging regulations that violate the APA, the Chamber is uniquely positioned to speak to the administrative law principles implicated by this case as well as the consequences to the Nation's business community of arbitrary agency regulatory activities that upset settled expectations.

SUMMARY OF ARGUMENT

I. The Supreme Court, the D.C. Circuit, and the Tax Court have properly rejected the IRS's longstanding "tax exceptionalism" posi-

tion that its regulatory activities are not fully governed by the APA and related administrative law doctrines. Yet, as this case illustrates, the IRS apparently has not received the message. Here, the IRS attempts to rewrite a two-decades-old tax regulation to impose tax liability retroactively and without fair notice. To do so, the IRS advances through litigation an unsupportable interpretation of a preexisting "clarification" to a regulatory definition. To change the regulation, the proper course under the APA would have been for the agency to engage in notice-and-comment rulemaking. Such process, however, would have required the agency to respond to adverse public comments, expressly recognize in the rule that it was expanding the regulatory definition, and attempt to justify such a revolutionary change.

II. The IRS attempts to wash away its failure to follow these administrative procedures by invoking the judicial deference doctrine that an agency's regulatory interpretation controls "unless it is plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). *Auer* deference raises serious constitutional concerns, and it is wholly inappropriate here. Not only is the IRS's interpretation of the "clarification" incon-

sistent with the regulation, as the Tax Court concluded, but the Supreme Court has commanded that *Auer* deference not apply in cases like this, where the agency's novel interpretation would apply retroactively in a way that violates principles of fair notice.

III. The IRS's failure to comply with the APA and its improper attempt to secure *Auer* deference have substantial negative consequences for the Nation's business community and thus the national economy. Arbitrary and capricious changes to federal regulations uproot settled expectations among regulated businesses. This is particularly true in the context of tax regulation, where businesses rely heavily on the existing law when directing their business operations and implementing their investment strategies. It is imperative that federal courts serve as an independent check on arbitrary agency action.

ARGUMENT

I. Applying Traditional Administrative Law Principles, the Tax Court Correctly Concluded that the IRS's Action Was Arbitrary and Capricious

For decades, tax law has suffered from what has been coined "tax exceptionalism"—the misperception that tax administration is not governed by the same rules of administrative law that generally apply to

any federal agency action. In recent years, however, courts have correctly rejected this "tax myopia."[1] Yet, as this case illustrates, the IRS continues to embrace tax exceptionalism when administrative law would get in the way of the agency's preferred policy outcome.

The APA sets the default rules for all federal "agency" action and judicial review thereof. Under the APA, the IRS, an executive agency within Treasury, is plainly an "agency" for purposes of the APA. *See* 5 U.S.C. § 701(b) (defining agency). As the Supreme Court has long held, "a reviewing court must apply the APA's court/agency review standards in the absence of an exception." *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999). Congress has provided no such exception to the IRS or Treasury.

To the contrary, in *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011), the Court refused to apply a different standard of review to a Treasury and IRS interpretation

[1] *See* Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 Va. Tax Rev. 517, 518-19 (1994); *see also* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537, 1541 (2006) (describing the "perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence"); Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 Minn. L. Rev. 221, 222-24 (2014) (further chronicling how federal courts have begun to reject tax exceptionalism).

of the tax code than is applied to other federal regulations. In holding that tax regulations can be eligible for deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), the unanimous *Mayo* Court refused "to carve out an approach to administrative review good for tax law only," noting that it has "expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" *Mayo*, 562 U.S. at 55 (quoting *Dickinson*, 527 U.S. at 154).

Similarly, in *Cohen v. United States,* 650 F.3d 717, 736 (D.C. Cir. 2011), the D.C. Circuit held en banc that the APA's judicial review provisions apply with full force to a form of IRS guidance known as a notice. The D.C. Circuit noted that "[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA." *Id.* at 723.

Here, the IRS once again engages in tax exceptionalism. The IRS attempts to rewrite via litigation a two-decades-old tax regulation that had limited the definition of "intangibles" in such a way that excluded items such as work-force-in place, goodwill, or going-concern value. The 1995 regulatory definition of an intangible listed 28 specific items, each of which must have "substantial value independent of the services of

any individual." 26 C.F.R. § 1.482-4(b) (2006). No listed item covered intangibles that are not considered intellectual property—the types of intangibles the IRS now claims are included within the regulatory definition. Instead, as Appellees argues (at 27-30), the regulatory definition limits intangibles to those that can be sold independently of a business.

To get around this plain reading of the regulation, the IRS argues that a "clarification" swept in a broader range of intangibles beyond intellectual property. The Tax Court has now twice rejected this argument as a matter of interpretation and regulatory history. In the decision below, the Tax Court recounted the regulatory history:

> In 1993 the IRS considered updating the 1968 transfer pricing regulations. Via temporary and proposed regulations, the Secretary requested comments specifically as to whether "the definition of intangible property . . . should be expanded to include items not normally considered to be items of intellectual property, such as work force in place, goodwill or going concern value." 58 Fed. Reg. 5312 (Jan. 21, 1993). After receiving numerous comments opposing such an expansion, the IRS decided not to change the definition of intangible property. *See* T.D. 8552, 1994-2 C.B. 93 (explaining that the revised regulations merely clarified the 1968 definition).

ER80 n.18; *see also Veritas Software Corp. v. Comm'r*, 133 T.C. 297, 316 (2009) (similarly rejecting the IRS's interpretation of intangibles).

In other words, Treasury and the IRS recognized in 1993 that the regulation's definition of an intangible did not include "work force in place, goodwill or going concern value," and thus asked for public comment on whether to "expand" the definition to include those types of items. Treasury and the IRS received a number of substantial comments criticizing the proposal to expand the regulatory definition.

For instance, Dole Food Company "question[ed] whether the Service has the statutory authority to make this addition to the regulations" and then explained that "[i]t would be impossible in the case of going concern value or goodwill [to get accurate information on similar items] since no two companies or fact patterns are exactly alike." Appellees Br. App010-App011. The American Petroleum Institute similarly questioned the IRS's statutory authority, underscoring, *inter alia*, the "dependent nature which disqualifies these items for ready valuation and independent commercial transfer." App014. In addition to questioning the IRS's statutory authority, the law firm Roberts & Holland expressed confusion about the scope of the proposed definition and requested "to know how to understand the difference." App016-App017.

In 1994, Treasury issued its final definition of intangibles, which was incorporated into the 1995 final rule on cost-sharing at issue here. The new regulatory definition did not say anything about going-concern value, workforce-in-place, or other intangibles that cannot be independently transferred. Treasury, however, did modify the catch-all "other similar items" clause, but described this change as merely a "clarifi[cation] to refer to items that derive their value from intellectual content or other intangible properties rather than physical attributes." 59 Fed. Reg. 34971, 34983 (July 8, 1994).

As a matter of regulatory interpretation, this should be the end of the matter, foreclosing the IRS's current interpretation of the regulatory definition. The IRS, however, claims this "clarification" of the residual clause did indeed expand the definition to include intangibles that cannot be independently transferred. As Appellees detail (at 31-35), this argument is unpersuasive. But in advancing the argument, the IRS also ignores fundamental principles of administrative law.

1. It is blackletter administrative law that "[a]n agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct.

1199, 1203 (2015) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). As this Court has noted in embracing D.C. Circuit precedent, the "APA's purpose is to cause agency to respond to comments in a reasoned manner and explain how agency resolved problems." *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992), *amended on other grounds*, 985 F.2d 1419 (9th Cir. 1993); *accord Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (observing that the APA-guaranteed "opportunity to comment is meaningless unless the agency responds to significant points raised by the public") (footnote omitted)). Treasury and the IRS's failure to respond to significant comments, including those discussed above, would have doomed any attempt to expand the definition in the final rule.

2. Similarly, the Supreme Court has long held that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*). Nothing in the final rule suggests Treasury and the IRS intended to expand the definition of an intangible. To the contrary, the only reasonable interpretation of the final rule is that they abandoned

the attempt to broaden the definition. The grounds for the IRS's new, strained interpretation of "clarification" are thus not properly included in the final rule as required by *Chenery I*.

3. If Treasury and the IRS intended to change the prior, narrower definition, they were required to at least recognize in the final rule that the agency intended to change its position. In *FCC v. Fox Television Stations*, the Supreme Court held that the APA's "requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." 556 U.S. 502, 515 (2009). "And of course the agency must show that there are good reasons for the new policy." *Id.*

This Court has identified four key procedural requirements that *Fox* crystalized: "a policy change complies with the APA if the agency (1) displays 'awareness that it is changing position,' (2) shows that 'the new policy is permissible under the statute,' (3) 'believes' the new policy is better, and (4) provides 'good reasons' for the new policy . . . ." *Orga-*

nized Vill. of Kake v. USDA, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Fox*, 556 U.S. at 515-16).

Here, Treasury and the IRS did not attempt to respond to significant critical comments regarding the proposed expanded definition, did not expressly embrace the new definition in the final rule, and did not even recognize in the final rule that the agency was aware it had changed the regulatory definition, much less provide good reasons for such a change. The most likely explanation for Treasury and the IRS's failure to follow these basic administrative principles is that they had decided in 1995 *not* to adopt the expanded regulatory definition. Accordingly, to achieve the change the IRS now argues the "clarification" effectuated, Treasury and the IRS would have had to have engaged in another notice-and-comment rulemaking and complied with these APA procedures to expand the regulatory definition.

The Tax Court correctly rejected as arbitrary and capricious the IRS's attempt to rewrite the regulatory definition through the IRS's litigating position. This Court should similarly forbid the IRS from rewriting the regulation now based on a manipulation of a "clarification" that,

if read as the IRS now insists, would have violated basic principles of administrative law.

II. *Auer* Deference Does Not Apply Here, Where the IRS's Interpretation Is Inconsistent with the Regulatory Text and Lacks Fair Notice for Regulated Entities

Having advanced an unsupportable interpretation of an alleged "clarification" that, if true, would have violated a number of fundamental administrative law principles, the IRS alternatively argues (at 56-60) that the tax regulation is ambiguous and thus the IRS's novel regulatory interpretation is owed deference under the *Auer* doctrine. This last-ditch effort fails for at least three reasons.

1. By its express terms, *Auer* deference does not apply if the agency's regulatory interpretation "is plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted); *accord Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). As the Tax Court concluded and as Appellees set forth in greater detail (at 27-39), the IRS's interpretation is inconsistent with the regulatory definition. Indeed, the regulatory history detailed in Part I confirms the regulation excludes the interpretation the IRS now advances.

2. The Supreme Court has instructed that *Auer* deference does not apply when an agency advances a regulatory interpretation that would apply retroactively and without fair notice. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-156 (2012). As this Court has held, courts do not "accord *Auer* deference to an interpretation that 'would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires.'" *Barboza v. Cal. Ass'n of Prof'l Firefighters*, 799 F.3d 1257, 1267 (9th Cir. 2015) (quoting *Christopher*, 567 U.S. at 156)).

Indeed, administrative law has long attempted to cabin agency efforts to regulate retroactively in ways that fail to provide fair notice. For instance, this Court embraced a similar unfair surprise principle decades before *Christopher*, holding that "the application of a regulation in a particular situation may be challenged on the ground that it does not give fair warning that the allegedly violative conduct was prohibited." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1192 (9th Cir. 1982).

In *Christopher*, like here, the agency's "interpretation of ambiguous regulations [would] impose potentially massive liability on [the regulated entity] for conduct that occurred well before that interpretation

was announced." 567 U.S. at 155-156. To apply *Auer* deference in such circumstances, the *Christopher* Court held, "would result in precisely the kind of 'unfair surprise' against which our cases have long warned." *Id.* at 156 (citing cases).

The unfair surprise here is arguably more severe than that in *Christopher*. Not only did the IRS announce its new interpretation long after Amazon.com had structured its business operations in 2004 and 2005 around the most natural reading of the 1995 interpretation, *see* ER22 fn.7, but the early 1990s regulatory history foreclosed the IRS's new interpretation. As discussed in Part I, Treasury and the IRS proposed the more expansive definition in 1993. In 1994, after receiving significant critical comments about the proposed expansion, Treasury and the IRS abandoned any attempt to expand the definition in the final rule—thus bringing important certainty to the regulatory definition.

Indeed, it was not until after Amazon.com structured its business operations that the IRS began to argue that the 1994 "clarification" changed the regulatory definition. *See* Appellees Br. 43 n.10 (citing sources). And this purported "clarification" was not some minor adjustment that could have been anticipated. As the IRS's own expert testi-

fied before the Tax Court in this case, the subsequent 2009 tax regulation that adopted this definition going forward constituted a "revolution in thinking" and a "[sea] change." SER011.

In the related context of reconciling two conflicting tax regulations, Judge Fisher observed that *Auer* deference does not apply when "taxpayers have not been given clear, fair notice of how the regulations will affect them." *Xilinx, Inc. v. C.I.R.*, 598 F.3d 1191, 1198 (9th Cir. 2010) (Fisher, J., concurring). The same is true here. Based on the text of the regulation, the regulatory history from the 1990s, and the IRS's arbitrary actions in the 2000s, Amazon.com and similarly situated taxpayers certainly have not been given clear, fair notice of how the regulations will affect them. *Auer* deference is thus wholly inappropriate.

3. Judicial deference to an agency's interpretation of its own regulations raises serious constitutional concerns that warrant cautious and narrow application by the courts.

Two decades ago John Manning, now Dean of Harvard Law School, argued that the Supreme Court should eliminate *Auer* (also known as *Seminole Rock*) deference and replace it "with a standard that imposes an independent judicial check on the agency's determination of

regulatory meaning." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). Professor Manning based his critique on separation of powers, and he drew on legal principles set forth by Blackstone, Locke, and Montesquieu concerning the dangerous consolidation of law-making and law-execution powers in the same government actor.

Since then, even *Auer*'s author—Justice Scalia—had joined the call to revisit *Auer* deference, observing that "[f]or decades, and for no good reason, we have been giving agencies the authority to say what their rules mean." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part). Other Justices have recently joined in the chorus of constitutional criticisms. For example, in *Perez v. Mortgage Bankers Ass'n*, Justices Thomas and Alito joined Justice Scalia's call to revisit *Auer* deference. *See* 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment); *id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

Auer deference is problematic precisely because it "seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am. v. Mich. Tel.*

Co., 564 U.S. 50, 68 (2011) (Scalia, J., concurring). That is because "when an agency promulgates an imprecise rule, it leaves to *itself* the implementation of that rule, and thus the initial determination of the rule's meaning." *Id.*

Moreover, this consolidation of power within a federal agency can create perverse incentives. In particular, as Justice Scalia explained, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.* at 69.

These separation-of-powers concerns serve as a caution to lower courts to narrowly apply *Auer* deference in only those instances clearly commanded by Supreme Court precedent. Indeed, two recent empirical studies suggest that circuit courts have already begun to cut back on *Auer* deference in light of these concerns.[2]

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[2] *See* Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813, 827 (2015) ("Between the Court's decisions in *Talk America* and *Christopher*, courts of appeals granted *Auer* deference at a rate of 82.3%. That rate dropped to 74.4% during the period between *Christopher* and *Decker*, and fell further to 70.6% since *Decker*."); William Yeatman, *An Empirical Defense of* Auer *Step Zero*, 106 Geo. L.J. 515, 547 (2018) (reviewing 1,047 circuit court decisions from 1993

For the reasons discussed above, this is an easy case for refusing *Auer* deference. To discourage the IRS from advancing perverse regulatory interpretations that are in tension with the text of the regulation and cause unfair surprise for taxpayers, this Court make clear that *Auer* deference will never apply, and should not even be requested, in cases such as this.

III. Allowing the IRS to Ignore Blackletter Administrative Law Introduces Great Uncertainty for the Business Community and Harms the National Economy

The IRS's arbitrary and capricious regulatory activities have real-world, substantial impacts on the Chamber's members and thus the national economy. Businesses depend on clear, predictable rules—and fair and nonarbitrary administrative processes—when planning their operations and investing for their businesses. This is particularly true of tax regulations. An agency's refusal to be constrained by administrative law's procedural protections creates destabilizing uncertainty for the individuals, businesses, and industries regulated by those laws. Such

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through 2013 and finding that the agency-win rate under *Auer* before 2006 was 77.8% but dropped to 71.4% after that).

arbitrary bureaucratic behavior, moreover, can disrupt an industry's settled expectations and investments.

Misapplication of *Auer* deference has similar negative impacts on the Chamber's members. Judicial deference to agency regulatory interpretations, especially those that change the regulatory landscape without fair notice, risks introducing destabilizing uncertainty for the individuals, businesses, and industries regulated by such laws. An agency's *post hoc* departure from the best reading of a regulation can disrupt an industry's settled expectations and investments, with profound economic consequences for the industry and, in turn, for the national economy.

This does not mean, of course, that agencies can never alter the regulatory landscape. When changing regulations, however, federal agencies must follow the APA and related administrative law doctrines, which ensure stakeholders have a meaningful role in preventing arbitrary, unworkable, or irrational regulation. "In explaining its changed position," the Court has counseled, "an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quoting *Fox*, 556 U.S. at 515).

The dangers inherent in the IRS's tactics here should be plain: the IRS wants to take advantage of the agency discretion afforded by *Auer* deference without also being bound by the constraints administrative law imposes on federal agency action in order to ensure an agency's discretion is not exercised in an arbitrary and capricious manner. The Supreme Court, the D.C. Circuit, and the Tax Court have all rejected any such claims of tax exceptionalism. This Court should send a clear message to the IRS that it must play by the same rules of the road that govern the rest of the federal regulatory state.

CONCLUSION

For these reasons, the Tax Court's decisions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 4,116 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing brief using this Court's Appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

July 5, 2018

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