No. 17-60191

In the United States Court of Appeals for the Fifth Circuit

TEXAS, *Petitioner*,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF ENERGY; JAMES RICHARD "RICK" PERRY, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF ENERGY; UNITED STATES NUCLEAR REGULATORY COMMISSION; KRISTINE L. SVINICKI, IN HER OFFICIAL CAPACITY AS CHAIRMAN OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION; UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD; THOMAS MOORE, PAUL RYERSON, AND RICHARD WARDWELL, IN THEIR OFFICIAL CAPACITIES AS UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD JUDGES; UNITED STATES DEPARTMENT OF THE TREASURY; AND STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY, *Respondents.*

Original Action under the Nuclear Waste Policy Act

TEXAS'S OPPOSITION TO AND MOTION TO STAY CONSIDERATION OF THE MOTION OF THE NUCLEAR ENERGY INSTITUTE AND NUCLEAR UTILITIES FOR LEAVE TO INTERVENE IN SUPPORT OF RESPONDENTS

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INTRODUCTION

This case arises from more than 35 years of inexcusable federal inaction on a commitment it made to build a permanent repository for growing, above-ground stockpiles of nuclear waste. *See* Nuclear Waste Policy Act ("NWPA" or "Act"), 42 U.S.C. § 10101 *et seq*. Texas, a uniquely-situated sovereign with its own, independently-managed energy grid, is a particular victim of this federal stagnation. Unwilling to wait any longer, Texas is resolved to protect its residents and territory from environmental, terroristic, and other dangers enhanced by the federal government's fecklessness. Thus, Texas's Petition prays for a series of remedies to move forward on the permanent storage of nuclear waste, including declaratory judgments, injunctions, writs of mandamus, accountings, civil contempt, and if ultimately necessary, restitution and disgorgement of the $40 billion Nuclear Waste Fund.

To the end of moving the federal government forward, the nuclear energy industry is an unquestionable ally. Putative Intervenors the Nuclear Energy Institute and nuclear utilities (collectively "NEI") share Texas's desire to restart the federal government's used fuel management program. Mot. of Nuclear Energy Inst. & Nuclear Utils. for Leave to Intervene in Supp. of Resp'ts ("NEI Mot.") 3, No. 17-60191 (Apr. 5, 2017). But NEI does not seek to support Texas's lawsuit; it seeks only to oppose restitution and disgorgement.

The thrust of Texas's Petition, however, is "equitable relief prohibiting [the Department of Energy] from conducting any other consent-based siting activity and ordering Respondents to finish the Yucca licensure proceedings." Pet. 3. In addition, Texas seeks concrete, identifiable forward progress on, as well as the ultimate result

of, the federal government's seasoned promise to provide permanent, underground nuclear waste storage.

To assist the Court in this endeavor, Texas's Petition prays for twenty-four different remedies. Pet. 25–28. Restitution and disgorgement, as antidotes to perennial federal indecision or inaction, may be appropriate for consideration "if Respondents are unable (or unwilling) to complete their obligations under the Act, or fail to approve the license for Yucca Mountain." Pet. 3. However, the other pleaded remedies are available to the Court as prospective means of achieving the overarching goals shared by both Texas and NEI.

If and until appropriate circumstances present themselves, argumentation, briefing, or other discussion regarding restitution and disgorgement is premature. Since NEI seeks intervention only to oppose restitution and disgorgement, the Court should deny its motion without prejudice to refiling or, alternatively, the Court should stay adjudication of NEI's motion.

ARGUMENT

When resolving a motion to intervene in an action filed under the Act, the Court considers (1) "the statutory design of the act," and (2) "the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24." *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985). Here, neither consideration warrants NEI's intervention at this juncture. This is an original proceeding under the NWPA requesting twenty-four different remedies to enable forward motion on safely disposing of nuclear waste. The NWPA's statutory scheme, and NEI's asserted interests in restitution and disgorgement only, merit denial or a stay of its intervention at

this time. Second, though its intervention is premature, NEI's interests are adequately represented by the federal Respondents. Thus, the Court should deny NEI's motion without prejudice to refiling, or stay consideration of NEI's motion to intervene, until such time as restitution and disgorgement are appropriate for adjudication.

I. The Statutory Design of the Nuclear Waste Policy Act Allows Texas to Seek Incremental Relief, which Warrants Denial of NEI's Intervention at this Juncture.

If one thing is clear after 35 years of stagnation on building a nuclear waste repository, it is that a solution cannot be achieved by any litigant in a one-off petition for review or writ of mandamus. *See, e.g., In re Aiken Cty.*, 725 F.3d 255, 266–67 (D.C. Cir. 2013) (issuing writ of mandamus for NRC to complete Yucca Mountain licensure); *In re U.S. Dep't of Energy*, No. 63-001, 2013 WL 7046350, at *6–7 (N.R.C. Nov. 18, 2013) (performing few tasks to move the program forward). That is why Congress designed the NWPA—to give the Court broad equitable authority to remedy a complex problem. Congress did not construct the Act to operate like a routine petition for review of agency action under Federal Rule of Appellate Procedure 15. Instead, the NWPA's design enables the Court to fashion an appropriate, or even incremental approach, to remedying Texas's problem.

When Congress empowered this Court with "original and exclusive jurisdiction," 42 U.S.C. § 10139(a)(1), over nuclear waste policy disputes, it did not cabin the resulting proceedings to review of agency actions. Rather, the Act confers jurisdiction over agency decisions or actions, review of environmental impact statements

and assessments, review of research and development activity, *id.* § 10139(a)(1)(A, C–F), and, as raised in this case, civil actions "alleging the failure of the Secretary [of Energy], the President, or the [Nuclear Regulatory] Commission to make any decision, or take any action, required under" the Act, *id.* § 10139(a)(1)(B).

Concomitant with the Act's expansive subject matter jurisdiction is its broad, unenumerated remedial powers. The Court may issue any lawful relief, such as injunctions, FED. R. APP. P. 21, mandamus, 28 U.S.C. § 1651; FED. R. APP. P. 21, declaratory judgments, 28 U.S.C. § 2201, and any other form of equitable relief requested in the Petition, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015).

This stands in stark contrast to a Congressionally-granted petition for review of a single final agency action. For example, the review authority authorized by Congress in the Clean Air Act ("CAA") is limited in scope. Petitions for review under the CAA must involve formal agency action that "appears in the Federal Register." 42 U.S.C. § 7607(b)(1). And those final agency actions are preceded by extensive docketing and public interaction that shape and mold that which is eventually published. *Id.* § 7607(d). The CAA also limits petitions for review of decisions of nationwide scope to venue in the District of Columbia—where the agency rulemaking is centralized. *Id.* § 7607(b)(1). And seeking alternate relief through other civil or criminal mechanisms is foreclosed. *Id.*

Enacted by Congress long after the petition for review process was well-established, the NWPA is a far different animal. The Act establishes a "civil action" for those affected by nuclear waste and provides six broad categories of lawsuits, 42 U.S.C. § 10139(a)(1), whereas the CAA petition for review process provides a mere

District of Columbia-based process for reviewing, after-the-fact, agency rulemaking following extensive public interaction. The Act also establishes proper venue, not in the District of Columbia, but in "the judicial circuit in which the petitioner involved resides or has its principal office . . . ." *Id.* § 10139(a)(2). And the design of the Act gives wide latitude as to the types of actions, or inactions, that can be challenged—matters well beyond those things formally promulgated and published in the Federal Register. *Id.* § 10139(a)(1).

In accordance with the broad parameters of the Act, Texas filed this Petition to start an ongoing, Court-supervised process of seeking equitable remedies that will result in the permanent, underground storage of nuclear waste. Because the facts pleaded by Texas are largely undisputed, the Court is already empowered to stop the Department of Energy ("DOE") from engaging in unlawful, consent-based siting for repositories. The Court can also order the Nuclear Regulatory Commission ("NRC") and DOE to request funding from Congress to complete the Yucca Mountain license, as required by the NWPA, or take other incremental approaches to the problem. Texas recognizes that these, and other prospective orders of the Court, may involve periods of time for compliance and that the ongoing supervision by the Court in moving things forward may take years. In other words, this case is not a one-off adjudication of an agency decision under Federal Rule of Appellate Procedure 15.

At some point during the case, particularly if the federal Respondents refuse to comply with the Court's orders, or none of the Court's efforts created any meaningful impact on building a repository, then a deeper discussion about the Nuclear Waste Fund itself may be appropriate. Until that time, however, as the Court has

already found, NEI's "only participation in the statutory scheme of the NWPA is in funding it," which "does not give the utilities such a special interest in every action [or inaction] taken by the DOE pursuant to the NWPA as to require their intervention." *Texas*, 754 F.2d at 552. For these reasons, NEI's interest in "protect[ing] the Fund" from restitution or disgorgement is insufficient to merit intervention under the Act at this time. *Id.* at 551.

II. The Motion to Intervene is Untimely.

NEI's motion to intervene is untimely. Ordinarily, the timeliness of an intervention is assessed as to whether the application is too late. Here, intervention is too early.

An applicant may intervene as of right under FED. R. CIV. P. 24(a)(2) when its application is "timely," it has "an interest relating to the property or transaction that is the subject of the action," "disposition of the action" will "impair or impede its ability to protect its interest," and its interests are "inadequately represented by the existing parties to the suit." *Sierra Club v. Espy*, 18 F.3d 1202, 1204–05 (5th Cir. 1994); *accord Texas*, 754 F.2d at 552.

Indeed, timeliness is an "indispensable factor" in establishing the grounds for intervention. *See Staley v. Harris Cty., Texas*, 223 F.R.D. 458, 461 (S.D. Tex. 2004), *aff'd*, 160 F. App'x 410, 411, 412 (5th Cir. 2005) (per curiam) (upholding an "exceptionally good" and "thorough" district court opinion). An untimely intervention may be denied without taking into account the Rule's other requirements. *Id.* (citing *Edwards v. City of Hous.,* 78 F.3d 983, 999 (5th Cir. 1996)); 7C Charles Alan Wright

& Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1913 (3d ed. 2007) (explaining that "timeliness *requires* a discretionary balancing of interests and in this sense *all* intervention is discretionary") (emphasis added) (internal footnotes omitted).

> Four factors serve as guideposts for determining the timeliness requirement:
>
> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to intervene;
>
> (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case;
>
> (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and
>
> (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Espy, 18 F.3d at 1205. As suggested by the multifactor test, the timeliness inquiry is "contextual." *Id.* It is based on "all the circumstances" rather than "chronological considerations," *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977), or "absolute measures of timelines," *Epsy*, 18 F.3d at 1205.

While the Court has concluded that the timeliness factor under FED. R. CIV. P. 24(a)(2) only measures whether intervention is too late, *Sierra Club v. Glickman*, 82 F.3d 106, 109 n.1 (5th Cir. 1996), the circumstances presented here are unique and, of course, not governed by FED. R. CIV. P. 24. Timeliness, whether too early or too late, is "determined from all the circumstances," *NAACP v. New York*, 413 U.S. 345,

366 (1973), including "unusual circumstances," *Espy*, 18 F.3d at 1205. "And [timeliness] is to be determined by the court in the exercise of its sound discretion . . . ." *NAACP*, 413 U.S. at 366.

The denial of intervention for being too early is not unprecedented. In *United States v. Metropolitan District Commission*, the First Circuit upheld the denial of an intervention that was, in part, "too early," because the interests the intervenor wished to protect were not yet at issue. 865 F.2d 2, 4 (1st Cir. 1989). And in *United States v. Louisiana*, the court said, "there is a sense in which the currently proposed intervention may be said to be untimely inasmuch as it may be too early yet to decide fairly whether there is a real need for it." 90 F.R.D. 358, 362 (E.D. La. 1981), *aff'd*, 669 F.2d 314 (5th Cir. 1982); *see also Gautreaux v. Chi. Hous. Auth.*, No. 66 C 1459, 2004 WL 1427107, at *5 (N.D. Ill. June 23, 2004) (discussing the denial of an intervention that was "too early"); *In re Silicone Gel Breast Implant Prod. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *20 (N.D. Ala. Sept. 1, 1994) ("In denying these motions to intervene on the basis of timeliness, the court did so not because they came too late, but because they are too early.").

Here, the unique circumstances of this matter—a "civil action" under the NWPA—warrant either denying NEI's motion without prejudice as too early, or staying consideration of its motion until a later date. NEI's motion is "limited to the Texas prayers for relief seeking restitution from and disgorgement of the Nuclear Waste Fund." NEI Mot. 1. But as the Court found in another matter, "the Fund is not [yet] at issue here." *Texas*, 754 F.2d at 552. NEI's intervention prematurely jumps the Court to arguably the greatest exercise of its equitable power under the

NWPA, whereas compliance with the NWPA is the core of Texas's Petition. NEI's motion to intervene is untimely.

III. NEI's Interests Are Adequately Represented by the Parties.

The best time to determine whether intervention is appropriate is the point at which it becomes apparent that the parties are or are not adequately representing the applicants' interests. *Stallworth*, 558 F.2d at 265. The "burden of establishing inadequate representation" is on the movants. *Haspel & Davis Milling & Planting Co. Ltd. v. Bd. of Levee Comm'rs of the Orleans Levee Dist.*, 493 F.3d 570, 578 (5th Cir. 2007). This requirement "ha[s] some teeth," *Veasey v. Perry*, 577 F. App'x 261, 263 (5th Cir. 2014), particularly when the movant seeks to intervene on the same side as a government defendant, *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994). In fact, the Court has recognized two situations where adequacy of representation is strongly presumed: when the movant and one party have the same ultimate objective, and when the movant seeks to intervene on the same side as the government. Both situations are present here.

A. NEI and the Federal Respondents Share the Same Objective on the Remedies of Restitution and Disgorgement.

NEI's interests are well-represented by the parties. Adequate representation is presumed when the movant and one of the parties to the suit have the "same ultimate objective." *Haspel*, 493 F.3d at 579. The "objective" is determined by the "matter currently before [the court]." *Id.* Currently, NEI and Texas are aligned. "NEI and the Nuclear Utilities share Texas' desire for restart of the federal used fuel management program." NEI Mot. 3. Texas also seeks to restart the program and

seeks equitable relief to, *inter alia*, declare Respondents in violation of the Act, enjoin DOE from consent-based siting, and mandamus DOE and NRC to restart the Yucca licensure. Pet. 25–26, ¶¶ 1–8.

Even if restitution and disgorgement were Texas's only pleaded remedies, NEI's stated objections to those remedies align with the federal Respondents (unless, of course, the federal government does not object to returning $40 billion to ratepayers). Though NEI has been engaged in litigation with the Respondents on past matters under the Act, NEI Mot. 14–15, those cases are improper barometers by which to measure the alignment of interests here. None of NEI's past disputes with the federal government under the NWPA involved restitution or disgorgement of the Nuclear Waste Fund. Rather, it is appropriate to presume that NEI and the federal government are acutely aligned in objecting to those remedies. Among other things, NEI does not want to lose the benefit of the Standard Contract. NEI Mot. 10–14. And the federal government does not want to give up $40 billion. Thus, Respondents adequately represent NEI's stated interests.

B. The Federal Respondents Adequately Represent NEI on the Remedies of Restitution and Disgorgement.

The Court presumes adequacy of representation when the Respondent is a "governmental agency" defending its own actions. *Hopwood*, 21 F.3d at 605. In those situations "a much stronger showing of inadequacy is required." *Id.* (citing 7C Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1909 (1986) (requiring a "very compelling showing" to overcome the governmental presumption)). That is particularly true where the federal government is defending its

actions and inactions—a task with which it is "well experienced." *Johnson v. City of Dall.*, 155 F.R.D. 581, 586 (N.D. Tex. 1994); *accord Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011) (the presumption is "nowhere more applicable than in a case where the Department of Justice deploys its formidable resources" to defend a federal law) (quotation marks and citation omitted). It is *not* enough to show that movants *might* make different legal arguments than the federal government. NEI must "demonstrate[] adversity of interest, collusion, or nonfeasance" by the federal government. *Haspel*, 493 F.3d at 579 (quotation marks and citation omitted); *see also Texas*, 754 F.2d at 553.

When the federal government has been presented with previous litigation seeking to recover money from the Nuclear Waste Fund, it defended against it vigorously. *Roedler v. Dep't of Energy*, 255 F.3d 1347 (Fed. Cir. 2001). This is perhaps why NEI is unable to make a showing of inadequacy. Indeed, NEI does not allege any actual "adversity of interest," *Haspel*, 493 F.3d at 579, between it and the federal Respondents on the topics of restitution and disgorgement. NEI claims that the "interests of the Respondents frequently diverge from the interests of NEI and its member utilities on the Nuclear Waste Fund and other NWPA issues." NEI Mot. 14. But NEI fails to identify any divergences on the topic of restitution or disgorgement.[1]

[1] The cases NEI cites to argue divergence are inapposite. NEI Mot. 14 n.41. *See Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300 (11th Cir. 2002) (adjudicating *agreement* between DOE and utility to offset future payments into Nuclear Waste Fund in exchange for forfeiture of breach of contract claim); *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369 (Fed. Cir. 2005) (seeking damages for partial breach, not restitution or disgorgement); *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 1585 (D.C. Cir. 2013) (seeking to stop payment of Nuclear Waste Fund fee, but not restitution or disgorgement).

Nor does NEI allege nonfeasance—*i.e.*, that the federal government "fail[ed]" to perform its "duty," BLACK'S LAW DICTIONARY (10th ed. 2014), under the Act. To do so "could be interpreted as a total breach of the Standard Contract" it has with the federal government, NEI Mot. 10, a result NEI seeks to avoid.

Rather than demonstrating adversity, NEI asserts that the federal government's position is unpredictable. NEI Mot. 14. Not only does this claim conflict with past conduct by the federal government, *see*, *e.g.*, *Roedler*, 255 F.3d at 1347, but any unpredictability of Respondents' position on restitution and disgorgement weighs in favor of denying NEI's motion without prejudice to refiling, or staying consideration of the motion. Showing adversity of interest requires "sharp disalignment," not slight imprecision. *Edwards*, 78 F.3d at 1005. Here, although Respondents are "the contractual counterparty to each of the utilities who has signed the Standard Contract," NEI Mot. 14, NEI fails to show that Respondents will not vigorously defend against restitution or disgorgement.

Even if NEI did show that its interests were adverse to the federal government's, it would still have to show "the particular way in which these divergent interests . . . impact[] the litigation," *Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015), and thereby prove that its interests "will not be represented" by the federal government, *Hopwood*, 21 F.3d at 605. Again, NEI offers only speculation. Even if it "cannot predict what Respondents' position will be" on restitution and disgorgement, NEI Mot. 14, a movant "must produce something more than speculation as to the purported inadequacy." *League of United Latin Am. Citizens v. Clements*, 884 F.2d

185, 189 (5th Cir. 1989) (quotation marks and citation omitted). Indeed, NEI's speculation is a far cry from the kind of existing, particularized adversity where successful movants showed "significantly different" legal positions based on "disagreement" with the governmental defendant that "ar[ose] directly from their divergent interests." *Texas v. United States*, 805 F.3d 653, 662–63 (5th Cir. 2015); *see Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016); *Brumfield v. Dodd*, 749 F.3d 339, 346 (5th Cir. 2014); *Edwards*, 78 F.3d at 1005–06. Here, with no real divergent interests, there are likewise no demonstrable disagreements. NEI has not "highlight[ed] arguments" that the federal government "*cannot*" make in defense of its inaction under the Act. *Wal-Mart*, 834 F.3d at 569 (emphasis supplied); *see also Kneeland v. NCAA*, 806 F.2d 1285, 1288–89 (5th Cir. 1987) (rejecting intervention after noting that existing defendant could raise proposed intervenor's arguments). NEI's speculation about what the federal government will or will not argue is insufficient for intervention at this juncture.

In short, NEI and "the utilities have articulated no reason why the government will not adequately represent their interests in the pending appeal." *Texas*, 754 F.2d at 553. NEI does not dispute that the twin presumptions of adequate representation apply here; it fails to allege the necessary elements to rebut those presumptions; and it fails to show any adversity of interest. For now, however, in light of Texas's request that the Court deny without prejudice or stay consideration of NEI's motion, the Court need not make any of these determinations at this time.

IV. The Court Should Stay Consideration of NEI's Intervention.

Instead of denying NEI's motion outright, the Court may also stay consideration of the motion. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *accord Clinton v. Jones*, 520 U.S. 681, 706 (1997).

Staying NEI's motion saves judicial resources and does not prejudice NEI's intervention, which is very narrow in scope. "The very purpose of intervention is to allow interested parties to air their views so that a court may consider them before making potentially adverse decisions." *Brumfield v. Dodd*, 749 F.3d 339, 345–46 (5th Cir. 2014). NEI expresses no interest in formally supporting or opposing the gravamen of Texas's Petition. Rather, NEI's sole interest is opposing that which the Supreme Court has described as "exceptional." *Kansas*, 135 S. Ct. at 1049.

Compelling the federal government to comply with the NWPA will require deadlines and long-term Court supervision. Thus, delaying consideration of NEI's motion saves judicial resources by preventing an otherwise disinterested party from the responsibility of cluttering the docket with "no position" filings. Nor does a delay prejudice NEI because the Court can reassess NEI's participation at the pertinent time. Thus, if the Court does not deny NEI's motion outright, *Texas*, 754 F.2d at 553, it should stay consideration of the motion until its disposition is necessary.

Conclusion

The Court should deny NEI's motion to intervene without prejudice to refile at a later, appropriate time. Alternatively, the Court should stay consideration of the motion until such time as it becomes proper to adjudicate.

Respectfully submitted this 19th day of April, 2017.

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Certificate of Service

On April 19, 2017, this document was filed with the Clerk of Court via CM/ECF. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ David Austin R. Nimocks
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Certificate of Compliance

I hereby certify that this brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 3,934 words; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word.

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