

Nos. 20-35412, 20-35414, 20-35415 & 20-35432 – Consolidated

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

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,
Plaintiffs-Appellees,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,
Defendants-Appellants,
and

TC ENERGY CORPORATION, *et al.*,
Intervenor-Defendants/Appellants.

Appeal from the U.S. District Court for the District of Montana
No. 4:19-cv-00044 (Hon. Brian Morris)

**MOTION OF AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS AND AMERICAN CHEMISTRY COUNCIL FOR
LEAVE TO FILE BRIEF AS *AMICI CURIAE***

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September 23, 2020

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The American Fuel & Petrochemical Manufacturers (AFPM) and the American Chemistry Council (ACC) respectfully request leave to file a brief as *amici curiae* in support of Appellants in these consolidated cases.

AFPM and ACC have sought the parties' consent to file an *amici* brief. Federal Appellants and Appellant State of Montana consent to the filing of this brief. All other Appellants do not oppose AFPM and ACC participating as *amici curiae*. Appellees take no position on AFPM and ACC filing an *amici* brief.

PROSPECTIVE AMICI'S INTERESTS AND ARGUMENT

AFPM's membership comprises most of the refining and petrochemical manufacturing capacity in the United States. Its members manufacture the petrochemicals needed to produce consumer products that are used daily in homes and businesses, and produce the fuels needed to deliver nearly all consumer goods. AFPM's members support nearly 4 million American jobs and produce a variety of products that are essential components of medical supplies and equipment. AFPM participated in this matter before this Court as *amicus curiae* in support of Appellants' motions to stay the district court order pending appeal. AFPM's Amicus Br., ECF No. 28-2 (No. 20-35412); Order, ECF No. 58 (No. 20-35412).

ACC represents approximately 150 member companies engaged in the business of chemistry. ACC members apply the science of chemistry to develop

the innovative products that make modern life possible, while working to protect the environment, public health and the security of our nation. ACC represents its member companies, which employ more than 540,000 men and women who make up America's business of chemistry. ACC represents major chemical producers across the United States, including a diverse set of small and medium-sized companies. ACC members make and enhance products that are critical to the everyday health and welfare of our nation.

Prospective *amici*'s members have a direct interest in the appeal of the district court's order which vacated Nationwide Permit (NWP) 12 and enjoined the authorization of all new oil and gas pipeline construction projects under the permit. As explained in the accompanying proposed brief, affirming the relief ordered below would threaten essential petrochemical supply chains and the response to the COVID-19 pandemic in ways that render the relief ordered below improper. *Amici*'s members depend on pipelines to convey raw materials and feedstock, as well as to transport refined products, used to manufacture materials used in nearly every sector of the U.S. economy. Many of these materials are indispensable in the production of supplies and protective equipment that healthcare workers and the public increasingly need to combat the ongoing COVID-19 pandemic. Absent NWP 12, construction work on the pipelines that serve prospective *amici*'s

members may be substantially delayed—even where there are only de minimis impacts to waters of the United States and no effects on listed species—thereby resulting in disruptions to the manufacture of medical supplies and other critical equipment.

These disruptions—and the harm they would cause to public health and the economy—are described in *amici*'s proposed brief. The consequences that *amici*'s members would suffer are distinct from those that will befall the parties to the case and germane to the court's consideration of whether the sweeping and draconian relief ordered below is lawful. Put simply, *amici*'s brief offers the Court “unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide,” a circumstance in which *amicus* participation “should normally be allowed.” *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

CONCLUSION

For the foregoing reasons, AFPM and ACC respectfully request this Court to grant this motion for leave and accept the proposed *amici* brief.

September 23, 2020

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SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association that has no parent corporation, and no publicly held corporation holds a 10% or greater ownership interest in AFPM.

Amicus curiae American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. It has no parent corporation, and no publicly held corporation holds a 10% or greater ownership interest in ACC.

Dated: September 23, 2020

s/ Andrew C. Sifton
Andrew C. Sifton

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The membership of the American Fuel & Petrochemical Manufacturers (AFPM) comprises most of the refining and petrochemical manufacturing capacity in the United States.¹ AFPM's members manufacture the petrochemicals needed to produce consumer products that are used daily in homes and businesses, and produce the fuels needed to deliver nearly all consumer goods. AFPM's members support nearly 4 million American jobs and produce a variety of products that are essential components of medical supplies and equipment. AFPM participated in this matter before this Court as *amicus curiae* in support of Appellants' motions to stay the district court order pending appeal. AFPM's Amicus Br., ECF No. 28-2; Order, ECF No. 58.²

The American Chemistry Council (ACC) represents approximately 150 member companies engaged in the business of chemistry. ACC members apply the science of chemistry to develop the innovative products that make modern life possible, while working to protect the environment, public health and the security of our nation. ACC represents its member companies, which employ more than

¹ No counsel for any party in this case authored this brief in whole or in part. No party, party's counsel, or any person other than AFPM, ACC, and their respective members has contributed money to the preparation or submission of this brief.

² All citations to docket entries are to No. 20-35412.

540,000 men and women who make up America’s business of chemistry. ACC represents major chemical producers across the United States, including a diverse set of small and medium-sized companies. ACC members make and enhance products that are critical to the everyday health and welfare of our nation.

The district court’s merits ruling under the Endangered Species Act (ESA) and its overbroad remedies should be reversed for the reasons stated in Appellants’ briefs. In short, the district court ignored or misconstrued multiple conditions of Nationwide Permit 12 (NWP 12) that ensure no activity is authorized “in the vicinity of” or that “might” affect listed species or critical habitat *unless* the Corps and the U.S. Fish and Wildlife Service determine—prior to the start of work that NWP 12 would authorize—that the ESA’s consultation requirements have been met. 82 Fed. Reg. 1,860, 1,999 (Jan. 6, 2017) (General Condition 18(c)); 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); *see generally* Fed. Apps.’ Opening Br. 25-27, ECF No. 70; NWP 12 Coalition’s Opening Br. 25-28, ECF No. 82. The district court’s speculation that NWP 12 could authorize harms to protected species—a conclusion foreclosed by the permit’s plain terms—is also contradicted by the district court’s acknowledged presumption that agencies and permittees “will comply with all applicable statutes and regulations.” Fed. Apps.’ Excerpts of Record (E.R.) 23, 57, ECF No. 71-1; NWP 12 Coalition’s Opening Br. 31-32.

Amici incorporate Appellants’ ESA arguments by reference, and focus this brief on amplifying the impropriety of the district court’s ordered remedy.

AFPM and ACC submit this brief on behalf of companies that, like many “project proponents and other affected members of the public across the country,” were “blindsided” by the unjustified and overly broad relief entered by the district court. Fed. Apps.’ Opening Br. 46. At no time did *amici* have advance warning that this litigation could directly impact them nor were they given a chance for their voices to be heard. The district court’s impermissibly broad and unjustified relief threatens key national security and public health interests, including essential petrochemical and petroleum supply chains and the response to the ongoing public health crisis. The injunction and vacatur ordered below would cause substantial delays in permitting the construction of pipelines on which *amici*’s members depend to transport refined products, and to move raw materials and feedstock used to manufacture materials used in nearly every sector of the U.S. economy. Many of these materials are indispensable in the production of supplies and protective equipment needed to combat the COVID-19 pandemic.

The district court’s initial remedy—the invalidation of Nationwide Permit 12 (NWP 12)—surprised both the parties and countless non-litigating stakeholders who would suffer adverse consequences from the loss of NWP 12. E.R. 64. The same is true even after the district court backtracked on its remedy at Appellees’

behest to single out “the construction of new oil and gas pipelines,” as that order is likewise procedurally defective and lacking record support. E.R. 38.

The order now on appeal imposed relief that far exceeded anything that Plaintiffs requested or had standing to pursue in this litigation.³ Instead, the district court arbitrarily prohibited construction of any new oil or gas pipeline—no matter how small in size or how negligible its possible impacts on protected species—while allowing NWP 12 to continue authorizing other projects involving similar types of construction activities. The court’s conclusion that oil and gas pipeline construction projects “likely pose the greatest threat to listed species” has no basis in the administrative record. It instead rests only on Plaintiffs’ self-serving, post-summary judgment declarations which, even if considered, indisputably show no ESA violations stemming from NWP 12. E.R. 10, 18, 22.

Moreover, the district court’s prohibition against authorizing all new oil and gas pipelines nationwide was a bait-and-switch, affording proponents of such pipelines no notice that the district court in this case might impose relief beyond the Keystone XL pipeline. *See* Fed. Apps.’ Opening Br. 46 (district court’s failure to provide fair notice of its ruling resulted in a decision that “lacked the benefit of hearing from those affected third parties about the harms that its sweeping order

³ *See* Fed. Apps.’ Opening Br. 39-55.

would impose”). In short, the district court rendered an opinion without factual support, adequate notice, or due process.

The Supreme Court recognized these flaws in the district court’s reasoning and the over-breadth of the remedies ordered. In a highly unusual order, the Court stayed pending appeal the district court’s order, except as it applies to the Keystone XL pipeline, without any noted dissent. E.R. 65. This order alone should place this Court on notice that the Supreme Court finds the district court’s remedy and process to be inadequate.

Amici bring to the Court’s attention “the harms that [the district court’s] sweeping order would impose” if it is not duly reversed. Fed. Apps.’ Opening Br. 46. The relief ordered below risks creating substantial delays to construction work on pipelines that would serve *amici*’s members, even where construction would have *de minimis* impacts to waters of the United States and no effects on listed species. Such delays would cause significant disruptions to the manufacture of sanitation products, medical supplies, and other critical equipment. These disruptions—and the harm they would cause to public health and the economy—can be avoided by rejecting the district court’s arbitrary and legally flawed decision to prohibit the authorization of all new oil and gas pipeline construction under NWP 12.

ARGUMENT

The district court's orders prohibited the use of NWP 12 for new oil and gas pipeline construction without considering the wide range of such projects or the severe harm to the American economy and public health that would follow from imposing such draconian relief. NWP 12 provides an efficient mechanism for authorizing low-impact oil and gas pipeline construction activities that are essential for *amici*'s members to respond to rapidly-changing market forces and to play a critical role in the supply chains for equipment needed to combat the COVID-19 pandemic. The relief ordered below—invalidating NWP 12 as it applies to all new oil and gas pipeline construction—would cause substantial permitting delays that would stymie *amici*'s ability to meet demand and produce the chemical building blocks for making equipment used by healthcare providers.

The prospect of these injuries to economic activity and public health highlight the impropriety of the district court's broad and damaging relief. Vacatur is inappropriate in circumstances like these, where the loss of NWP 12 would have substantial, negative impacts on the economy and public welfare. *See Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (declining to vacate agency action where doing so would “delay a much needed power plant” and “be economically disastrous”). These injuries to public health

and the broader economy—which the district court failed to consider—warrant reversal here.⁴

I. The Loss of Nationwide Permit 12 Would Harm the Supply Chains for Critically-Needed Fuel and Petrochemical Products.

A. Production of Fuel and Countless Products Depends on Pipelines.

The district court’s order fails to take into account the harms that it would visit on supply chains vital to the American economy and public health. AFPM’s members produce fuel needed by first responders, delivery trucks, and airplanes, and to heat homes. Members of both *amici* organizations also manufacture six base petrochemicals needed to create plastics, engineered polymers, and ingredients for products used to make necessities found in homes, hospitals, and businesses. Those six base petrochemicals—ethylene, propylene and butylenes, benzene, toluene, and xylenes—are integral to sanitation, food production and delivery, and multiple aspects of public health and the food supply.

These production activities depend on pipelines to move oil, natural gas, and gas liquids like propane and ethane, and to transport fuels and other refined products that are feedstocks for manufacturing petrochemicals used to make a wide variety of products. *Amici*’s members rely on highly regulated pipelines to bring

⁴ The district court’s failure to consider these impacts is itself a basis for reversing the relief ordered below. *See* TC Energy’s Opening Br. 63-66, ECF No. 80.

crude oil to refineries and wet natural gas to processing plants. Once crude oil is refined and after wet natural gas is processed and fractionated, pipelines then transport fuel into distribution channels (and ultimately, to local gas stations) and hydrocarbon feedstock—naphtha, ethane, propane, and butane—to petrochemical plants.⁵ In some instances, very dry gas—consisting almost exclusively of pure methane—bypasses processing and fractionating and is piped directly to ammonia, methanol and hydrogen facilities. These pipelines, varying in size and length, comprise a network totaling nearly 225,000 miles.⁶

Once feedstock reaches petrochemical plants by pipeline, *amici*'s members employ various engineering processes to make the six base petrochemicals that are the building blocks for producing plastics and advanced engineering composites that make modern life possible. Petrochemicals and their derivatives permeate numerous supply chains, such that any disruption to the production of base

⁵ Crude oil, natural gas, and refined products in some instances can be transported by truck or other means, but these alternatives are far less efficient than pipelines. For instance, replacing the capacity of a modest-sized oil pipeline would require the use of 750 tank trucks, loading up every two minutes, twenty-four hours per day, seven days a week. *General Pipeline FAQs*, PHMSA, <https://www.phmsa.dot.gov/faqs/general-pipeline-faqs> (last updated Nov. 6, 2018).

⁶ *Pipeline Facilities and Miles 2010+* (data through September 20, 2020), PHMSA, <https://www.phmsa.dot.gov/data-and-statistics/pipeline/pipeline-mileage-and-facilities> (last updated Jan. 28, 2020) (found in “2010+ Pipeline Miles and Facilities”).

petrochemicals will significantly affect American manufacturing, including the production of personal protective equipment (PPE) and sanitizers needed for the COVID-19 response, as discussed in Section II below.

B. Affirming the District Court’s Order Would Threaten the Continuity of Multiple Crucial Supply Chains.

The district court failed to consider how its sweeping ban on NWP 12 authorization of new oil and gas pipeline construction would threaten the supply chains described above and create market uncertainty. That is unsurprising because the district court, without proof or a factual record, summarily equated all potentially covered oil and gas pipelines—no matter their size, location, or purpose—with Keystone XL, a unique project. Pipelines transporting natural gas, crude oil, and feedstock often cross waters of the United States, so that building them requires a Corps permit. *See* 33 U.S.C. §§ 1311(a), 1344. These carefully planned projects typically pose negligible or nearly no impacts to such waters, and *amici*’s members rely on NWP 12 to build pipelines and to meet marketplace demands while simultaneously advancing national security, safety, and public health. *See* 82 Fed. Reg. at 1,985. NWP 12 has a long history of successful use and provides an established process for authorizing projects.

If NWP 12 were to become unavailable, activities previously requiring no prior Corps approval or short Corps verification timeframes would be subject to a

lengthy individual permit process averaging 217 days. Nicole Carter, Cong. Research Serv., 97-223, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments 2* (2017). Individual permits' additional time and costs will impair *amici*'s members' ability to manage and build pipelines, and to respond to rapidly changing market conditions. These consequences would befall all new pipelines serving *amici*'s members, "regardless of diameter, length ... or even whether they are in the vicinity of protected species." Fed. Apps.' Opening Br. 55. Moreover, the district court's opinion creates great uncertainty at a time when investors and financiers require a measure of certainty before funding new projects.

Amici's members are just beginning to assess how the loss of NWP would disrupt pipeline construction and the supply chains served by these pipelines. Among *amici*'s ongoing construction projects, several have near-term (late 2020 or early 2021) projected completion dates that will be delayed substantially if the Corps can only authorize construction of pipelines crossing waters of the United States via individual permits:

- An **ethylene pipeline** that will transport surplus ethylene production to a market storage hub and supply feedstock to polyethylene production facilities. Polyethylene is used in the manufacture of products utilized

for sanitary handling of fresh food and groceries, medical supplies, and numerous other essential products.

- A **propylene pipeline** that is part of a multi-phase project intended to transport feedstock to polypropylene production facilities. Polypropylene is used to manufacture medical supplies and protective equipment, including N95 respirators. *See infra* Figure 1.
- A **natural gas pipeline** that will transport natural gas for use in home heating, industrial applications, and liquefied natural gas exports.
- A **natural gas gathering pipeline** designed to transport raw natural gas to a processing plant for removal of natural gas liquids. These liquids can then be turned into feedstocks for the manufacture of petrochemicals that are the building blocks for a variety of plastics and advanced materials needed in many sectors.

Under the district court's remedy, the completion dates for each of these projects could be delayed nine to twelve months, if not longer.⁷ During the delays, the supply chains that would be served by the ethylene and propylene pipelines described above will lose access to new sources of polyethylene and

⁷ *Amici* anticipate that these delays could extend beyond one year due to the increase in the Corps' individual permitting workload that would result from the loss of NWP 12 for oil and gas pipeline construction.

polypropylene, which are used to make supplies needed to respond to the ongoing public health crisis caused by the novel coronavirus. *See infra* Section II. The additional time required to build the natural gas pipeline and gathering line will also affect the availability of natural gas in the marketplace, potentially impacting the prices paid by consumers and businesses alike. All of these effects will be felt during times when Americans already face substantial economic uncertainty and an increased need for life-saving products that can be manufactured at levels to meet demand only if petrochemical supply chains work efficiently.

II. Affirming the District Court’s Order Would Risk Disruption to COVID-19 and Other Critical Response Supply Chains.

Uncertainty, increased costs, and project delays like those described above—which would result from an affirmance of the relief ordered below—would specifically threaten manufacturing of supplies critical for responding to the COVID-19 pandemic and other healthcare needs. *Amici*’s members produce source components of medical devices, sanitizers, and PPE used by healthcare workers in every hospital and medical office across the country. As shown in Figure 1, manufacturing N95 masks, which provide crucial protection for doctors and nurses, requires components derived from propylene, toluene, and xylene—

three of the base petrochemicals.⁸ Face shields, protective gowns, and testing kit components are also made from petrochemical derivatives that *amici*'s members produce, and ventilators use a variety of engineering polymer components made from petrochemicals.

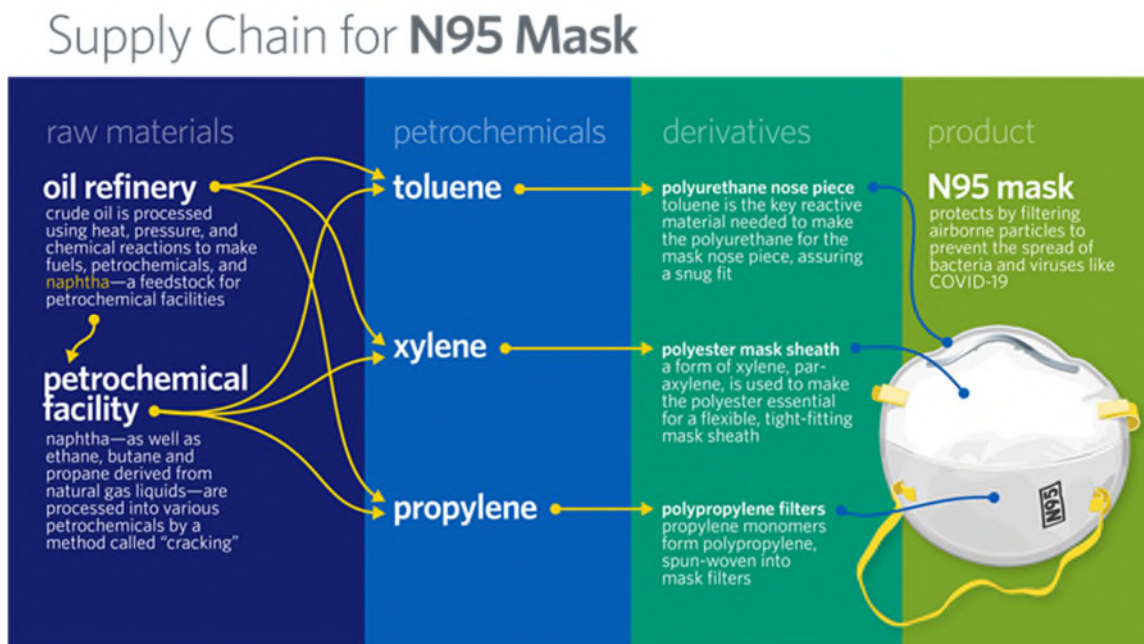


Figure 1

The permitting delays and costs that would result from the loss of NWP 12 for new oil and gas pipeline construction risk exacerbating shortages of supplies needed by COVID-19 patients and frontline medical workers. Hospitals' needs for N95 respirator masks, ventilators, and other equipment have at times outstripped

⁸ AFPM Communications, *Supplying Armor in the Battle Against COVID-19*, AFPM (Apr. 30, 2020), <https://www.afpm.org/newsroom/blog/supplying-armor-battle-against-covid-19>.

available supplies, thereby hindering the pandemic response and putting both patients and healthcare workers at risk.⁹ This problem will become more acute if *amici*'s members encounter delays—like those described above—in building pipelines necessary to meet the increasing demand for the base petrochemicals from which the components of medical devices and PPE are made. These supply chain impacts are in addition to the pandemic's work force and economic impacts discussed by Appellants in their motions for stay. *See* Fed. Defs.' Mot. for Stay at 42, ECF No. 11; TC Energy's Mot. for Stay at 23-24, ECF No. 19.

The unique challenges posed by the COVID-19 pandemic highlight the impropriety of the district court's nullification of NWP 12 for all new oil and gas pipeline construction. The supply chain disruptions that would result from affirming the district court's order will compound shortages have strained the healthcare system's ability to treat and limit the further spread of COVID-19.¹⁰

⁹ *See generally, Megan L. Ranney et al., Critical Supply Shortages—The Need for Ventilators and Personal Protective Equipment during the COVID-19 Pandemic*, 482 New Eng. J. Med. e41 (Apr. 30, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMp2006141?articleTools=true> (describing shortages of ventilators and PPE at hospitals in the United States).

¹⁰ Reversing the district court would not impact any existing environmental safeguard or alter the Corps' NWP 12 obligation to initiate ESA consultation for any utility line that even “might” affect listed species or habitat, to the extent such consultation has not already been completed in conjunction with other permitting requirements for the project. *See* 82 Fed. Reg. at 1,999-2,000. *Amici* and their

Such a result is clearly against the public welfare and militates toward reversing the relief ordered below.

CONCLUSION

The loss of NWP 12 for all new oil and gas pipeline construction would disrupt supply chains critical to the U.S. economy and to responding to the current public health crisis. Producing medical supplies, PPE, safe food packaging, and numerous other essential goods, as well as the supply of fuel for emergency response vehicles and delivery trucks, depends on *amici*'s members being able to rely on NWP 12. The challenged district court decision was made without adequate notice, fact finding, or due process and is wrong on the law. Reversing the baseless and overly-broad relief ordered below will ensure that these critical operations do not suffer from unnecessary and harmful disruptions.

September 23, 2020

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members are committed to environmental protection and are stewards of the land and water they cross.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 20-35412, 20-35414, 20-35415, and 20-35432

I am the attorney or self-represented party.

This brief contains 2,795 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

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Signature s/ Andrew C. Siltan

Date September 23, 2020