No. 16-2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS,
Plaintiff-Appellant,

v.

HENRY HENDERSON, et al.,
Defendants-Appellees.

Appeal from the United States District Court, District of New Mexico,
No. 15-CV-604-KG/WPL, Honorable Kenneth Gonzales

RESPONSE BRIEF OF APPELLEES ELEANOR SHIRLEY, ET AL.

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Appellees Eleanor Shirley, Former Members of the Navajo Nation Supreme Court, Richie Nez, Casey Watchman, Ben Smith, Blaine Wilson, Former Members of the Navajo Nation Labor Commission, Eugene Kirk, Reynold R. Lee, Former Members of the Office of Navajo Labor Relations, and John and Jane Does, are government officials of the Navajo Nation, and not a corporation.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

SUPPLEMENTAL STATEMENT OF THE CASE

This case concerns an attempt to challenge the Navajo Nation's employment jurisdiction over a lessee occupying tribal trust land with the Nation's consent under federally-approved leases. In this case, the lessee happens to be a school district organized under New Mexico state law.

The Navajo Nation is a federally-recognized Indian nation with a sovereign-to-sovereign relationship with the United States under two treaties ratified by the United States Senate in 1850 and 1868. Treaty between the United States and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667; Treaty between the United States and the Navajo Tribe of Indians, September 9, 1849, 9 Stat. 974. Appellees Eleanor Shirley, Former Members of the Navajo Nation Supreme Court, Richie Nez, Casey Watchman, Ben Smith, Blaine Wilson, Former Members of the Navajo Nation Labor Commission, Eugene Kirk, Reynold R. Lee, Former Members of the Office of Navajo Labor Relations, and John and Jane Does, are all government officials of the Navajo Nation.[1]

Through its sovereign authority, the Nation has passed several employment laws to govern employers operating on its trust lands. Among those is the Navajo Preference in Employment Act (NPEA), passed in 1985 and amended in 1990. 15

[1] Appellees are collectively referred to as "the Nation" in this brief. The brief refers individually to their respective government offices, the Navajo Supreme Court, the Office of Navajo Labor Relations, and the Navajo Nation Labor Commission, where appropriate.

N.N.C. §§ 601, *et seq*. (2005). Though titled "Navajo Preference in Employment," the NPEA is actually a general labor and employment code, regulating the relationship between employers and employees within the Nation. *See id.* Among other things, the NPEA requires employers to give preference to citizens of the Nation and their spouses when qualified for a position, and to discipline or terminate all employees, whether Navajo or not, only for "just cause." *Id.*, §§ 604(A)(1), (B)(8), 614; *Staff Relief, Inc. v. Polacca*, 8 Nav. R. 49, 56 (Nav. Sup. Ct. 2000) (holding employee claims may be filed under the NPEA by any employee regardless of Navajo citizenship).

The Nation established the Office of Navajo Labor Relations (ONLR) and the Navajo Nation Labor Commission (Commission) to hear claims for violations of the NPEA's requirements. *See* 15 N.N.C. § 611 (2005). ONLR investigates charges filed by employees, issues probable cause determinations, and attempts to resolve disputes between employer and employees. 15 N.N.C. §§ 610(A)–(I) (2005). If ONLR does not resolve a charge, an employee may file a complaint with the Commission. 15 N.N.C. § 610(J) (2005). ONLR may also file its own complaint on behalf of an employee. 15 N.N.C. § 610(I)(2) (2005).

A five-member panel of Commission members hears complaints under due process procedures mandated by the NPEA, the Navajo Bill of Rights, and the Indian Civil Rights Act. 15 N.N.C. § 303. The Commission takes and weighs

evidence through witnesses and exhibits, and issues written decisions that may be appealed to the Navajo Supreme Court. 15 N.N.C. §§ 304, 613. The Navajo Supreme Court is a full-time appellate court made up of three justices appointed by the Navajo Nation President and confirmed by the Navajo Nation Council. 7 N.N.C. §§ 354(B), 355(A). It hears appeals under the Navajo Rules of Civil Appellate Procedure, and issues written opinions published in its own official Navajo Reporter and through West's American Tribal Law Reporter.

As in other parts of the State of New Mexico, public school districts such as Appellant Board of Education for the Gallup-McKinley County Schools (School District) operate schools within the Navajo Nation. Owning little or no land within the Navajo Reservation to build schools, the districts must seek permission of the Navajo Nation and the federal Bureau of Indian Affairs to use Navajo trust lands. 25 U.S.C. § 415. Consequently, the Nation has entered into leases with the School District and other school districts such as Central Consolidated School District[2] to authorize them to build and operate public schools. The school where Henry Henderson was employed, as well as the schools where Emma Benallie and Greg Bigman were employed, are built on Navajo trust land pursuant to leases with the

[2] As discussed by the School District in its Opening Brief, and as discussed below, the School District attempted to amend its complaint to add the Central Consolidated School District as a co-plaintiff. At the time of the motion to amend the federal complaint, a complaint brought by Navajo employee Greg Bigman against Central Consolidated was pending before the Commission.

Nation. Given the dismissal of the case at the complaint stage, the leases are not part of the district court record in this appeal. However, such leases may differ in their language concerning consent to Navajo jurisdiction.

SUMMARY OF THE ARGUMENT

The Federal District Court of New Mexico (District Court) correctly held that the School District lacked standing to bring its case.

The School District's complaint and amended complaint both falsely suggest that the Navajo Supreme Court was continuing to assert jurisdiction over Henry Henderson's employment claim. As the Supreme Court dismissed that claim for lack of jurisdiction, there was no pending case against the School District when it filed its federal complaint. Therefore, there was no imminent threat of injury, and the School District lacked standing to seek an injunction. Further, as the School District sought a ruling on a purely hypothetical legal question, it lacked standing to seek a declaratory judgment.

Further, beyond Henderson's claim, there is no certainty that the Commission would accept jurisdiction over any future employment claim filed against the School District, again precluding standing.

Also, the District Court appropriately denied the School District's motion to amend its complaint. As it lacked standing to bring its original complaint, it could not amend that complaint to add new claims.

Finally, as the District Court did not rule on exhaustion, consideration of whether exhaustion of tribal court remedies is required before challenging the Nation's jurisdiction over the claims of Emma Benallie and Greg Bigman is

unnecessary. The exhaustion question can be decided on remand if this Court reverses the District Court's ruling on standing.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE SCHOOL DISTRICT LACKS STANDING.

For a federal court to have subject matter jurisdiction, the plaintiff must have standing. Standing is one element of the "case or controversy" limitation on federal judicial authority arising from Article III of the United States Constitution. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S.Ct. 2652, 2663 (2015). The "irreducible constitutional minimum" requires (1) an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The merits of the plaintiff's claim that the defendant's conduct is illegal does not affect whether there is standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Tandy v. City of Wichita*, 380 F.3d 1277, 1283, n.10 (10th Cir. 2004).

The plaintiff invoking federal jurisdiction bears the burden to establish standing. *Steel Co. v. Citizens for a Better Environment*, 528 U.S. 83, 103–04 (1998). The plaintiff must demonstrate standing separately for each type of relief sought. *Tandy*, 380 F.3d at 1283.

To seek injunctive relief, as the School Board does here, the plaintiff "must

be suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Tandy*, 380 F.3d at 1284. While alleged past wrongs are evidence whether there is a real or immediate threat of repeated injury, "the threatened injury must be certainly impending and not merely speculative." *Id.* Past exposure to allegedly illegal conduct "does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Steel Co.*, 523 U.S. at 109. Therefore, allegations of future injury must be "particular and concrete." *Id.*

For declaratory relief, which the School District also seeks, standing depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Importantly, "hypothetical disagreements about the law are not enough to invoke the jurisdiction of federal courts." *Baser v. State Farm Mut. Auto. Ins. Co.*, 560 Fed. Appx. 802, 803 (10th Cir. 2014).

A dismissal for lack of standing is reviewed by this Court *de novo*. *Tandy*, 380 F.3d at 1283.

A. The merits of the School District's claim that the Nation lacks jurisdiction cannot establish standing.

The School District first argues that it has standing by arguing that the

Nation lacks jurisdiction. *See* Op. Br. at 13–17. The School District's claim that it is exempt from the Nation's jurisdiction does not bear on whether it has standing to pursue its purported claims. *See Whitmore*, 495 U.S. at 155; *Tandy*, 380 F.3d at 1283 n.10. As the Nation's jurisdiction is a merits question, which is not at issue in this appeal, the Court can and should ignore this argument.[3]

B. The District Court correctly held that the injury the School District claims it will suffer is speculative and hypothetical and cannot justify standing.

The School District next argues that the possibility that the Nation will enforce the Navajo Preference in Employment Act (NPEA) against it in the future is sufficient to establish standing. Op. Br. at 18. According to the District, the "unlawful assertion of administrative and regulatory jurisdiction by the Navajo Nation" is itself an ongoing injury. *Id.*

1. The School District's original and amended complaints based standing on the Nation's continued assertion of jurisdiction over Henderson's claims.

Standing is to be determined by the facts as they existed at the time the action was filed. *Southern Utah Wilderness Alliance*, 707 F.3d 1143, 1152–53

[3] The Nation in no way concedes it lacks jurisdiction. If this Court reverses the District Court on standing, the direct issue of jurisdiction would be ripe for adjudication on remand, as it involves unresolved and complex legal and factual issues. *See National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855–56 (1985) (stating questions of jurisdiction involve a "careful examination of tribal sovereignty," including review of treaties, statutes, executive policies, and other sources). The Nation reserves all arguments concerning its jurisdiction for that later proceeding, if it becomes necessary.

(10th Cir. 2013). In this case, the School District alleged an *ongoing* assertion of jurisdiction by the Nation over Henderson's claims specifically. Complaint, ¶¶ 1–2, Aplt. App. 8. The School District did not allege an assertion of jurisdiction based on any other cases or claims until it attempted to amend its initial complaint. Even then, it kept the same allegations concerning Henderson in its amended complaint. First Amended Complaint, ¶ 2, Aplt. App. 99. Although Henderson's claim had already been dismissed by the Navajo Supreme Court, both complaints falsely suggested that the Nation was continuing to adjudicate Henderson's case against the School District. Complaint, ¶ 2; Amended Complaint, ¶ 2 ("The case before the NNSC over which the Navajo Nation *asserts* authority and jurisdiction over Plaintiff is titled *Henry Henderson vs. Gallup McKinley County Schools*, NNSC No. SC-CV-38-11." (emphasis added)). However, the School District also correctly stated that the Henderson case was dismissed for lack of jurisdiction prior to the filing of the federal complaint. Complaint, ¶¶ 4, 28, Aplt. App. 8, 15; First Amended Complaint, ¶ 4, 38, Aplt. App. 99, 108.

Based on the School District's own assertions, the District Court properly dismissed the School District's complaint for lack of standing. As Henderson's case was dismissed with prejudice by the Navajo Supreme Court, there was and is no possibility that the School District could continue to be injured. Put another way, the School District sought to enjoin the Nation's continued jurisdiction over

Henderson's case. As there was no pending case, and no possibility of Henderson reviving his dismissed case, there was simply nothing to enjoin.

That the School District also sought a declaratory judgment does not change the outcome. The declaratory judgment claim was still premised on a continuing claim by Henderson. Further, even when the School District attempted to amend its complaint, it still asserted ongoing jurisdiction by the Nation over Henderson's claims. The School District could have amended its complaint or simply filed another complaint on an actual, live assertion of jurisdiction. It did neither, and its complaint was appropriately dismissed, as the School District sought an advisory opinion on a purely hypothetical legal issue.

2. There is no certainty that the Nation will assert jurisdiction over the School District in a future case.

Even if not tied to Henderson's dismissed claims, the School District's arguments that it will be subject to future NPEA cases filed against it are speculative, and do not show an imminent threat of injury.[4] Indeed, the School

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[4] In this section of its brief, the School District again attempts to insert merits arguments on jurisdiction, arguing it has "legal rights" to be free from the NPEA. Op. Br. at 18–19. It argues that the NPEA's requirements impermissibly conflict with Title VII of the Civil Rights Act of 1964 and the New Mexico Human Rights Act, though it does not specify which provisions of the NPEA so conflict. *Id.* These are properly arguments on the merits, not standing. However, assuming the School District refers to the Navajo preference in hiring provisions of the NPEA, *see, e.g.,* 15 N.N.C. § 604(A)(1) (2005), Navajo citizenship is neither a racial nor national origin classification. *See Equal Employment Opportunity Comm'n v. Peabody Western Coal Co.*, 773 F.3d 977, 988 (9th Cir. 2014). Further, Navajo

District distorts how NPEA claims are raised. The Navajo Nation Labor Commission (Commission) and Supreme Court do not reach out and unilaterally assert jurisdiction over employers. Rather, employees file a charge with the Office of Navajo Labor Relations (ONLR), and then a complaint with the Commission only if the matter is not resolved. 15 N.N.C. §§ 610(B); (J) (2005). Alternatively, ONLR may file its own charge and then a complaint with the Commission on behalf of employees who have alleged violations of the NPEA. 15 N.N.C. § 610(I)(2) (2005). If neither happens, the Commission asserts no authority over the School Districts.[5] If no party appeals a Commission decision, the Supreme Court asserts no jurisdiction.

Therefore, for the Nation to assert its jurisdictional authority to adjudicate employment claims, an allegation of an NPEA violation must be filed by somebody to ONLR, and to continue jurisdiction, someone must file a complaint with the Commission. Even then, the Commission can assess its own jurisdiction,

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Law permits school districts to waive Navajo hiring preference. 10 N.N.C. § 108 (C) (2005).

[5] This is precisely what happened to Emma Benallie's claim against the School District, which the School District attempted to add in its amended complaint. *See* Amended Complaint, ¶ 7, Aplt. App. 100. Ms. Benallie filed a charge with ONLR, and ONLR issued a notice of right to sue because it could not make a probable cause determination within the time required by the NPEA. *See* Response in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint, Aplt. App. 120–21. Ms. Benallie has not filed a complaint with the Commission, and therefore there is no live case against the School District.

depending on the facts asserted in the complaint,[6] or a party may file a motion to dismiss for lack of subject matter jurisdiction. Further, that decision can be reviewed by the Supreme Court on appeal or through an extraordinary writ. Absent an actual charge and complaint being filed, and jurisdictional issues being adjudicated in favor of the employee, there is nothing more than the hypothetical possibility of the Nation's jurisdiction over the School District. That is insufficient to trigger standing.

Further, given the negative federal district court decisions the School District cites, and the imminent issuance of a Ninth Circuit decision on these issues, *see Window Rock Unified School Dist. v. Nez*, No. 13-16259 (9th Cir.),[7] there is no certainty that the Nation's tribunals will continue to accept jurisdiction over claims by the School District's employees. Therefore, even if the Nation's courts have

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[6] As the District Court noted, these facts include the language in specific leases between the Nation and the School District, which vary in its language concerning jurisdiction. *See* Memorandum Opinion and Order, Aplt. App. 146; *Office of Navajo Labor Relations ex rel. Bailon v. Central Consolidated School Dist. No. 22*, 8 Nav. R. 501, 505–07 (Nav. Sup. Ct. 2005) (finding employment jurisdiction over school district based on specific consent language in lease).

[7] The Ninth Circuit heard oral argument in the *Window Rock* case on September 27, 2015. A ruling may be issued at any time. The case is an appeal from the ruling of the Federal District Court of Arizona, cited several times by the School District, that the Nation's jurisdiction over Arizona public school districts is "plainly lacking" and therefore exhaustion of tribal court remedies was unnecessary. *See Window Rock Unified School Dist. v. Reeves*, No. 3:12-cv-08059-PGR, 2013 WL 1149706 (D. Ariz. March 19, 2013). The outcome of that case may have a direct effect on the Nation's continued assertion of employment jurisdiction, though technically restricted to the area of the Nation within the Ninth Circuit.

found jurisdiction in prior situations, that it would continue to do so in the face of contrary federal decisions is purely speculative, and does not give rise to a "real and immediate threat of being injured in the future." *Tandy*, 380 F.3d at 1283. Further, the Navajo Nation Council, the legislative body empowered to pass statutory law for the Nation, might amend the NPEA to exempt school districts regardless of the outcome of those cases. *Cf.* 10 N.N.C. § 108(C) (2005) (providing waiver of Navajo preference requirements of the Navajo Preference in Employment Act for schools if made in individual employment decisions by formal vote of the school board). Either way, there is no imminent threat to the School District.

Further, these facts distinguish the case from *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004). In that case, a movie theatre was applying a written policy to disallow certain seating for people with disabilities, with no facts suggesting the theatre might limit the policy in the future. *See id.*, at 1078–79, 1081–82. The School District quotes *Fortyune*, but adds a bracketed reference to tribal statutes not present in the original opinion. Op. Br. at 20. However, the *Fortyune* court clearly was not thinking of tribal governments and their employment jurisdiction, but was concerned with a private business and its "ongoing" policy concerning persons with disabilities. *See* 365 F.3d at 1081–82. Given the unclear future application of the NPEA to school districts, there is no

imminent injury concrete enough to grant standing to the School District.[8]

II. THE DISTRICT COURT APPROPRIATELY DENIED THE AMENDMENT TO THE SCHOOL DISTRICT'S COMPLAINT.

This Court reviews the denial of an amended complaint for an abuse of discretion. *Barnes v. Harris*, 783 F.3d 1185, 1197 (10th Cir. 2015). However, it may review legal conclusions underlying a "futility" determination de novo. *Id.*

Here, the District Court only denied the amendment of the complaint based on the School District's lack of standing to bring the original complaint. It did not rule on the futility of amending the complaint to include Emma Benallie's claims against the School District or Greg Bigman's claims against Central Consolidated School District. As the School District did lack standing in its original complaint for the reasons discussed above, that dismissal was correct. *See Fed. Recovery Servs., Inc. v. United States,*72 F.3d 447, 453 (5th Cir. 1995) ("Rule 15 does not allow a party to amend to create jurisdiction where none actually existed."); *Summit Office Park, Inc. v. United States Steel Corp.,* 639 F.2d 1278, 1282 (5th Cir.1981) ("where a plaintiff never had standing to assert a claim against the

[8] The School District further argues that the three-part test applied in *Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1202 (D. Nev. 2009) applies to this case. Op. Br. at 21. That test applies in the Ninth Circuit in cases where a plaintiff alleges a statute violates a party's constitutional right. *See id.* Even assuming that test were binding on this Court, which it is not, there is no constitutional question here, as the School District does not allege a specific constitutional right it possesses that the Nation is violating through the NPEA.

defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs, a new class, and a new cause of action.”).

In denying the amended complaint, the District Court made no ruling on whether exhaustion of tribal courts remedies was required for the additional claims raised concerning Emma Benallie and Greg Bigman. Despite this, the School District spends a significant amount of its brief arguing that several exceptions to exhaustion apply. Op. Br. at 23–27.

The Court should not accept the School District’s invitation to rule on whether the exhaustion doctrine justifies the denial of the amended complaint, as the District Court did not rule on that issue. Indeed, if the dismissal is reversed, there would be no need to amend the complaint in the first place, as the School District could proceed to adjudicate its jurisdictional claims based on Henderson’s case, and resolution of the additional claims related to Emma Benallie and Greg Bigman would be unnecessary.[9]

Through its exhaustion arguments, like many of the other arguments advanced elsewhere in the brief, the School District seeks a merits ruling from this Court on its jurisdictional claims. Again, as this appeal only concerns the School District’s standing related to Henderson’s case, the School District’s jurisdictional

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[9] There is no dispute that the School District exhausted its remedies in relation to Henderson’s claim. Therefore, if the District Court’s dismissal of the claims related to Henderson is reversed, exhaustion is not an issue.

claims embedded in its exhaustion argument are not relevant and should be ignored. *See Whitmore*, 495 U.S. at 155; *Tandy*, 380 F.3d at 1283 n.10. If this Court reverses the District Court on the issue of standing, the Nation will make all arguments concerning its jurisdiction, including, if relevant, whether the School District and the Central Consolidated School District have appropriately exhausted their tribal court remedies concerning Emma Benallie and Greg Bigman. *See supra*, n.1.[10]

CONCLUSION

Based on the above, the District Court's decision should be affirmed.

Respectfully submitted,

/s/ Paul Spruhan
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[10] In its response to the School District's motion to amend its complaint, the Nation reserved its opposition to the addition of the Central Consolidated School District. Response, Aplt. App. 127. As the Nation argued, and the District Court agreed, that the School District could not amend its complaint on its own claims, the Nation did not comment on whether Central Consolidated's claims were subject to dismissal based on a lack of exhaustion. *Id.* If the case is remanded, and the amended complaint is accepted, the Nation reserves its objection to Central Consolidated's claims. *See Pessotti v. Eagle Manufacturing Co.*, 774 F. Supp. 669, 677–78 (D. Mass. 1990) (lack of objection to amendment of complaint does not waive defense raised in response to amended complaint).

ORAL ARGUMENT STATEMENT

The Nation agrees with the School District that given the issues in the case, oral argument is appropriate.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

i. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,844 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

ii. This 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 brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman

/s/ Dana Martin
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that a copy of the foregoing Response Brief of Plaintiff – Appellant. The Navajo Nation, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Malwarebytes Anti-Malware, version 2.2.1.1043 as updated through November 17, 2016 and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

/s/ Dana Martin
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response Brief of Appellee was furnished through (ECF) electronic service to the following on this 17th day of November, 2016:

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