No. 21-2542

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KRISTI NOEM, Governor of South Dakota, et al.,

Plaintiffs-Appellants,

v.

DEB HAALAND, U.S. Secretary of the Interior, et al.,

Defendants-Appellees,

CHEYENNE RIVER SIOUX TRIBE, et al.,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the District of South Dakota

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

DENNIS R. HOLMES
Acting United States Attorney

MICHAEL S. RAAB
BRIAN J. SPRINGER
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-5446

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

At a time when counties across the nation were experiencing high rates of COVID-19 transmission, the National Park Service denied the State of South Dakota's request to host up to 10,000 visitors at Mount Rushmore for an Independence Day fireworks show that could not comply with social distancing protocols recommended by public health experts. And the agency's tribal partners expressed deep dissatisfaction with holding a fireworks show in a location considered sacred to the tribes. The agency also detailed other significant cultural, environmental, and management reasons for concluding that such a fireworks event could not proceed in a safe and responsible manner. Plaintiffs challenge this decision as arbitrary and capricious, and they contend that Congress unconstitutionally delegated authority to the Park Service to make permitting decisions.

After the date of the State's proposed event had passed, the district court properly concluded that "whether there was an arbitrary and capricious denial of a permit now appears to be moot." The court had previously determined that the Park Service reasonably denied the permit due to COVID-19 and other concerns. And the district court correctly held that plaintiffs' nondelegation claim lacks merit.

The district court's judgment should be affirmed for the reasons set out in its comprehensive rulings. The government stands ready to present oral argument if this Court would find it helpful.

TABLE OF CONTENTS

Page

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Regulations:

Legislative Material:

Other Authorities:

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331. Joint Appendix (JA) 13, ¶ 10. The district court denied plaintiffs' motion for a preliminary injunction on June 2, 2021. JA664. The court converted its order on the preliminary injunction into an entry of final judgment on July 12, 2021. JA668-69. Plaintiffs filed a notice of appeal on July 13, 2021. JA671. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

At a time when counties across the nation were experiencing high rates of COVID-19 transmission, the National Park Service denied the State of South Dakota's request to host up to 10,000 visitors at Mount Rushmore for an Independence Day fireworks show that could not comply with social distancing protocols recommended by public health experts. In addition to these health and safety concerns, the agency detailed the significant tribal, cultural, environmental, and management reasons for concluding that such a fireworks event could not proceed in a safe and responsible manner. The questions presented are:

1. Whether plaintiffs' claim that the Park Service unlawfully denied a permit for a July 2021 event is moot.

- Most apposite authorities: U.S. Const. art. III, § 2; *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam); *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482 (8th Cir. 1998).

2. Whether the district court correctly held that the Park Service reasonably denied a permit for a 2021 fireworks show due to COVID-19 and other concerns.

- Most apposite authorities: 5 U.S.C. § 706; 36 C.F.R. § 1.6; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016); *Organization for Competitive Mkts. v. U.S. Dep't of Agric.*, 912 F.3d 455 (8th Cir. 2018).

3. Whether the district court correctly held that Congress constitutionally delegated authority to the Park Service to make permitting decisions.

- Most apposite authorities: 54 U.S.C. §§ 100101, 100751; *Mistretta v. United States*, 488 U.S. 361 (1989); *Gundy v. United States*, 139 S. Ct. 2116 (2019); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005).

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

More than a century ago, Congress recognized the need to establish a unified service to promote and regulate the use of national parks and monuments. H.R. Rep. No. 64-700, at 2 (1916). At the time, despite "the great extent and value of [national] park areas," there existed no "organization sufficiently complete or adequate to handle the various administrative phases." *Id.* In the National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916), Congress created the National Park Service and vested the agency with "broad authority" to "administer both lands and waters" in the parks. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1076 (2019).

The Park Service's statutory directive has remained materially unchanged since its original enactment. In 1916, the statute stated that the Park Service "shall promote

and regulate the use of the Federal areas known as national parks, monuments, and reservations" by "such means and measures" as "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." National Park Service Organic Act, § 1, 39 Stat. at 535. In 1970, Congress declared that the "superlative natural, historic, and recreation areas" comprising the national park system "derive increased national dignity and recognition of their superb environmental quality [as one united system] preserved and managed for the benefit and inspiration of all the people of the United States." 54 U.S.C. § 100101(b)(1)(A), (C). And in 1978, Congress reaffirmed that "[t]he authorization of activities shall be construed and the protection, management, and administration of the [national park system] shall be conducted in light of the high public value and integrity of [that system]." *Id.* § 100101(b)(2).

The statutory directive in effect today provides that "[t]he Secretary [of the Interior], acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units." 54 U.S.C. § 100101(a). The statute further defines the purpose "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." *Id.* The Park Service is

also empowered to "prescribe such regulations as . . . necessary or proper for the use and management of [the national park system]." *Id.* § 100751(a).

In carrying out its responsibility for managing 423 units covering over 85 million acres in all fifty States (and Washington, D.C.) and U.S. territories, the Park Service has exercised its regulatory authority to establish a permitting system. As relevant here, a permit is required for special events like "public spectator attractions" and for the use of fireworks. 36 C.F.R. §§ 2.38(b), 2.50(a). In deciding whether to issue a permit, the Park Service will make "a determination that public health and safety, environmental or scenic values, natural or cultural resources, scientific research, implementation of management responsibilities, proper allocation and use of facilities, or the avoidance of conflict among visitor use activities will not be adversely impacted." *Id.* § 1.6(a). If one or more of these factors "would be adversely impacted," the Park Service may deny the permit. *Id.* § 1.6(d).

II. The Park Service's Permit Decision

A. Since 1933, the Park Service has managed the scenery, natural and historic objects, and wildlife at Mount Rushmore National Memorial, which spans 1,278 acres in the central Black Hills of southwestern South Dakota. JA207, ¶ 3. The land contains granite peaks, pine forest, streams and wetlands, and flora and fauna, representing five different biomes. JA207, ¶ 3. Archaeological surveys have uncovered evidence of human habitation and development stretching back thousands of years, including early stone tools of tribal populations. JA207, ¶ 3. Guests often

visit Mount Rushmore to see the carved mountain depicting the heads of four former presidents and to spend time at the park's amphitheater, walking trails, and other visitor facilities. JA227.

Beginning in 1998, fireworks events were held almost annually at Mount Rushmore, but those displays ceased in 2009 for reasons related to visitor safety and fire danger. JA238, 314-15. In 2019, the Department of the Interior and the State of South Dakota signed a Memorandum of Agreement "to work to return fireworks to Mount Rushmore National Memorial in a safe and responsible manner on July 3, July 4, or July 5, beginning in the year 2020." JA109. In the early days of the COVID-19 pandemic, the Park Service issued a special use permit for a fireworks event on July 3, 2020. JA596-97. The event, which coincided with a presidential visit, hosted approximately 7,500 people who were crowded close together to witness the fireworks display:

JA584. The permit included an explicit disclaimer that issuance was for the "year 2020 and [did] not mean an automatic renewal of the event in the future." JA599.

B. The State subsequently sought a special use permit to hold a July 3, 2021 fireworks celebration at Mount Rushmore, with up to 10,000 people in attendance. JA123. The State requested a permit from June 15 to July 15 (later revised to July 10) to allow time for setup and takedown of the event. JA123, 126. After extensive consultation with agency leadership as well as input from park staff and experts, the Park Service denied the permit in a March 11, 2021 letter. JA210-11, ¶¶ 10-11.

In the letter, the agency described the multiple factors that would "not allow a safe and responsible fireworks display to be held at th[e] site." JA130. The agency emphasized the serious health and safety risks to members of the public and park employees. JA130. While acknowledging that the country had made progress in combatting the spread of COVID-19, the agency explained that holding "an event of this size and magnitude that draws people from across the country" in the midst of "the ongoing COVID-19 pandemic" would make it "difficult, if not impossible, to comply with social distancing protocols" recommended by public health experts. JA130. The agency also noted that "most participants were not wearing face coverings" at the 2020 fireworks event. JA130.

The agency further highlighted its commitment to "respecting tribal connections with the site and building stronger relationships with associated tribes." JA130. The 2020 permit decision had strained the agency's relationships with its tribal

partners. JA213, ¶ 14. Then-President Trump announced that the 2020 event at Mount Rushmore would occur even though government-to-government discussions were still ongoing. JA363-64, 414. And the event went forward despite several objections from the tribes, including the need to conduct an on-site survey to identify significant tribal cultural resources. JA436-44. "[D]ue to the pandemic," the survey was "delayed until summer 2021," and the agency recognized the importance of collecting the results before approving another fireworks event. JA130.

The agency also identified other management and environmental concerns. The Park Service noted that necessary attendance limits at the 2020 event "impacted tens of thousands who were not able to visit the memorial or had their visit cut short." JA131. Additionally, Mount Rushmore was undergoing construction where "any delay in the project would result in the work not being complete by July." JA131. The 2020 event had caused approximately $60,000 in damage to newly poured concrete, JA214, ¶ 17, and "[a] second demobilization [of construction] to accommodate [a 2021] event would be costly to the agency and impact the visiting public further based on the 2020 experience," JA131. And the park was "continu[ing] to monitor levels of [a certain contaminant] in the water and the potential for wildfire." JA131. Based on these factors, the Park Service denied the permit.

III. District Court Proceedings

A. Plaintiffs are the Governor and State of South Dakota. JA14, ¶¶ 13-14. They brought suit on April 30, 2021, alleging that the Park Service's permit decision

was arbitrary and capricious and that Congress unconstitutionally delegated legislative power to the Park Service. JA25-31. The Cheyenne River Sioux Tribe and its tribal historic preservation officer were permitted to intervene. JA616. Plaintiffs moved for a preliminary injunction, which the district court denied.

The district court held that the Park Service's decision was not arbitrary and capricious because the agency reasonably "denied the [State's] permit request" on a number of grounds. JA652. The court recognized that "[t]he concern about COVID-19 spread, from the perspective of someone writing on March 11, 2021, was very real and based on relevant data." JA653. And the court explained that it was rational to avoid a gathering of up to 10,000 people at Mount Rushmore in light of public health guidance and "information suggesting ongoing high to substantial spread of COVID-19 in the Black Hills area." JA654.

The court also detailed the other bases identified by the Park Service. The court cited "data supporting the tribal concerns for their cultural sites within the Memorial" and concluded that the Park Service reasonably decided "to honor those tribal concerns as one ground for permit denial." JA655. Based on the drop in visitation during the 2020 event, the court credited the agency's rationale that "the fireworks display would disrupt enjoyment of the Memorial by others." JA656-57. The court concluded that the concern about disrupting an ongoing construction project was "rational based on the damage to the concrete caused during the 2020

event." JA658. And the court explained that the agency's decision to continue monitoring for possible water contamination and wildfire was justified. JA655-56.

The court further rejected plaintiffs' counterargument that the agency failed to "explain why it changed positions from last summer when it approved a substantially similar event." JA659. The Park Service "acknowledged the 2020 event in its letter and explained some of the problems that arose from having the event and how those issues factored into its decision." JA660. The court concluded that plaintiffs' demand for additional explanation was unwarranted in any event because the Park Service's "denial of the 2021 permit after it granted the 2020 permit is not the sort of a change in policy requiring fuller explanation as to the reason for the change." JA660. The court therefore held that the permit decision was not arbitrary and capricious. JA660.

The district court was also unpersuaded by plaintiffs' fallback claim that Congress unconstitutionally delegated authority to the Park Service to make permitting decisions. The court addressed the claim even though plaintiffs had not raised it in support of their preliminary injunction motion. JA647. The court concluded that the claim "finds virtually no support in existing law, which perhaps explains why [plaintiffs] did not argue it in briefing." JA647.

The court explained that the inquiry "turns on whether Congress has supplied an 'intelligible principle' to guide the delegee's use of discretion." JA647 (citation omitted). And the court observed that "[t]his standard is not demanding," as the Supreme Court has only twice declared statutes unconstitutional on this ground while

repeatedly upholding "even very broad delegations." JA648 (quotation marks omitted). After scrutinizing the relevant statutory language, the district court concluded that "the delegation to the [Park Service] passes constitutional muster because it conveys Congress's general policy that the [agency] regulate the use of the national parks with the goals of conservation of the scenery, natural and historic objects, and wildlife in order to preserve them for future generations." JA649-50.

The district court denied a preliminary injunction principally on the ground that plaintiffs had failed to show a likelihood of success on the merits. JA664.

B. Plaintiffs did not appeal the district court's June 2, 2021 preliminary injunction decision. On July 7, 2021, plaintiffs requested that the district court convert its preliminary injunction decision into a final judgment. JA666.

The district court noted that plaintiffs "did not file anything between June 2 and Independence Day weekend to seek a final judgment or to appeal." JA667. Given that the proposed date of the event had passed, the district court explained that "it would seem that issues surrounding the denial of the permit for 2021 are moot." JA667. In particular, the court concluded that "the issue of whether there was an arbitrary and capricious denial of a permit now appears to be moot." JA667.

The court nevertheless recognized that its "legal conclusion that the delegation of authority to [the Park Service] is constitutional" presents a "non-moot appealable issue." JA667. Accordingly, the court granted plaintiffs' motion, JA667, and entered judgment in favor of the government and the intervenors, JA669. Plaintiffs appealed.

SUMMARY OF ARGUMENT

In the midst of the COVID-19 pandemic, the State of South Dakota requested a permit to hold a fireworks event at Mount Rushmore on July 3, 2021. That date has long since passed, and plaintiffs' challenge to the National Park Service's denial of the permit for 2021 is moot. The Park Service based its decision on the particular factual conditions at the time, and plaintiffs cannot demonstrate a reasonable expectation that the same issue will recur even if they seek permits in subsequent years.

Even if plaintiffs' arbitrary-and-capricious claim were not moot, the Park Service reasonably denied the permit on a number of grounds. Notably, counties across the country were experiencing high rates of COVID-19 transmission, and public health experts advised against large gatherings of people from different households where social distancing could not be maintained. The Park Service emphasized the health and safety risks in holding the State's proposed event that would bring together up to 10,000 people from around the country for a fireworks celebration in contravention of the applicable public health guidance. The concern about COVID-19 spread "was very real and based on relevant data." JA653.

In addition to COVID-19 danger, the agency recognized tribal concerns, public visitation concerns, ongoing construction, and the risks of water contamination and wildfire as further reasons to conclude that a 2021 Mount Rushmore fireworks display could not proceed in a safe and responsible manner. The district court properly held that the Park Service's considered decision was not arbitrary and capricious.

The basic thrust of plaintiffs' response is that the agency should have issued a longer letter and should have disregarded the relevant factors and evidence because it granted a permit in 2020. But the Park Service amply described the COVID-19 and other rationales justifying denial of the permit. And the Park Service's decision acknowledged and explained the materially different circumstances relative to the prior year. The agency recognized that COVID-19 risks had to be evaluated in light of updated public health information and guidance. Further, the agency considered that the 2020 event had strained the agency's relationship with its tribal partners, denied access to tens of thousands of visitors, and caused approximately $60,000 in damage to ongoing construction that would be costly to repeat. There is no basis to overturn the Park Service's reasoned and context-specific permit decision.

The district court also properly held that Congress constitutionally delegated authority to the Park Service to make permitting decisions. The relevant statutory provisions direct the agency to regulate the use of the national parks with the goals of conservation of the scenery, natural and historic objects, and wildlife in order to preserve them for future generations. That standard is at least as intelligible as the standards upheld by the Supreme Court and this Court in other cases, and plaintiffs' contrary arguments lack merit. The district court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo whether plaintiffs' arbitrary-and-capricious claim is moot. *See Abdurrahman v. Dayton*, 903 F.3d 813, 816 (8th Cir. 2018). Even if the claim

were still live, the Park Service's permit decision may not be overturned unless it was "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under that standard, reviewing courts afford agency decisions "a great deal of deference." *Mausolf v. Babbitt*, 125 F.3d 661, 669 (8th Cir. 1997).

This Court reviews plaintiffs' constitutional claim de novo. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 794 (8th Cir. 2005).

ARGUMENT

I. Plaintiffs' Arbitrary-and-Capricious Claim Is Moot.

Plaintiffs sought through their arbitrary-and-capricious claim to challenge the Park Service's denial of a permit for an event that the State proposed to hold months ago, in July 2021. As the district court correctly recognized, "the issue of whether there was an arbitrary and capricious denial of a permit now appears to be moot." JA667. In a single conclusory sentence in the jurisdictional statement of their opening brief, plaintiffs invoke (Br. 1) the mootness exception for issues capable of repetition yet evading review. They have not come close to satisfying their "burden of demonstrating that [the exception] applies." *Whitfield v. Thurston*, 3 F.4th 1045, 1047 (8th Cir. 2021).

The exception that plaintiffs raise is "extraordinary and narrow." *McGehee v. Nebraska Dep't of Corr. Servs.*, 987 F.3d 785, 788 (8th Cir. 2021) (quotation marks omitted). Yet plaintiffs rely (Br. 1) on circumstances that are likely to be present in large swaths of cases involving permit denials—namely, that the applicant "intends to

request a permit" in the future. It is not enough that plaintiffs "may be parties to the same sort of dispute in the future." *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482, 485 (8th Cir. 1998) (alterations and quotation marks omitted); *see* 13C Edward H. Cooper, *Federal Practice and Procedure* § 3533.8.1 (3d ed. 2021) (rejecting as insufficient the notion that an event "may well recur in more generic form"). Instead, there must be a "reasonable expectation" that plaintiffs will be "subjected to *the same action* again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam) (emphasis added).

Here, plaintiffs cannot show a reasonable expectation that the Park Service will again deny a permit on the same or similar grounds. The Park Service's context-specific denial in this case rested on the particular factual record before the agency at the time. The Park Service emphasized that the then-current state of the COVID-19 pandemic threatened health and safety concerns, JA130, which may or may not persist next year depending on the country's progress in combatting the rapidly evolving pandemic. Other factors are likewise subject to change. For example, the Park Service cited major renovations at Mount Rushmore that were completed in June 2021, JA131, and there is no reason to believe that a similar project would affect next year's permit decision. Similarly, tribal opposition was premised in part on a cultural survey that had been delayed by the pandemic, and the risks of wildfire and water

contamination vary year-to-year. *See* JA130-31. In short, plaintiffs ask this Court to resolve a factbound dispute whose recurrence is at best speculative.[1]

The nature of plaintiffs' claim underscores the absence of a live controversy. Even if plaintiffs were successful on their arbitrary-and-capricious claim, the proper remedy would be to remand to the agency for additional explanation. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Such a remand would serve no purpose here—nothing would be gained from having the Park Service provide further detail regarding its decision to deny the State's permit request for a date that has already passed. And it would be premature for the Park Service to opine on anticipated permit applications that the State has not yet submitted, particularly where conditions on the ground that bear on the ultimate decision are dynamic. Plaintiffs' arbitrary-and-capricious claim should be dismissed as moot.

II. In Any Event, the Park Service's Permit Decision Was Not Arbitrary and Capricious.

A. The Park Service Amply Articulated the COVID-19 and Other Concerns Justifying Denial of a Permit.

Even if plaintiffs' arbitrary-and-capricious claim were not moot, the district court correctly held that the Park Service reasonably "denied the [State's] permit request" on a number of grounds. JA652. In its letter denying the permit, the agency

[1] By contrast, the district court's "legal conclusion that the delegation of authority . . . is constitutional" presents a "non-moot appealable issue" that does not depend on the specifics of the denial of the permit for 2021. JA667.

detailed the significant health, safety, tribal, cultural, environmental, and management reasons for concluding that a 2021 Mount Rushmore fireworks display could not proceed in a "safe and responsible" manner. JA130. The Park Service plainly satisfied its obligation to "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The agency's "highest priority" was protecting "[t]he health and safety of the public and [park] employees" from the ongoing spread of the deadly COVID-19 virus. JA130; *see* 36 C.F.R. § 1.6(a) (listing "public health and safety" as a relevant factor). At the time of the letter, counties across the country were experiencing high or substantial rates of transmission, including around the Black Hills area where Mount Rushmore is located. *See* JA578-79 (providing link to Centers for Disease Control and Prevention (CDC), *COVID Data Tracker: COVID-19 Integrated County View*, https://bit.ly/3C8vLO0 (last updated Mar. 8, 2021)); *see also* JA213, ¶ 15. And CDC guidance discouraged large gatherings, particularly if members of different households could not stay at least six feet apart. *See* CDC, *Guidance for Organizing Large Events and Gatherings*, https://bit.ly/3lj7duO (last updated Mar. 8, 2021).

The "size and magnitude" of the fireworks event proposed by the State did not comport with this public health guidance. JA130. Not only did the State request to have up to 10,000 visitors in attendance, JA123, but the event was likely to attract people from all over the country, JA130, risking exposure during travel. As the Park

Service explained, it would be "difficult, if not impossible, to comply with social distancing protocols" that applied to gatherings of people from different households. JA130. Indeed, the Park Service's regional director noted that attendees at the 7,500-person fireworks show in 2020 did not practice social distancing, JA213, ¶ 15, as evidenced by a photograph showing crowd density at the event, JA584. As the district court correctly explained, "[t]he concern about COVID-19 spread, from the perspective of someone writing on March 11, 2021, was very real and based on relevant data." JA653.

These COVID-19 concerns were augmented by other significant considerations, including tribal opposition to the fireworks display. JA130; *see* 36 C.F.R. § 1.6(a) (listing "cultural resources" and "avoidance of conflict among visitor use activities" as relevant factors). Pursuant to the National Historic Preservation Act, *see* 54 U.S.C. § 306108, the Park Service invited tribal entities to consult on the proposed 2020 fireworks event, and the 2020 permit decision strained the agency's relationships with the tribes. JA213, ¶ 14. The tribal partners were surprised when then-President Trump announced that the event would occur while discussions were still ongoing with the tribes. JA363-64, 414. And the tribal partners expressed disappointment that the event was permitted over their strong objections. JA213, ¶ 14. Most notably, tribal cultural specialists were unable to conduct an on-site survey to identify significant tribal cultural resources in advance of the 2020 event. JA130. The survey still was not complete in March 2021, as the pandemic had caused delays

until summer 2021, JA130, and the agency denied the permit in part because the results would inform permitting decisions by documenting potential impacts on tribal cultural resources, JA212, ¶ 13.

Multiple other management concerns supported the Park Service's denial of the permit. For example, Mount Rushmore saw a decline in visitation as a result of limits on attendance at the 2020 event. JA131; *see* 36 C.F.R. § 1.6(a) (listing "avoidance of conflict among visitor use activities" as a relevant factor). Those restrictions were necessary because non-ticketed fireworks shows in prior years had been unmanageable and dangerous. *See* JA217, ¶ 21. Thus, to safely accommodate the 2020 fireworks show, the Park Service restricted access to approximately 7,500 people. JA217, ¶ 21. This number was considerably lower than the 20,000 to 39,000 people that Mount Rushmore had historically hosted for Independence Day during non-fireworks years. JA217, ¶ 21. The agency reasonably sought to avoid a similar reduction in 2021 holiday attendance. *See* JA131 (indicating that "tens of thousands . . . were not able to visit the memorial or had their visit cut short" in 2020).

Additionally, at the time of the letter, the agency was "in the final phase of a significant construction project in the park." JA131; *see* 36 C.F.R. § 1.6(a) (listing "management responsibilities" and "allocation and use of facilities" as relevant factors). This project threatened to interfere with the proposed event because although the work was "scheduled to be complete in June 2021," any delay would postpone completion until July. JA131. In fact, the State requested the permit period

to begin on June 15, 2021, JA123, which was expected to overlap with the final days of construction that are often critical to project completion, JA215, ¶ 17.

Moreover, the agency sought to avoid a repeat of damage that occurred the previous year. *See* JA658. While construction originally began in July 2019 with an expected completion date of late 2020, crowds from the 2020 fireworks event placed "too much weight on concrete that had not cured long enough." JA214, ¶¶ 16-17. The resulting damage disrupted the construction, with the cost of replacement concrete estimated at $60,000. JA214, ¶ 17. As the agency explained in its letter, "[a] second demobilization to accommodate [a 2021] event would be costly to the agency and impact the visiting public further based on the 2020 experience." JA131.

The Park Service further noted possible environmental concerns, explaining that the park "continues to monitor" risks of water contamination and wildfire. JA131; *see* 36 C.F.R. § 1.6(a) (listing "environmental or scenic values" as a relevant factor). The need for continued monitoring was well founded. High levels of perchlorate—a contaminant that is a common component of fireworks and can cause human thyroid dysfunction—were first detected in the park's water in 2011. JA254. Past fireworks displays were identified as "the most probable source of perchlorate contamination," JA256, with levels likely to "become elevated following a fireworks display," JA258. After a downward trend in years with no fireworks show, "data collected after the 2020 fireworks event registered an increase in perchlorate at some sites." JA216, ¶ 19. There were also legitimate concerns about wildfire, which had

occurred at Mount Rushmore on more than twenty occasions as a result of past fireworks displays. JA239. Severe drought conditions in the Black Hills area of South Dakota and throughout the western United States, JA587, also threatened "shortages of fire personnel to assist with wildfire efforts." JA219, ¶ 26.

In sum, the Park Service amply justified its conclusion that a 2021 fireworks display could not proceed at Mount Rushmore in a "safe and responsible" manner. JA130. Whether or not the "regulatory decision [was] the best one possible," the agency "engaged in reasoned decisionmaking" by describing the evidence-supported factors warranting denial of the permit. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 292, 295 (2016).

B. Plaintiffs' Counterarguments Are Unavailing and Ignore Aspects of the Park Service's Considered Decision.

1. In their effort to overcome the reasonableness of the agency's permit decision, plaintiffs nitpick individual factors and findings while discounting evidence that supported the agency's conclusions. These sorts of disagreements with the agency's considered judgment do not demonstrate that the agency's explanation was contrary to the record or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Agency action must be upheld so long as it "is supportable on any rational basis." *Organization for Competitive Mkts. v. U.S. Dep't of Agric.*, 912 F.3d 455, 459 (8th Cir. 2018) (quoting

Voyageurs Nat'l Park Ass'n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004)). In any event, each of plaintiffs' hodgepodge of contentions lacks merit.

a. In disputing the agency's COVID-19 rationale, plaintiffs improperly rely (Br. 18, 42-43, 43 n.7) on post-decisional information about vaccination and infection rates. As plaintiffs' own precedent instructs, judicial review is "ordinarily limited to the administrative record that was before the agency when it made its decision." *McClung v. Paul*, 788 F.3d 822, 827 (8th Cir. 2015) (quotation marks omitted). The agency was entitled to rely on available information, especially when the volatile nature of the COVID-19 pandemic made predictions infeasible. During the course of this litigation alone, initial improvements in the state of the pandemic, JA653, were later overshadowed by a renewed surge in cases, *see* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://go.usa.gov/xFRXv (last visited Sept. 23, 2021).

Moreover, the Park Service did not disregard the then-current trajectory of the pandemic, as plaintiffs intimate. The agency acknowledged the country's "encouraging progress in combating the COVID-19 pandemic" but explained that "the situation remain[ed] dynamic." JA130. Thus, the agency determined to rely on "the best available science and public health guidance available" at that time, including the CDC's recommendation to avoid large gatherings "in which physical social distancing cannot be maintained between people who live in different households." JA130. It was eminently reasonable for the agency to take this cautious approach at a

time when transmission rates were high and vaccine rollout efforts were still in their initial stages. *See* JA653; *see also* JA190, ¶ 42; 213, ¶ 15; 579.

Nor was the agency presented with any reliable forecast that conditions would so substantially improve by July 2021 as to assuage concerns about endangering public health. Plaintiffs cite (Br. 42) remarks delivered by President Biden on March 11, 2021, but those statements are consistent with the Park Service's decision. Contrary to plaintiffs' characterization (Br. 42), President Biden merely expressed hope that individuals could celebrate Independence Day by "get[ting] together in [their] backyard or in [their] neighborhood and hav[ing] a cookout and a barbeque" to "begin to mark [the country's] independence from this virus." *Remarks by President Biden on the Anniversary of the COVID-19 Shutdown* (Mar. 11, 2021), https://go.usa.gov/xMj9R. The President did not endorse massive gatherings of thousands of shoulder-to-shoulder attendees. To the contrary, he distinguished "small groups [that] will be able to get together" from "large events with lots of people." *Id.*

Plaintiffs do not dispute that most attendees at the 2020 event did not wear face coverings, but they question (Br. 43-44) the relevance because masks were not mandatory at the time. The agency's letter, however, was recognizing a change from the prior year: by March 2021, face coverings were "required in all national parks where physical distancing [could not] be maintained." JA130. The Park Service thus faced a greater administrative burden in 2021, where gaps in enforcement and

compliance risked serious consequences because, as the CDC had found, failure to "wear[] masks consistently and correctly" would increase "the likelihood of attendees getting and spreading COVID-19 at large events." CDC, *Guidance for Organizing Large Events and Gatherings*, https://bit.ly/3lj7duO (last updated Mar. 8, 2021). Nor was the agency required to turn a blind eye to the numerous unmasked spectators at the 2020 event. Rather, that fact was probative because, even at that time, the CDC strongly urged people to wear face coverings in public settings. *See* CDC, *About Cloth Face Coverings*, https://bit.ly/396MTHn (last updated June 28, 2020). The agency's legitimate "concern about COVID-19 spread" had a strong evidentiary basis. JA653.

b. The record also rebuts plaintiffs' related assertion (Br. 30-31) that the Park Service's management goal to promote visitation cannot be reconciled with its safety goal to prevent the spread of COVID-19. The Park Service's COVID-19 concerns were based primarily on the lack of social distancing. *See* JA130 (mentioning social and physical distancing repeatedly). Whereas a fireworks event would bring a large group of people into close quarters for a sustained period (as occurred in 2020, JA213, ¶ 15; 584), open access to the park would not. As the district court observed, "[t]hose who visit the Memorial typically stay perhaps a couple of hours" to walk around the site and view the sculpture, but "[v]ery few visitors would ever stay an entire day." JA657. A steady flow of visitors throughout the day does not present the same COVID-19 risk as thousands of people crowded together for the duration of a fireworks celebration.

Plaintiffs attempt (Br. 32-34) to downplay the reasonable concerns about a competing construction project by claiming that the Park Service's declarant offered "new rationalizations" for this ground rather than "explanatory" material. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 771 F.2d 409, 413 (8th Cir. 1985). The district court properly rejected this argument, explaining that the declaration set forth "what information [the agency] had when denying the application" but did not "constitute a change in the reasons for denial." JA652 n.8. Although plaintiffs suggest (Br. 33-34) that the declarant went beyond the letter in discussing the estimated $60,000 in damage to newly poured concrete caused by the 2020 event, the declaration elaborates on the letter's statement that "[a] second demobilization . . . would be costly to the agency and impact the visiting public further based on the 2020 experience." JA131.

c. Plaintiffs' objections (Br. 38-42) to the agency's discussion of water contamination and wildfire risk are wholly misplaced. As plaintiffs appear to understand (Br. 30), the agency's letter stated only that the park was "continu[ing] to monitor" perchlorate levels and wildfire risk, JA131. Because the Park Service did not purport to claim that the risks exceeded some absolute threshold, plaintiffs lack support for their charge (Br. 30) that the agency had to "quantify the risk levels," "identify acceptable levels of risk," and "explain why any purported risks could not be mitigated." The agency simply recognized the need for continued assessment of possible environmental impact.

That need was supported by substantial evidence before the agency. An environmental report indicated that fireworks displays likely caused a rise in perchlorate levels, JA256, 258, and sites at Mount Rushmore registered an increase after the 2020 event, JA216, ¶ 19. Plaintiffs ask the Court (Br. 38-39) to overlook this evidence because the Environmental Protection Agency (EPA) withdrew a 15 µg/L interim advisory for perchlorate in drinking water. Again, the Park Service's letter did not suggest that perchlorates had crossed a threshold but instead articulated the need to "continue[] to monitor" those levels.[2] JA131. Plaintiffs also note (Br. 40) that perchlorate levels went down at one site after the 2020 event, but the Park Service's regional director said nothing to the contrary. *See* JA216, ¶ 19. His statements were consistent with the evidence showing that levels went up at multiple sites, JA585, which reinforced the agency's decision to continue tracking the trends of these contaminants, JA131; 216, ¶ 19.

Similarly, the area around Mount Rushmore was prone to wildfires, JA241-43, and a March 2021 fire assessment "predicted persistent drought in western South Dakota through May 2021," JA219, ¶ 25; 587. Plaintiffs discount this evidence (Br. 40-41) on the ground that the March 2021 assessment suggested normal potential for

[2] Regardless, plaintiffs have not offered any case law to support the notion that an agency is barred from treating the EPA's interim advisory level as informative when the EPA determined only that a national perchlorate regulation was unnecessary based on successful state and local reduction efforts. *See* EPA, *EPA Issues Final Action for Perchlorate in Drinking Water* (June 18, 2020), https://go.usa.gov/xMj9J.

significant wildland fire in South Dakota through June 2021. JA586. But the Park Service did not claim that the risks were higher than normal; instead, the regional director noted "potential for an active and destructive fire season" in dry areas across the western United States that could cause "shortages of fire personnel to assist with wildfire efforts." JA219, ¶ 26. That view aligned with a February 2020 environmental assessment, which indicated a "high potential for large fires in the central Black Hills in July," especially "in particularly dry years." JA243; *see also* JA139 ("In a dry year there exists the possibility of a larger wildfire . . . .").[3] The Park Service permissibly weighed the evidence to conclude that monitoring was necessary.

Affirmance would be appropriate even if there were minor discrepancies on this factor because courts must take "due account" of "the rule of prejudicial error." 5 U.S.C. § 706. There can be no meaningful dispute that the agency would reach the same result on reconsideration. The treatment of environmental concerns in the agency's letter suggests that they were a non-dispositive factor—indeed, the agency granted a permit in 2020 in the face of similar concerns. And the Park Service has authority to deny a permit when any factor "would be adversely impacted." 36 C.F.R. § 1.6(d). The Park Service provided multiple reasons for its decision, all or many of which might have been sufficient on their own.

[3] Plaintiffs repeatedly note (Br. 6, 8, 13, 16, 41-42) that the Park Service used a checklist to assess wildfire conditions on the day of the 2020 event, but that is beside the point. A court's role is to determine whether an agency decision is reasonable, not "whether it is better than the alternatives." *Electric Power Supply*, 577 U.S. at 292.

2. a. Plaintiffs' broader attacks on the letter as a whole fare no better. Plaintiffs complain (Br. 30) about the letter's succinctness, but the Administrative Procedure Act imposes no minimum-sentence requirement. The agency need only provide "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The purpose "is to allow a reviewing court to assess the agency's decision." *High Country Citizens All. v. Clarke*, 454 F.3d 1177, 1192 (10th Cir. 2006); *see also Department of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) (holding that agencies must provide "reasons that can be scrutinized by courts and the interested public").

As discussed at length above, the agency clearly recited the factors justifying its decision to deny the permit. As the district court correctly recognized, the Park Service's "path may reasonably be discerned" from its concise letter. JA652 n.8 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009)). Although the agency must have an adequate evidentiary basis for its findings and conclusions, the Park Service was under no obligation to enumerate that evidence in excruciating detail, as plaintiffs imply (Br. 30-32). A contrary rule would place an unmanageable burden on the Park Service, which handles scores of permit applications. The agency adequately explained the bases for its decision, and nothing more is required.

b. Plaintiffs also incorrectly contend (Br. 34-38) that, even if there is a rational basis for the decision, it should nonetheless be overturned because the Park Service "did not acknowledge or explain" allegedly inconsistent findings from the prior year. That contention is wrong as a factual matter—the Park Service acknowledged and

explained the changed circumstances from 2020 to 2021 without contradicting prior findings. And the Park Service was not legally required to provide such a thorough justification in any event—the cases on which plaintiffs rely involved changes in formal policies that adopted rules of general applicability, rather than fact-specific permitting decisions that depended on the contemporaneous facts.

In general, when an agency changes an existing policy, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox Television*, 556 U.S. at 515). A more substantial justification is necessary when the new policy relies on contradictory factual findings or when the old policy implicates serious reliance interests. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 105-06 (2015). Those standards would be met even if they applied in this case.

As the district court recognized, the Park Service's letter was replete with references to the 2020 event, and the agency "explained some of the problems that arose from having the event and how those issues factored into its decision." JA660. With respect to COVID-19, the letter stated that health and safety risks were "being evaluated as a result of the 2020 event" against the backdrop of updated science and CDC guidance. JA130; *see also* JA130 (stating that "as we saw last year, most participants were not wearing face coverings"). The letter further indicated that 2020 attendance limits, which were necessary "due to safety concerns," denied access to tens of thousands of visitors. JA131. And the letter explained that, "based on the

2020 experience," delay or damage to the ongoing construction project would be expensive and affect visitation. JA131. These statements provide a reasoned explanation for treating the 2021 event differently.

Plaintiffs attempt (Br. 36-37) to conjure up inconsistencies with statements in two environmental reports prepared in advance of the 2020 event, but the alleged conflicts are illusory. Those reports were specific to "the [then-]current conditions of the affected environment." JA238; *see* JA137 (specifying that the "statements and conclusions reached" were "based on [2020] documentation and analysis"). The Park Service considered up-to-date information about risks of water contamination and wildfire in issuing the letter in 2021. *See, e.g.*, JA216, ¶ 19; 219, ¶¶ 25-27. More broadly, prior findings that a 2020 fireworks event "would contribute minimally to wildfire risk," JA250, and would not be expected to cause "human health effects from perchlorate," JA258, did not preclude the agency action here. The agency permissibly considered the need to continue monitoring these environmental impacts as one factor among many in deciding to deny a permit in 2021. *See* JA131.

Plaintiffs halfheartedly allege inconsistencies with respect to other factors. They cite (Br. 12, 15) a prediction in the 2020 environmental reports of no likely impact on visitation, but actual visitor data undercut that prediction. JA217, ¶ 21. And the forecast (Br. 10-11, 14-15) regarding the impact on cultural resources was predicated on incomplete information because tribal cultural specialists were unable to conduct a tribal cultural survey prior to the event to identify unknown resources.

JA140-41; 212, ¶ 13. Plaintiffs also claim (Br. 17) that the 2020 show did not result in documented transmission of COVID-19. Even if true, the state of the pandemic had changed dramatically by the next year. When the agency issued the letter, the seven-day average of daily new COVID-19 cases had more than doubled since the grant of the 2020 permit, *see* CDC, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://go.usa.gov/xFRXv (last visited Sept. 23, 2021), and counties across the country were experiencing high or substantial rates of transmission, JA579. One of the very reports on which plaintiffs heavily rely indicated that the Park Service would consider the CDC's COVID-19 guidance, JA163, which in March 2021 advised strongly against a large fireworks show with thousands of strangers in close contact, JA130. The Park Service fully justified its decision to deny a permit in 2021.

In any event, the agency was not legally required to provide such a detailed justification. The cases on which plaintiffs rely (Br. 34) involved changes in formal administrative policies that were promulgated as regulations, orders, or guidance documents and that declared rules of general applicability (namely, how the agency interpreted statutory provisions to apply in a class of cases). *See Encino*, 136 S. Ct. at 2123; *Fox Television*, 556 U.S. at 508-10. In those circumstances, the public could justifiably rely on the policy and its factual underpinnings as the agency's established position, and the agency was required to account for interests like "decades of industry reliance" in deciding to depart from that policy. *Encino*, 136 S. Ct. at 2126.

The Park Service's permitting decisions are not this type of "change in policy requiring fuller explanation as to the reason for the change." JA660. By granting a permit in 2020, the Park Service did not announce a policy at all; instead, that decision was a product of the agency's careful consideration of the contemporaneous factual conditions. Nor could there be any surprise that the Park Service would likewise make a context-specific judgment in 2021. The 2020 permit itself made clear that the permit was valid only "for the current year 2020" with no guarantee of "an automatic renewal of the event in the future." JA599. Similarly, the parties' Memorandum of Agreement provided only that they would "work to" resume fireworks at Mount Rushmore "in a safe and responsible manner." JA109. The Park Service reasonably determined that a 2021 fireworks event could not proceed in a safe and responsible manner due to COVID-19 and other concerns.

III. Congress Constitutionally Delegated Authority to the Park Service to Make Permitting Decisions.

There is no merit to plaintiffs' fallback claim that the Park Service's entire permitting scheme should be declared an unconstitutional delegation of legislative power. Plaintiffs did not even mention the nondelegation doctrine in their preliminary injunction briefing—the government and district court addressed nondelegation in an abundance of caution. And plaintiffs opted to forgo any further briefing on the nondelegation issue by asking the court to convert its preliminary injunction order into a final judgment. As the district court properly concluded,

plaintiffs' nondelegation claim "finds virtually no support in existing law, which perhaps explains why [plaintiffs] did not argue it in briefing." JA647.

"Only twice in this country's history" (and only in 1935) has the Supreme Court "found a delegation excessive—in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion." *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (plurality op.) (first quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989); then citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and then citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935)); *see also United States v. Fernandez*, 710 F.3d 847, 849 (8th Cir. 2013) (per curiam) ("[W]ith the exception of two cases in 1935, the Supreme Court has uniformly rejected every nondelegation challenge it has considered.").

"By contrast," the Supreme Court has "over and over upheld even very broad delegations." *Gundy*, 139 S. Ct. at 2129. For example, the Court has "approved delegations to various agencies to regulate in the 'public interest.'" *Id.* (first citing *National Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); and then citing *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)). It has "sustained authorizations for agencies to set 'fair and equitable' prices and 'just and reasonable' rates." *Id.* (first quoting *Yakus v. United States*, 321 U.S. 414, 422 (1944); and then quoting *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 595 (1944)). And it has "more recently affirmed a delegation to an agency to issue whatever air quality standards are 'requisite to protect the public health.'" *Id.* (quoting *Whitman v. American Trucking Ass'ns*, 531

U.S. 457, 472 (2001)). Similarly, this Court has upheld a statute authorizing an agency to take land into trust "for the purpose of providing land for Indians." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005) (quotation marks omitted). In these decisions, the courts have made clear that Congress's delegations are valid so long as they provide an "intelligible principle" to which the agency must conform. *Mistretta*, 488 U.S. at 372 (quotation marks omitted).

The statutory standard at issue here is at least as intelligible as the directions to agencies upheld by the Supreme Court and this Court in other cases. The statute expressly delineates the congressional policy "to conserve the scenery, natural and historic objects, and wild life" in the national parks and monuments and "to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). The statute further provides that the Director of the Park Service "shall promote and regulate the use" of national parks and monuments "by means and measures that conform to th[at] fundamental purpose." *Id.*; *see id.* § 100751 (empowering the Park Service to "prescribe . . . regulations" to manage the national parks and monuments under the statutory mandate). As the district court explained, the delegation was proper because these provisions "convey[] Congress's general policy that the [Park Service] regulate the use of the national parks with the goals of conservation of the scenery, natural and historic objects, and wildlife in order to preserve them for future generations." JA649-50.

Plaintiffs' comparison (Br. 45-46) of the provisions at issue here with the statute held unconstitutional in *Schechter Poultry*, 295 U.S. 495, is wholly unavailing. In *Schechter Poultry*, the statute authorized private parties to write, and the President to approve or prescribe, "codes of fair competition" in order "to rehabilitate industry" but did not prescribe any method of attaining that goal, any limitations on the nature of the codes that could be created, or any standards against which the codes should be adjudged. *See* 295 U.S. at 530-31, 535, 541 (quotation marks omitted). The statute left the President with "virtually unfettered" authority to regulate trade throughout the country, *id.* at 542, and made it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed," *Yakus*, 321 U.S. at 426. The statutes authorizing the Park Service's permitting authority bear no resemblance to a statute granting "authority to unilaterally enact a sweeping regulatory scheme that will affect the entire national economy." *South Dakota*, 423 F.3d at 797.

Rather, as noted above, the pertinent provisions direct the Park Service to pursue conservation and preservation of resources in regulating the use of national parks. Those explicit textual parameters undercut plaintiffs' assertion (Br. 47) that there are no "meaningful guardrails" to guide administrative determinations. Indeed, plaintiffs misapprehend the nondelegation inquiry in pointing (Br. 47-48) to nonbinding cases that recognize flexibility in the Park Service's statutory directives. "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby v.*

United States, 500 U.S. 160, 165 (1991); *see Panama Ref. Co.*, 293 U.S. at 429 (explaining that it would be "impracticable" to demand that Congress spell out "various and varying details of management" (quotation marks omitted)). Here, Congress validly delegated authority to a specialized land management agency to handle administrative functions related to park management, like issuing or denying special use permits, within set bounds.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

DENNIS R. HOLMES
Acting United States Attorney

MICHAEL S. RAAB

s/ Brian J. Springer
BRIAN J. SPRINGER
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 616-5446
brian.j.springer@usdoj.gov

September 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,008 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that this document was scanned for viruses, and no virus was detected.

s/ Brian J. Springer
Brian J. Springer

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Brian J. Springer
Brian J. Springer