No. 18-3103

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONESVILLE COAL PREPARATION
and
EAST COAST RISK MANAGEMENT
Petitioners

v.

ROBERT W. PORTH
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is unnecessary in this case, because "the facts and legal arguments are adequately presented in the briefs and record." Fed. R. App. P. 34(a)(2)(C).

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18-3103

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EAST COAST RISK MANAGEMENT

Petitioners

v.

ROBERT W. PORTH

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944, filed by Robert Porth. On August 31, 2016, Administrative Law Judge Peter B. Silvain, Jr. (ALJ) issued a decision awarding benefits. Joint Appendix, page (JA) 34. Conesville Coal Preparation, Mr. Porth's former employer, and East Coast Risk Management (collectively Employer), appealed this decision to the United States Department of Labor Benefits Review Board (Board) on September 28, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a).

The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The Board affirmed the award on November 30, 2017, JA 19, and Employer petitioned this Court for review on January 29, 2018, JA 1. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury here—Mr. Porth's exposure to coal mine dust—arose in Ohio, within this

Court's territorial jurisdiction. The Court therefore has jurisdiction over Employer's petition for review.

STATEMENT OF THE ISSUE

To qualify as a "miner" potentially eligible for disability benefits under the BLBA, a claimant must work "in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d). "Coal preparation" includes the "sizing," "cleaning," "washing," "drying," and "loading" of coal. 20 C.F.R. § 725.101(a)(13). "Custom coal preparation facilities" are specifically identified as "coal mines." 30 U.S.C. § 802(h)(2).

The Conesville Coal Preparation facility (Preparation Plant) sized, cleaned, washed, and dried raw coal. It then loaded the processed coal onto a conveyor belt for use by the Conesville Power Plant (Power Plant), an electric power generation plant located approximately two miles away. The ALJ found that the Preparation Plant was a coal preparation facility as defined by the Act. The ALJ further determined that Mr. Porth's work as a laborer and mechanic was integral and necessary to the work performed at the facility. He thus concluded that Mr. Porth was a miner under the Act.

The issue presented is whether this finding is supported by

substantial evidence and in accordance with law.[1]

STATEMENT OF THE CASE

A. Statement of the Facts

The material facts related to Mr. Porth's work at the Preparation Plant are not in dispute.[2] The Preparation Plant prepared coal to the specifications of the Power Plant, which needed vast amounts of clean coal in order to generate electricity and comply with the requirements of the Clean Air Act. JA 105-106, 348.

The coal brought to the Preparation Plant was unprocessed.

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[1] Employer also argues that the ALJ's evidentiary rulings and evaluation of the medical evidence are erroneous. Petitioner's Opening Brief (OB) 21-48. The Director does not address these arguments in this brief.

[2] Mr. Porth was employed by the Conesville Coal Preparation Company. *See* Director's Exhibit 6 (Mr. Porth's Social Security Earnings Record); JA 90-91 (admitting Director's Exhibits into the record). The Conesville Coal Preparation Company, in turn, was owned by America Electrical Power (AEP). JA 105, 351. AEP put the Preparation Plant up for sale in 2012, and Westmoreland Coal Company currently owns it. *See* respectively, https://aepretirees.com/2012/01/20/conesville-coal-prep-plant-to-close-to-be-offered-for-sale/; https://arlweb.msha.gov/drs/drshome.htm (search "Conesville" under "Mine Name") (last visited June 19, 2018).

JA 105. It was fresh out of the pits, and had never been washed—it was dirty, combined with rock, mud, and dirt. JA 105. Mr. Porth testified that the Preparation Plant was a tipple or wash facility that prepared roughly 130,000 to 200,000 tons of coal each month. JA 105-06; *see also* JA 450 (photograph of the Preparation Plant). But it did not consume any coal. *See* JA 106, 348. Rather, the processed coal was transported to the Power Plant, which burned it to generate electricity. JA 106, 348-49.

At the Preparation Plant, the raw coal was first placed into feeders that moved it onto a belt, which ran to the top of the facility. JA 109. Next, the coal went through various sizing screens and shakers. JA 109. These separated out larger pieces of coal, which were then put into a wash box. JA 109-10. In the wash box, the rock sank out but the coal, which was lighter, floated across to go through another screen. JA 110. From there, the coal was dried by a set of centrifugal dryers. JA 110, 112. After going through the dryers, the processed coal was dumped into a pile. JA 113. Finally, the coal was loaded onto a conveyor belt for delivery to the Power Plant two miles away. JA 113, 364.

Mr. Porth worked at the Preparation Plant from November

1984 to September 2010. JA 107. For his first seven years he was a laborer (later, the title changed to stationary equipment operator). JA 107. In that role, Mr. Porth did whatever needed to be done. JA 108. He treated water with chemicals to get the solids out of it, and did a lot of cleaning, such as shoveling, sweeping, and hosing things down. JA 108.

Later as a diesel mechanic, Mr. Porth was responsible for all the equipment that prepared and processed the coal. JA 113. Everything that ran on either gasoline or diesel fuel he maintained. JA 115. He worked inside the tipple on the bottom floor right next to the belt line. JA 115.

The facility contained substantial amounts of coal dust. It was visible in Mr. Porth's work area, and he breathed it in all day long. JA 365. In particular, a tremendous amount of dust was produced by the centrifugal force dryers. JA 112, 117. And by the end of his work day his face, hands, and clothing were dark black. JA 365. The Preparation Plant did have fans to help increase air circulation, but they were not on Mr. Porth's level, and they brought in a lot of coal dust. JA 134.

The coal dust would ruin the tools he used to maintain the

equipment. JA 118. For instance, coal dust destroyed a new battery charger in just two weeks, and the automatic low rails used for changing oil lasted only two months. JA 118. And when he worked on heavy equipment, he would have to work quickly to ensure that the parts did not get too much dust into them. JA 119.

B. Procedural History

Mr. Porth filed this claim for disability benefits under the BLBA in 2012. JA 35. A hearing was held on October 21, 2015, before Administrative Law Judge Peter B. Silvain, Jr. JA 35, 86. In an August 31, 2016 decision and order, ALJ Silvain awarded benefits. Employer appealed to the Benefits Review Board which affirmed. JA 19. Employer then petitioned this Court for review. JA 1.

1. The ALJ Decision Awarding Benefits

The ALJ found that Mr. Porth was a "miner" within the meaning of the BLBA and awarded his claim. JA 41, 70. The ALJ applied this Court's situs/function analysis to determine Mr. Porth's eligibility. JA 40 (citing *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926 (6th Cir. 1989)). Accordingly, he examined whether Mr. Porth's work occurred in or around a coal

mine or coal preparation facility (situs) and involved the extraction or preparation of coal (function). *Id.*

The ALJ had little difficulty finding that Mr. Porth met both prongs. He observed that the definition of coal mine includes coal preparation facilities and tipples, and that the Preparation Plant was such a facility: it received raw, unprocessed coal, processed it, then loaded and delivered it to the Power Plant. JA 41. He further determined that Mr. Porth's work as a laborer and mechanic was integral and necessary to the Preparation Plant's operations.[3] JA 41. In view of these findings, the ALJ concluded that Mr. Porth was a miner under the Act. JA 41.

The ALJ then turned to the medical merits of the case, and determined that Mr. Porth was entitled to disability benefits. JA 70. Employer appealed to the Benefits Review Board.

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[3] The ALJ also noted that there is a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. JA 40. *See* 20 C.F.R. § 725.202(a). The presumption may be rebutted by proving that the person was either (1) not engaged in coal extraction, preparation or transportation, or (2) not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. § 725.202(a)(1), (2). The ALJ found that the Employer had offered "no such proof." JA 41.

2. The Board Affirmance

The Board affirmed the ALJ's finding that Mr. Porth was a miner. With respect to the situs requirement, it observed that the definition of "coal mine" encompasses facilities where coal is prepared, including custom coal preparation facilities. JA 6. The Board then found that the ALJ "permissibly determined that the situs requirement was satisfied because the [Preparation Plant] . . . was used for 'coal preparation' as defined in § 725.101(a)(13), i.e., crushing, sizing, cleaning, washing, drying, and loading coal." JA 6-7.

The Board further upheld the ALJ's finding that Mr. Porth's "duties as a laborer and a diesel mechanic were an 'integral and necessary part' of the functioning of the [P]reparation [P]lant , as [he] was either directly involved in the processing of the coal or kept the machinery used for that purpose in working order." JA 8. It thus agreed with the ALJ that Mr. Porth met the function element as well.

In so finding, the Board rejected Employer's argument that Mr. Porth's work at the Preparation Plant did not satisfy the function element because the coal was being prepared for the sole

use by the Power Plant and not for delivery into the stream of commerce. JA 8. Quoting *Southard v. Director, OWCP*, 732 F.2d 66, 69 (6th Cir. 1984), the Board explained that "coal is extracted and prepared when it is 'in condition for delivery to distributors and consumers,' and a mine extends at least to the point where the coal is processed and loaded for further shipment.'" JA 8.

The Board further distinguished *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), relied upon by Employer. JA 8 n.9. There, the Board reported, the claimant had

> worked *at* the power plant, wetting coal dust and shoveling it into the boilers—tasks related to the consumption of coal. Furthermore, in contrast to the state of the coal at [the Preparation Plant], the coal used at the power plant boilers in *Foreman* had been processed prior to delivery."

Id. (emphasis in original, internal citation and quotations removed). The Board thus concluded that because Mr. Porth's work involved the "processing of raw coal that was being prepared for delivery to the [P]ower [P]lant," it met the function requirement. *Id.*

The Board then affirmed Mr. Porth's award on its medical merits. JA 12-15. Employer's petition for review to this Court followed. JA 1.

SUMMARY OF THE ARGUMENT

The Court should affirm the ALJ's ruling that Mr. Porth is a miner covered by the BLBA. To qualify as a "miner," a claimant must work "in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d). "Coal preparation" includes the sizing, cleaning, washing, drying, and loading of coal. 20 C.F.R. § 725.101(a)(13). And this is exactly what the Preparation Plant did—Employer does not dispute this. Thus, based on the plain language of the BLBA, the Preparation Plant is a coal preparation facility. Moreover, Mr. Porth's duties as a laborer and mechanic were integral to the preparation process occurring at the facility. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922-23 (6th 1989) (stating that a "miner" generally includes workers whose duties are "necessary to keep the facility operational and in good repair"). Thus, the ALJ correctly concluded that he was a miner covered by the BLBA.

Employer disagrees, claiming that Mr. Porth's duties "were strictly to enable [the Preparation Plant] to deliver coal to the Power Plant, not to prepare coal for delivery into the stream of commerce." OB 19. Employer does not consider, however, that the BLBA

expressly includes "custom coal preparation facilities" within the definition of "coal mine." Moreover, *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1989), Employer's sole authority, found no BLBA coverage for a claimant who worked with fully processed coal at the consuming facility (*i.e.*, power plant). The decision obviously has no relevance here where the Preparation Plant prepared raw coal, consumed no coal itself, and transported the prepared coal to Power Plant.

ARGUMENT

A. Standard of Review

This case presents both factual and legal questions. On factual issues, the ALJ's "findings are conclusive if they are supported by substantial evidence and accord with the applicable law." *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 488 (6th Cir. 2014) (internal quotations and citations omitted). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support" the decision. *Id.* "Where the substantial evidence requirement is satisfied, the court may not set aside the ALJ's findings, even if the court would have taken a different view of the evidence were we the trier of facts." *Id.* at 489 (quotations and

alterations omitted).

In contrast, the Court gives no deference to the ALJ's or Board's construction of the BLBA. *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1056 (6th Cir. 2013). The Director's interpretation of the BLBA as expressed in its implementing regulations is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Ramage*, 737 F.3d at 1058. The Director's interpretation of those implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation," *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted), even if they are expressed in a brief, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The plain language of the BLBA and its implementing regulations establish that Mr. Porth worked as a "miner" at the Preparation Plant.

The BLBA defines "miner" as, *inter alia*, "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d); *see also* 20 C.F.R. § 725.202(a). Courts have interpreted this

definition as establishing a two-part test. First, the worker must work in or around a coal mine or preparation facility (the "situs" requirement). Second, their duties must involve the extraction or preparation of coal (the "function" requirement). *See, e.g.*, *Petracca*, 884 F.2d at 929. Duties that are an "integral" or "necessary" part of the coal extraction and preparation process meet the function prong. *Clemons*, 873 F.2d at 922. Here, the ALJ concluded that Mr. Porth was a "miner" because he (1) worked at a coal preparation facility and (2) performed duties that were an integral part of the coal preparation process. These findings are supported by substantial evidence and in accord with governing law.

The situs test is satisfied here. The BLBA's definition of "coal mine" includes not only traditional mines where coal is extracted, but also facilities where "the work of preparing the coal so extracted" is performed, "includ[ing] custom coal preparation facilities." 30 U.S.C. § 802(h)(2).[4] The black lung regulations define

[4] The BLBA is codified in Title 30, Chapter 22, Subchapter IV of the United States Code. 30 U.S.C. § 901(b). The definitions in 30 U.S.C. § 802 apply to all of Chapter 22, including the BLBA, unless otherwise provided for. Relevant to this case are section 802's definitions of coal mine and coal preparation. 30 U.S.C. § 802(h)(2),

"coal preparation" as including "the sizing, cleaning, washing, drying, . . . and loading" of coal. 20 C.F.R. § 725.101(a)(13) (implementing 30 U.S.C. § 802(i)). Employer does not contest the ALJ's findings that these coal preparation activities were performed on raw unprocessed coal at the Preparation Plant. Indeed, it candidly admits that the purpose of the Preparation Plant was to "prepare coal." OB 19. The Preparation Plant is therefore a coal preparation facility as defined by the regulations.

Mr. Porth's work as a laborer and mechanic satisfies the function test. As an initial matter, anyone who works at a covered situs is rebuttably presumed to be a miner. 20 C.F.R. § 725.202(a). Employer could have rebutted the presumption by showing that Mr. Porth was not engaged in the preparation of coal, but as the ALJ pointed out, the company "offered no such proof." JA 41.

In fact, there was no such proof because his work clearly satisfies the function test. "[I]ndividuals who handle raw coal or who perform tasks necessary to keep the mine operational and in repair are generally classified as 'miners.'" *Clemons*, 873 F.2d at

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(i). The BLBA contains its own definition of "miner." *See* 30 U.S.C. § 902(d).

922-23; *see also Petracca*, 884 F.2d at 935 (mechanic working in a repair shop was a miner); *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891, *3 (6th Cir. July 18, 1984) (worker who built and maintained railroad "spur" used to transport coal from mine mouth to tipple was a miner, because "without properly functioning spurs, the cars could not have been transported and positioned to receive coal"). Similarly, Mr. Porth's duties as a laborer and mechanic were essential to keeping the facility operational. *See supra* at 6 (describing Mr. Porth's duties at the Preparation Plant).

Employer does not argue that it did not prepare coal as defined by the statute, nor that Mr. Porth's duties as laborer and mechanic were not integral to such work. Rather, it argues that Mr. Porth was not a miner because the coal it prepared was solely for the Power Plant's consumption. OB 19.

This argument must fail. As an initial matter, the case law makes clear that work performed at a tipple is covered under the BLBA. (The Preparation Plant is a tipple. JA 41, 105). It is only *after* the coal has been processed through the tipple and loaded that courts have found the preparation process complete. As illustrated by Fourth Circuit:

> [t]raditionally the tipple marks the demarcation point between the mining and the marketing of coal. It is at that structure that the screening of the coal occurs and the final product is loaded for transport. When coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce.

Collins v. Director, OWCP, 795 F.2d 368, 372 (4th Cir. 1986). *See also, e.g.*, *Southard*, 732 F.2d at 69 (coal is prepared when it is in condition for delivery to distributors and consumers); *Ratliff*, No. 93-3535, 1994 WL 376891 at *3 (finding that the final step of coal preparation "ended when the coal was loaded into the railroad cars at the tipple; after that, the coal entered the stream of commerce and was no longer being 'prepared'"); *Hanna v. Director, OWCP*, 860 F.2d 88, 93 (3rd Cir. 1988) (removal of coal from tipple is mining work since it is a "step, if only the very last step, in preparation of coal"). Likewise here, coal preparation ended only after the processed coal was loaded onto the two mile conveyor belt that ran from the Preparation Plant to the Power Plant. JA 364.

Further, it is of no import that the Preparation Plant processed the coal according to the Power Plant's specifications. That fact simply highlights the Preparation Plant's status as a covered "custom coal preparation facility." 30 U.S.C. § 802(h)(2); *see Dowd*

v. Director, OWCP, 846 F.2d 193, 194 (3rd Cir. 1988) (industrial plant preparing coal to customers' specifications is a "custom coal preparation facility under the BLBA). Also irrelevant is Employer's comment (OB 19) that Clean Air Act considerations drove the Power Plant's specifications. Regardless of the underlying reason, the Power Plant simply could not burn the coal until the Preparation Plant cleaned it.[5] *See Amax Coal Co. v. Fagg*, 865 F.2d 916, 919 (7th Cir. 1989) (mine reclamation work covered under the BLBA because "'work in the extraction or preparation of coal includes all work which is part of the modern commonly-applied process of extracting and preparing coal.").

[5] According to the U.S. Energy Information Administration, electric power plants consume well over 90% of the nation's coal. U.S. Energy Information Administration, https://www.eia.gov/totalenergy/data/browser/?tbl=T06.02#/?f=A&start=1949&end=2017&charted=1-5-12-13-14 (last visited June 15, 2018). Excluding coal preparation conducted for Clean Air Act purposes would thus cause many workers to lose BLBA eligibility, a result clearly at odds with the BLBA's legislative history. *Dowd*, 846 F.2d at 195 ("[T]he Senate Committee stated that 'what is considered to be a mine and to be regulated under the Act' was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility within the coverage of the Act.").

Employer's related defense—that it was not preparing coal because the Preparation Plant and Power Plant had the same parent company (AEP)—is equally unpersuasive.[6] OB 19-20. First, Mr. Porth did not work for the Power Plant, the consumer of coal, as Employer asserts (OB 20). He worked directly for the Preparation Plant, and the two companies were separate. *See supra* n.2.

More important, the definitional analysis for coal preparation depends primarily on what is done to the coal itself, not on the identity of the actors or their relatedness. *Director, OWCP v. Ziegler Coal Co.*, 853 F.2d 529, 536 (7th Cir. 1988) (stating "section 802(i) focuses on what is done to the coal itself, specifically enumerating tasks"); *see also Hanna*, 800 F.2d at 92 (stating that it is the work the miner does that is determinative). Thus, vertically integrated employers and coal preparation facilities with connections to the ultimate consumer have been not only liable for BLBA benefits but

[6] Accepting Employer's contention would lead to inconsistent results for similarly situated workers. Mr. Porth would not be covered, but current workers having the same exact duties at the Preparation Plant would be merely because AEP no longer owns the facility. *See supra* n.2

also subject to the regulatory jurisdiction of the Mine Safety and Health Administration.[7] *See id.* at 89 (miner covered who worked for a company that owned the entire operation: the mine, the preparation plant, the boating operation that transported the coal, and the steel mill that consumed the coal); *Kinder Morgan Operating, L.P. "C" v. FMSHRC*, 78 Fed. App'x 462 (6th Cir. 2003) (upholding the Federal Mine Safety and Health Review Commission's determination that a third party who blended coal to the specifications of the end user, who also owned the coal, was a preparation facility, and therefore, a coal mine); *Power Fuels LLC v. FMSHRC*, 777 F.3d 214, 215, 220 (4th Cir. 2015) (finding MSHA jurisdiction over a facility that prepared coal to the specifications of a power plant across the street, that also owned the coal); *United Energy Services, Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 975 (4th Cir. 1994) (finding it irrelevant that United Energy transported and delivered coal to the power plant it operates, rather than to another consumer of coal). Indeed, Employer's coverage

[7] The definition of mine for both regulatory jurisdiction purposes and the BLBA include "custom coal preparation facilities." 30 U.S.C. §§ 802(h)(1),(2).

defense here comes out of left field: MSHA has regulated and inspected the Preparation Plant as a covered coal preparation facility for decades. *See* https://arlweb.msha.gov/drs/drshome.htm (search "Conesville" under "Mine Name") (last visited June 19, 2018).

Finally, as the Board held, Employer's reliance on *Foreman*, *supra*, is misplaced. The facility in *Foreman*, unlike here, was not in the business of preparing coal, but rather, of consuming it. *Foreman*, 794 F.2d at 569. Moreover, Foreman's job immediately preceded consumption: he brought the coal to the boilers that burned it, wet it, and then shoveled it into the boilers. *Id.* Finally, the coal had already been processed prior to its delivery to the facility, well before Foreman ever handled it. *Id.* at 569, 571.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court affirm the ALJ's ruling that Mr. Porth was a miner covered by the Black Lung Benefits Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contain contains 4,076 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I also certify that 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 it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

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