Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re STATE OF NEW MEXICO AND THE NEW MEXICO ENVIRONMENT DEPARTMENT, Petitioners

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From the United States
Judicial Panel on Multidistrict Litigation

IN RE: STATE OF NEW MEXICO AND THE NEW MEXICO ENVIRONMENT DEPARTMENT

PETITION FOR WRIT OF MANDAMUS

HECTOR BALBERAS
Attorney General

P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

Christopher Atencio
Assistant General Counsel
Jennifer Hower
General Counsel
Special Assistant Attorneys General
christopher.atencio@statem.nm.us
jennifer.hower@state.nm.us
New Mexico Environment Department

KANNER & WHITELEY, LLC
Allan Kanner
Elizabeth B. Petersen
Allison S. Brouk
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777
Special Counsel for
Plaintiff –Petitioners
Attorney General,
State of New Mexico

121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies, pursuant to Fed. R. App. P. 26.1, that the following have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Plaintiffs-Petitioners:

1. The State of New Mexico
2. New Mexico Environment Department

B. Counsel for Plaintiffs-Petitioners:

3. Cholla Khoury
4. William Grantham

5. Jennifer Hower

6. Christopher Atencio

7. Allan Kanner

8. Allison Brouk

9. Elizabeth Petersen

C. <u>Defendants-Respondents:</u>

10. The United States Judicial Panel of Multidistrict Litigation

D. <u>Other Interested Parties:</u>

11. Robert A. Bilott
Plaintiff's Advisory Counsel, MDL No. 2873

12. Michael A. London
Plaintiffs' Co-Lead Counsel, MDL No. 2873

13. Paul Napoli
Plaintiffs' Co-Lead Counsel, MDL No. 2873

14. Scott Summy
Plaintiffs' Co-Lead Counsel, MDL No. 2873

15. Fred Thompson, III
Plaintiffs' Liaison Counsel, MDL No. 2873

16. Joseph G. Petrosinelli
Defendants' Co-Lead Counsel, Defendants' Coordination Committee, MDL No. 2873

17. Michael A. Olsen
Defendants' Co-Lead Counsel, Defendants' Coordination Committee, MDL No. 2873

18. David E. Dukes

Defendants' Co-Liaison Counsel, Defendants' Coordination Committee, MDL No. 2873

19. Brian C. Duffy
Defendants' Co-Liaison Counsel, Defendants' Coordination Committee, MDL No. 2873

20. Christina M. Falk
United States Department of Justice, MDL No. 2873

21. David Mitchell
United States Department of Justice, D.N.M.

22. Shari Howard
United States Department of Justice, D.N.M.

23. Erica Zilioli
United States Army Corps of Engineers, D.N.M.

E. <u>Presiding District Court Judge, MDL No. 2873:</u>

24. Honorable Richard Mark Gergel
U.S. District Court for the District of South Carolina

Dated: _February 1, 2021_____

Respectfully submitted,

HECTOR BALBERAS
Attorney General

P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

KANNER & WHITELEY, LLC
Allan Kanner
Elizabeth B. Petersen
Allison S. Brouk
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777
Special Counsel for
Plaintiff –Petitioners
Attorney General,
State of New Mexico

Christopher Atencio
Assistant General Counsel
Jennifer Hower
General Counsel
Special Assistant Attorneys General
christopher.atencio@statem.nm.us
jennifer.hower@state.nm.us
New Mexico Environment Department
121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Fourth Circuit Rules 21 and 34(a)(1), Plaintiff-Petitioners respectfully requests that the Court hear oral argument because this Petition implicates significant and unprecedented due process and constitutional concerns.

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BRIEF OF PETITIONERS

HECTOR BALBERAS
Attorney General

P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

Christopher Atencio
Assistant General Counsel
Jennifer Hower
General Counsel
Special Assistant Attorneys General
christopher.atencio@statem.nm.us
jennifer.hower@state.nm.us
New Mexico Environment Department
121 Tijeras Ave. NE

KANNER & WHITELEY, LLC
Allan Kanner
Elizabeth B. Petersen
Allison S. Brouk
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777
Special Counsel for
Plaintiff –Petitioners
Attorney General,
State of New Mexico

Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

RELIEF SOUGHT BY PETITIONERS

Petitioners, the State of New Mexico and the New Mexico Environment Department ("NMED") (collectively, "the State" or "New Mexico"), request that this Court vacate the June 2, 2020 order of the Judicial Panel on Multidistrict Litigation ("JPML" or "Panel"), JPML Rec. Doc. 650 [A001].[1] The Panel's order transferred the State's action brought under state and federal environmental statutes to protect the health of its citizens and the environment, to *In re: Aqueous Film-Forming Foams (AFFF) Products Liability Litigation*, MDL No. 2873 ("AFFF MDL"), pending in the District of South Carolina. Petitioners here seek a writ of mandamus, pursuant to 28 U.S.C. § 1407(e), ordering the Panel to vacate its order and remand of the State's case to the District of New Mexico to allow the State to prosecute its claims. JPML's transfer order exceeds the limited authority granted to the federal judiciary by Congress in 28 U.S.C. § 1407, and violates the well-established Constitutional principles of federalism, which grant authority to the State to bring an action pursuant to its police powers to abate an imminent and substantial endangerment to human health and the environment caused by a defendant's repeated and uncontrolled discharge of toxic chemicals into the environment.

[1] References to "A__" are to the Appendix; references to "JPML Rec. Doc. __" are to filings in the United States Judicial Panel on Multidistrict Litigation; references to "AFFF MDL Rec. Doc. ___" are to filings in MDL 2783 in the District of South Carolina; and references to "D.N.M. Rec. Doc. ___" are to filings in the District of New Mexico.

The State brought this civil action against the United States and the United States Department of the Air Force (collectively "Defendants" or "United States"), pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 ("HWA"), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.* ("RCRA"), after the United States failed for years to abate the imminent and substantial endangerment to human health and the environment at two Air Force bases, Cannon and Holloman ("the Bases"), resulting from the Defendants' improper and ongoing disposal and failure to contain hazardous and solid wastes at the Bases, including per- and polyfluoroalkyl substances ("PFAS"), which are present in "aqueous film-forming foam" ("AFFF"), a product that Defendants have and continue to use for firefighting training activities and petroleum fire extinguishment at the Bases. *See* First Amended Compl., D.N.M. Rec. Doc. 9 [A008]. That imminent and substantial endangerment continues into the present day and will continue into the future unless action is taken. Without relief from this Court, it will remain, and worsen, until the MDL has run its course, which likely will take years.

The dangerous levels of PFAS detected at Cannon and Holloman are shocking and found to be migrating into offsite public and private wells that provide drinking water and livestock and irrigation water to the surrounding communities, impacting, among other things, the public health, New Mexico's dairy industry, residential and

commercial property values, local and state economies, and the livelihood of the communities surrounding the Bases.

Although Defendants acknowledge that the PFAS contamination at and around the Bases resulted from their use of AFFF, they have failed to take the necessary actions to clean up the waste or cooperate with the State in its efforts to protect New Mexicans from further harm. When the State asked Defendants to take immediate steps to clean up the contamination, they refused. When the State ordered Defendants to clean up the contamination pursuant to hazardous waste permits, the United States filed a lawsuit against NMED in the District of New Mexico challenging its permitting authority.[2] Further, despite requests, Defendants have not provided the State with complete information already within their possession regarding the full nature and extent of this problem. Thus, to fulfill its constitutional obligation to protect the interests of its citizens in a healthy and clean environment, *see* New Mexico Const., Art. XX § 21, the State brought this action under the HWA and RCRA seeking injunctive relief to remedy the endangerment caused by Defendants' contamination.

Despite the desperate need for action, the JPML's improper transfer of the State's case to the AFFF MDL has obstructed the State's ability to protect its public

[2] Complaint, *United States of America v. New Mexico Environment Department, et al.*, Case No. 2:19-cv-00046 (D.N.M.) (filed Jan. 17, 2019) [A950].

and its environment. The State's claims against Defendants are asserted under its police powers and seek injunctive relief, not money damages, needed to sufficiently delineate as well as abate the imminent and substantial endangerment Defendants have created. Prior to transfer to the AFFF MDL, the State filed and fully briefed a motion for preliminary injunction, seeking immediate action from Defendants to address the contamination at the Bases. In opposing transfer, the State urged the Panel to allow its case, including a decision on the pending motion, to move forward in the District of New Mexico. But, the Panel transferred the case to the AFFF MDL, where the State's efforts to obtain emergency relief have been rebuffed.

The JPML lacks the authority under 28 U.S.C. §1407 to strip the State of its police powers and ability to control its case as needed to address the public health, environmental, and economic crises that New Mexicans living near the Bases are facing. This nation's system of dual sovereignty cannot be suppressed unless Congress has explicitly expressed its intention to do so, and Section 1407 says nothing on the issue. Contrary to these well-founded principles, the JPML's transfer order has interfered with the dual sovereignty enjoyed by the states and subjected the State to a case management system that commandeers State resources and seizes the State's control of its case. To cure these wrongs, the State requests that this Court reverse the order of the JPML that transferred the State's case to the AFFF MDL and remand the case to the District of New Mexico.

QUESTION PRESENTED

Whether a sovereign state, acting under its *parens patriae* authority and exercising its rights under federal statutes, may be stripped of its ability to advocate for and protect its citizens from ongoing harm and further risk of harm from toxic contaminants infiltrating the environment, by the JPML acting pursuant to 28 U.S.C. §1407, which does not expressly limit state's rights to act pursuant to its Constitutionally protected police powers.

STATEMENT OF FACTS

I. STATE ACTION WAS NECESSARY TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT FROM THE IMMINENT AND SUBSTANTIAL ENDANGERMENT CAUSED BY THE UNITED STATES' RELEASES OF PFAS-CONTAINING AFFF AT CANNON AND HOLLOMAN AIR FORCE BASES.

A. PFAS have been detected at Cannon and Holloman at Extremely High Levels.

For decades, Defendants used AFFF-containing PFAS at the Bases in the course of firefighting and training activities, thereby discharging PFAS into the environment. PFAS chemicals, which include perfluorooctanoic acid ("PFOA") and perfluorooctane sulfonic acid ("PFOS"), are both biologically and chemically stable in the environment, resistant to degradation, and are known to have negative health effects.[3] According to the U.S. Agency for Toxic Substances and Disease

[3] *See* U.S. EPA Technical Fact Sheet—PFOS and PFOA (Nov. 2017), *available at* https://www.epa.gov/sites/production/files/2017-

Registry ("ATSDR"), studies have shown that exposure to certain PFAS may: contribute to low birth weight in newborns and increase the possibility of preeclampsia in women; interfere with the body's natural hormones; increase cholesterol levels; affect the immune system; or increase the risk of cancer.[4] The United States has not disputed the seriousness of the impacts associated with exposure to PFAS chemicals.

At Cannon, where Defendants have for decades used and continue to use AFFF for firefighting training and fire extinguishment, PFAS are found in groundwater, soil, surface water, and sediment at several locations throughout the Base at extremely high levels. An August 2018 site inspection indicated that six groundwater samples exceeded the United States Environmental Protection Agency's ("EPA") Lifetime Health Advisory ("HA") limit of 70 parts per trillion ("ppt") where PFOS and PFAS levels are combined. *Final Site Investigation Report, Investigation of Aqueous Film Forming Foam Cannon Air Force Base, New Mexico*, ("Cannon SI Report"), at 37, attached as Exhibit A to the Certification of Cholla Khoury in Support of the State of New Mexico's Motion for Preliminary Injunction,

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12/documents/ffrrofactsheet_contaminants_pfos_pfoa_11-20-17_508_0.pdf (last accessed Jan. 22, 2021).

[4] ATDSR, *An Overview of Perfluoroalkyl and Polyfluoroalkyl Substances and Interim Guidance for Clinicians Responding to Patient Exposure Concerns*, at 8 (rev. Dec. 6, 2019), *available at* https://www.atsdr.cdc.gov/pfas/docs/clinical-guidance-12-20-2019.pdf (last accessed Jan. 25, 2021).

D.N.M. Rec. Doc. 14-1 [A121]. Concentrations ranged from 130 ppt to 26,200 ppt, nearly 375 times the EPA's HA. *See* Cannon AFB-Onsite 2017 PFAS Soil Exceedances, attached as Exhibit B to the Certification of Mark Laska, Ph.D., in Support of the State of New Mexico's Motion for Preliminary Injunction, D.N.M. Rec. Doc. 13-2 [A100].

Around Cannon near the city of Clovis, PFAS have migrated offsite via groundwater and infiltrated water supplies of neighboring properties. *See* Cannon AFB-Onsite & Offsite 2017, 2018 & 2019 PFAS Groundwater Exceedances, attached as Exhibit E to the Certification of Mark Laska, Ph.D., in Support of the State of New Mexico's Motion for Preliminary Injunction, D.N.M. Rec. Doc. 13-5 [A106]. Families and businesses in the neighboring city of Clovis, including those associated with cattle and dairy production, have already suffered catastrophic losses as a result of the contamination and risk losing much more as the contamination continues to spread.

Similarly, at Holloman, PFAS were detected in soil, surface waters, sediment, and groundwater throughout the base at levels even higher than at Cannon, in some instances at more than 4,314 times the EPA's HA. *See* Detection Summary of Lake Holloman Sampling, attached as Exhibit E to the Certification of Cholla Khoury in Support of the State of New Mexico's Motion for Preliminary Injunction, D.N.M. Rec. Doc. 14-5 [A333]. PFAS contamination extends to valuable public resources

at Holloman, including Lake Holloman. *See* Letter from Attorney General Balderas to U.S. Air Force (May 9, 2019), attached as Exhibit J to the Certification of Cholla Khoury in Support of the State of New Mexico Motion for Preliminary Injunction, D.N.M. Rec. Doc. 14-5 [A350]. Lake Holloman is considered an important habitat for birds, including migrating ducks, shorebirds, and several federally listed endangered species and state-listed species of concern.[5] Lake Holloman also serves as a valuable recreational resource to the community surrounding the Base.[6]

B. PFAS Contamination at the Bases Remains Unabated and Continues to Spread and Endanger the Public Health and the Environment.

The United States does not and could not contest that there are high levels of PFAS contamination at Cannon and Holloman and that remediation is necessary. However, the United States has not contained or cleaned up the contamination at either of the Bases. Nor has the United States taken steps to delineate the full extent of the contamination at either Base.[7] Human, environmental, and economic health remains threatened as a result of the uncontrolled contamination emanating from Cannon and Holloman.

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[5] *See* Lake Holloman Recreational Area Development Environmental Assessment (Aug. 2009), *available at* https://apps.dtic.mil/dtic/tr/fulltext/u2/a636343.pdf (last accessed Jan. 22, 2021).

[6] *Id.*

[7] Although the federal Department of Defense is required to exercise cleanup functions at the Bases pursuant to Executive Order 12580, it argues in this case that it has contaminated too many of its own facilities and thus, it is prevented from addressing the contamination at the Bases. *See* United States Motion to Dismiss, D.N.M. Rec. Doc. 31 [A415].

II. PROCEEDINGS IN THE DISTRICT OF NEW MEXICO

The State filed its initial complaint in the District of New Mexico on March 5, 2019, asserting a claim under the HWA against Defendants the United States and the U.S. Department of the Air Force for the Defendants' violations of the HWA for causing an imminent and substantial endangerment to human health and the environment.[8] On July 24, 2019, the State filed an Amended Complaint, adding a cause of action under RCRA. State of New Mexico's First Amended Complaint (July 24, 2019), D.N.M Rec. Doc. 9 [A008]. Also on that date, the State filed a Motion for Preliminary Injunction seeking immediate, limited injunctive relief necessary to stop the imminent and continued threat of injury to communities surrounding the bases that had been exposed to Defendants' contaminants. State of New Mexico's Motion for Preliminary Injunction,[9] D.N.M Rec. Doc. 10 [A042]. Defendants, together with their opposition to the State's motion for preliminary injunction, moved to dismiss the case. United States Motion to Dismiss and Opposition to State's Motion for Preliminary Injunction, D.N.M. Rec. Doc. 31

[8] Suits against the United States must be brought in federal court. 28 U.S.C. §1345.

[9] The Plaintiff's Preliminary Injunction filing encompasses D.N.M. Rec. Doc. Nos. 10-14, as listed here: D.N.M. Rec. Doc. 10 – Plaintiffs' Motion for Preliminary Injunction, D.N.M. Rec. Doc. 11 – Plaintiffs' Brief in Support of Motion for Preliminary Injunction, D.N.M. Rec. Doc. 12 – Certification of Dave Cobrain In Support of Plaintiffs' Motion for Preliminary Injunction, D.N.M. Rec. Doc. 13 – Certification of Mark Laska, Ph.D., In Support of Plaintiffs' Motion for Preliminary Injunction and D.N.M. Rec. Doc. 14 – Certification of Cholla Khoury in Support of Plaintiffs' Motion for Preliminary Injunction.

[A415]. The State's motion for preliminary injunction, as well as Defendants' motion to dismiss, were fully briefed and had been awaiting a decision from the New Mexico federal district court for eight months at the time the case was transferred to the AFFF MDL.[10] *See* State's Response in Opposition/ Reply in Support, D.N.M. Rec. Doc. 35 [A536]; United States Reply in Support, D.N.M. Rec. Doc. 40 [A579]; Notice of Completion of Briefing US Mot. to Dismiss, D.N.M. Rec. Doc. 41 [A594]; Notice of Completion of Briefing State Motion for Preliminary Injunction, D.N.M. Rec. Doc. 42 [A597].

III. AFFF MDL IN THE DISTRICT OF SOUTH CAROLINA

The AFFF MDL initially consisted mainly of product liability cases brought by individuals and water providers against the main manufacturers of PFAS and AFFF products seeking, in part, money damages. *See* Transfer Order, Entry No. 1 (Dec. 7, 2018), at 3, AFFF MDL Rec. Doc. 239 [A357] ("With some minor variations, the same group of AFFF manufacturer defendants is named in each action . . . additionally, the AFFF manufacturers likely will assert identical government contractor defenses in many of the actions."). A number of sovereigns were later transferred to the MDL, but those cases, in large part, also assert product liability

[10] While the State's motion for preliminary injunction was pending in the District of New Mexico, that district faced a shortage of judges. The State's case was assigned to various judges during that time period and had recently been assigned to the Honorable Kea W. Riggs just prior to transfer to the MDL. *See* Notice of Reassignment (Jan. 6, 2020), D.N.M. Rec. Doc. 46 [A600].

claims seeking monetary relief, with a few exceptions that were transferred to the MDL at a later date, including the State's case. *See* Memorandum Regarding the State and Sovereign Plaintiffs' Cases, at 4 [A936] ("The sovereigns bring claims based primarily in tort against the private companies that designed, developed, manufactured, marketed, supplied, distributed, sold, and delivered AFFF products or their hazardous components. The claims include, among others: negligence, public and private nuisance, trespass, defective product design, failure to warn, and restitution/unjust enrichment.").

The AFFF MDL court has entered a series of Case Management Orders that subjects New Mexico to the control of plaintiffs' co-lead counsel and divests the State of its sovereign police power to protect its citizens and environment. For example, Case Management Order 2, which appointed co-lead counsel for the parties, vests plaintiffs' co-lead counsel with the authority and duty to, for example, sign and file pleadings related to all actions; initiate, coordinate and conduct discovery on behalf of all plaintiffs in the MDL; issue, in the name of all plaintiffs, necessary discovery requests; explore, develop and pursue all settlement options pertaining to any claim, or portion thereof, in any case filed in the MDL; and act as a spokesperson for all plaintiffs at pretrial proceedings. *See* Case Management Order 2, AFFF MDL Rec. Doc. 48, at 5-7 [A361-636]. Further, Case Management Order No. 2A clarifies that any party seeking to file a motion must first seek a

signature from co-lead counsel, and if co-lead counsel refuses to sign the pleading, the moving party must seek leave of court. *See* Case Management Order 2A, AFFF MDL Rec. Doc. 130, at 1 [A413]. As described below in the context of the State's attempts to seek preliminary relief, these requirements have prevented the State from prosecuting its case.

Similarly, Case Management Order No. 3 requires that all substantive communications to the MDL court must first be sent to plaintiffs' co-lead counsel before being submitted to the court. *See* Case Management Order 3, AFFF MDL Rec. Doc. 72, at 4 [A390]. Further still, Case Management Order No. 3 also provides that the State must pay to be subjected to this control through an assessment of common benefit fees and costs. *See id.* at 16 [A402] ("[T]he Court shall impose a holdback assessment of 6% allotted for common benefit attorneys' fees and 3% allotted for reimbursement of permissible common benefit costs and expenses from any settlement(s) or judgment(s) paid by defendant(s).").[11] These Case Management Orders, which are intended to provide discretion in case management decisions to the Plaintiffs' Executive Committee ("PEC") and Defense Coordinating Counsel ("DCC"), were in place at the time of the State's transfer to the MDL.

[11] Here, the State is not challenging the MDL court's broad discretion in case management, but rather the JPML's order that ignored the implications that the MDL court's orders would have on the State's sovereign powers.

IV. THE STATE'S CASE WAS TRANSFERRED TO THE AFFF MDL DESPITE THE PARTIES' PREFERENCE TO REMAIN IN THE DISTRICT OF NEW MEXICO AND MOVE FORWARD WITH THE LITIGATION THERE.

Neither the State nor Defendants sought transfer to the AFFF MDL. This case was pending in the District of New Mexico for more than one year before transfer to the AFFF MDL was ever suggested. The issue of transferring the State's case was first raised by the PEC and DCC, neither of whom are parties to this case, in a Joint Status Report to the MDL court. Joint Status Report in AFFF MDL (Feb. 7, 2020), at 14 [A615].[12] Thereafter, the State's case was discussed by the MDL Plaintiffs' lead counsel and the MDL court at a case management conference, where the court directed the United States to file a tag-along notice. AFFF MDL Status Conf. Trans. (Feb. 7, 2020), 51:7-52:2; *Id.* 55:18-55:18, AFFF MDL Rec. Doc. 497 [A619]. In the course of the MDL court's discussion of the State's case, the MDL court expressed his predisposition that the State would need to surrender some of its rights upon entering the MDL. *See* Status Conf. Trans. (Feb. 7, 2020) 55:20-56:14, ("[O]bviously, an MDL does not move with the velocity of an individual case. You give up a little bit of that when you're in an MDL."). AFFF MDL Rec. Doc. 497 [626-627].

[12] Counsel for the State of New Mexico was not consulted prior to the inclusion of the discussion of the State's case in this Joint Status Report.

On February 18, 2020, the United States submitted a Notice of Potential Tag-Along Action to the JPML after being directed to do so by the MDL court. U.S. Notice of Potential Tag Along (Feb. 18, 2020), AFFF MDL Rec. Doc. 600 [A629]. In its Notice, the United States took no position "as to whether inclusion of this matter in the MDL is warranted." *Id.* Prior to that submission, the United States had informed the MDL court that it did not think that transfer was appropriate, and that it sought to have the motions pending before the District of New Mexico heard sooner rather than later. AFFF MDL Joint Status Report (Feb. 7, 2020), at 14 [A615]; AFFF MDL Status Conf. Trans. (Feb. 7, 2020), 51:7-52:2, AFFF MDL Rec. Doc. 497 [A622-623].

The Clerk of the JPML issued a Conditional Transfer Order No. 26 ("CTO") on February 20, 2020, AFFF MDL Rec. Doc. 603 [A006]. The State filed a notice of opposition to the CTO with the Panel. *State of New Mexico v. United States, et al.*, Dkt No. NM/1:19-cv-00178, Rec. Doc. 3 (Feb. 27, 2020)) (JPML Rec. Doc. 606, MDL No. 2873) [A671]. New Mexico then filed a motion to vacate and a supporting brief requesting that the Panel vacate the CTO, pursuant to Rule 7.1(f), arguing that the criteria for transfer of its case to the MDL were not satisfied here. New Mexico's Motion to Vacate CTO 26 (Mar. 13, 2020), JPML Rec. Doc. 618 [A673]. Only a small group of defendants, not party to the litigation between the State and the United States, submitted a response in opposition. Response of Tyco Fire Products, LP,

Chemguard, Inc., and 3M Company in Opp'n to State of New Mexico's Motion to Vacate CTO 26 (Apr. 3, 2020), JPML Rec. Doc. 625 [A689]. Thereafter, on June 3, 2020, the JPML denied the State's motion to vacate and ordered transfer of this case to the AFFF MDL. JPML Transfer Order (June 3, 2020), JPML Rec. Doc. 650 [A001].

In its order, the Panel failed to properly justify the transfer of the State's case. As explained more fully below, the JPML ignored the framework for sovereign rights to protect citizens and the environment from emergency environmental conditions in favor of § 1407, contrary to the intent of § 1407 and the Constitutional framework. Further, the JPML did not consider the impacts that the structure of the AFFF MDL would have on the State's case, and whether it was reasonable to impose those effects for the sake of efficiency. Instead, the Panel based its decision on the alleged common issues that the State's case shared with other cases pending in the MDL. This reasoning, however, ignores the Panel's own explanation of the AFFF actions within the MDL. In a prior order from the JPML, the Panel explained that the actions to be transferred to the MDL each alleged that the use of AFFF caused the release of PFOA and PFOS into groundwater and drinking water systems. The Panel recognized that with some variations, "the same group of AFFF manufacturer defendants are named," in each of those actions, who will "assert identical government contractor defenses." JPML Transfer Order (Dec. 7, 2018), AFFF MDL

Rec. Doc. 239 [A357].[13] In transferring the State's case, the Panel did not justify expanding the scope of the MDL to incorporate the claims of a sovereign state seeking injunctive relief pursuant to its police powers to protect its people and environment from immediate harm.

V. THE AFFF MDL COURT DENIED THE STATE'S MOTION FOR LEAVE TO FILE MOTION FOR PRELIMINARY INJUNCTION.

Upon transfer of the State's case to the AFFF MDL, its pending motion for preliminary injunction was dismissed without prejudice pursuant to the AFFF MDL Case Management Order No. 2A, AFFF MDL Rec. Doc. 130 [A413]. Because the need for immediate relief remained, as it does to this day, the State sought to have its motion heard before the MDL court.

To have its motion heard, the State faced a number of procedural obstacles set in place by the MDL court's various Case Management Orders. As required by Case Management Order No. 2A, the State requested that the PEC sign the proposed motion. The PEC declined to sign the State's proposed motion but did not oppose the State's motion for leave to file its motion for preliminary injunction, which was filed on August 4, 2020. The PEC, DCC, and the United States filed oppositions to

[13] Significantly, in that same order, the Panel excluded claims from transfer to the MDL that were against direct dischargers. While those claims did not involve AFFF, the reasoning for excluding those cases against direct dischargers would also apply here, where the State has sued the United States as a discharger under RCRA and the HWA, as opposed to a manufacturer under product liability theories.

the State's motion. Defense Coordination Committee's Response to the State of New Mexico's Motion for Leave to File Motion for Preliminary Injunction, at 6 (Aug. 17, 2020), AFFF MDL Rec. Doc. 762 [A789]; PEC's Response to State of New Mexico's Motion for Leave to File Motion for Preliminary Injunction, at 5 (Aug. 17, 2020), AFFF MDL Rec. Doc. 760 [A728]; United States Response in Opp'n to Mot. for Leave (Aug. 17, 2020), AFFF MDL Rec. Doc. 761 [A735]. No party properly justified the erosion of the State's police powers that would result from the denial of the motion.

The MDL Court denied the State's motion, finding that "[a]llowing New Mexico, and each of the thousands of Plaintiffs in this MDL, to conduct motion practice outside the auspices of Lead Counsel would derail a centralized proceeding . . . and impede each plaintiff's opportunity to participate in an organized proceeding and efficient resolution." AFFF MDL Order (Sept. 3, 2020), AFFF MDL Rec. Doc. 801 [A860].[14] In effect, the State was treated as just another plaintiff and its sovereign rights were of no consequence.

As a result, the State's case is now pending in the MDL with no avenue for the needed immediate injunctive relief and continues to be controlled by counsel for private plaintiffs within the MDL, as opposed to the Attorney General and NMED

[14] In its order, the court failed to identify any anticipated ruling to be made in the context of the preliminary injunction motion that would disrupt the MDL.

Secretary, the duly elected and appointed official with the obligation to protect the interests of the citizens of New Mexico regarding public health and the environment. The State has alleged an imminent harm to its citizens and environment and has sought preliminary relief in order to provide emergency relief. Despite the State's immediate needs, the JPML wrongfully transferred the case to the MDL where it faces indefinite delays.

The unique nature of the State's role counsels in favor of allowing the claims proceed where they were filed. As explained more fully below, because 28 U.S.C. §1407 does not expressly trump state sovereignty concerns, a writ of mandamus reversing the transfer order of the JPML is appropriate here to allow the State to protect its citizens from ongoing harm and further risk of harm from toxic contaminants infiltrating the environment.

ARGUMENT

The writ of mandamus is a "drastic and extraordinary remedy reserved for really extraordinary cases."[15] The writ has been used in the federal courts only to compel it to exercise its authority when it is its duty to do.[16] Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation

[15] *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 380 (2004).
[16] *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953).

of this extraordinary remedy.[17] Nevertheless, "[t]hese hurdles, however demanding, are not insuperable."[18] In passing 28 U.S.C. §1407, Congress employed the mandamus procedure to achieve expeditious resolution in the face of an unjust transfer.[19]

A court may issue a writ of mandamus if the petitioner (1) has no other adequate means to attain the desired relief; (2) has demonstrated a right to the issuance of a writ that is clear and indisputable; and (3) satisfies the court that the writ is appropriate under the circumstances.[20] In certain circumstances, it may be proper to issue the writ "to restrain a lower court when its actions would . . . result in the intrusion by the federal judiciary on a delicate area of federal-state relations."[21] For the reasons set forth herein, these requirements are satisfied in this case.

I. THE RELIEF REQUESTED BY THE STATE IS APPROPRIATE UNDER THESE CIRCUMSTANCES.

A writ of mandamus is the only appropriate avenue to challenge the JPML's transfer of a case to an MDL. 28 U.S.C. § 1407(e) provides that review of an order

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[17] *Id.* at 383.
[18] *Cheney*, 542 U.S. at 381.
[19] *See* 28 U.S.C. §1407(e); *see also Transfer of Pretrial Proceedings in Multidistrict Litigation* (Feb. 28. 1968), Committee on the Judiciary, H.R. 1130, 90th Cong., 2d Sess. (to accompany S. 159) ("Subsection (e) limits review of transfer and subsequent decisions of the panel to mandamus in the Federal Court of Appeals for the transferee district. This procedure is more expeditions than appeal, and is consistent with the overall purpose of the proposed statute.").
[20] *Id.* at 380-81.
[21] *Id.* at 381 (internal citations and quotation marks omitted).

of the JPML may be permitted "by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code." "Petitions for an extraordinary writ to review an order to transfer . . . shall be filed only in the court of appeals having jurisdiction over the transferee district." *Id.*

Thus, according to the clear language of the statute, the State has no means of going directly to the JPML to reconsider its Order, and mandamus is the sole means of obtaining review of that Order. *See, e.g., FedEx Ground Package Sys., Inc. v. U.S. Judicial Panel on Multidistrict Litigation*, 662 F.3d 887, 890 (7th Cir. 2011) (finding that petitioner's requested relief was appropriate because §1407(e) provides that "[n]o proceedings for review of any order of the [JPML] may be permitted except by extraordinary writ"). Although the State may seek remand from the AFFF MDL court, it would be futile to do so here given the MDL court's engineered transfer of New Mexico's case to the MDL in the first instance. As discussed above, this case was transferred without any request from the parties to the litigation to do so. Further, the MDL court expressed that it intends to defer to Plaintiffs' Co-Lead Counsel for matters of case management, who have opposed the State moving forward with its case. AFFF MDL Order (Sept. 3, 2020), AFFF MDL Rec. Doc. 801 [A860]; *see also In re Murphy-Brown, LLC*, 907 F.3d 788, 796 (4th Cir. 2018) (finding that "[a] motion for reconsideration would not have been an 'adequate' means of relief" where the trial court had already considered the legal issues of its

order, reasoning that "[p]arties need not endure repeated and irreparable abridgements of their . . . rights simply to afford the district court a second chance"). As such, a writ of mandamus seeking to remand the case to the District of New Mexico is appropriate relief under the circumstances presented here, where transfer of the State's case to the AFFF MDL has resulted in the loss of control of the litigation and the ability to move its case forward pursuant to its sovereign powers, outside of the control of the MDL court or counsel for private litigants that are not parties to the instant case.

II. NEW MEXICO HAS A CLEAR AND INDISPUTABLE RIGHT TO CONTROL THE PROSECUTION OF ITS CLAIMS OUTSIDE OF THE AFFF MDL.

In ordering transfer of the State's case to the AFFF MDL, the JPML improperly ignored and disrupted the framework that provides sovereign states the obligation and authority to protect citizens and the environment from emergency environmental conditions, despite Section 1407's silence on the issue and contrary to the intent of § 1407 and the Constitution. In transferring the State's case, the JPML improperly subjected the State to a case management structure within the MDL geared towards facilitating the resolution of private parties' claims for monetary damages that has further torn away from the State rights associated with litigating its own case and protecting its public and environment. Given these errors on matters of constitutional and statutory law, the continuing spread of the

contamination on and around the Bases, and the State's critical interest in protecting public health and the environment, the requirements for issuing a writ are satisfied here and the JPML transfer order must be reversed.

A. 28 U.S.C. § 1407 Does Not Strip the State of its Police Powers or its Right to Control its Own Claims and have those Claims be Heard as Provided by the United States Constitution.

Under the United States Constitution, state and federal governments are dual sovereigns. The Federal Government is one of limited powers. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution . . . are reserved to the States." U.S. Const. Amend. X. This division of powers specifically reserves for the states those powers necessary to guard and protect the safety and health of the people and the natural resources of the state. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution established a system of dual sovereignty, between the States and the Federal Government."); *see also Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

These "police powers," as they are known, belonging to the State impose responsibilities and grant authority as *parens patriae* to act to protect the health, safety, and welfare of the citizens of the State. *Georgia v. Pa. R. Co.*, 324 U.S. 439, 451 (1945) (finding that a State's sovereignty means it may, as "a representative of the public," sue to right a wrong that "limits the opportunities of her people, shackles

her industries, retards her development, and relegates her to an inferior economic position among her sister States"). As the Chief Justice recently recognized in *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (Mem) (2020) (Roberts, C.J., concurring):

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). When those officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people." *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).

States have been granted these powers not only to protect the well-being of their residents, but also to serve as "a check of abuses" of the federal government's power. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This check of power against the federal government is especially critical here where the United States is the party responsible for the contamination and resulting harm.

Where sovereign interests are threatened or federal government powers have gone unchecked, as is the case here, where the United States' contamination remains unmitigated as it flows though the communities surrounding the Bases, the State not only has the authority but an affirmative duty to act to protect those interests. New

Mexico's Constitution expressly recognizes its obligation to protect the interests of its citizens in a clean and healthy environment. *See* New Mexico Constitution, Art. XX, § 21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare."). Further, State statutes grant the State the power to act in furtherance of this objective, including, for example, the grant of power to the Attorney General to bring suit whenever, in his judgment the interest of the State requires, NMSA § 8-5-2, as well as the grant of power to NMED to regulate hazardous wastes and to sue any person who has violated the HWA. NMSA 1978, § 74-4-1.[22] States also have specific authority to act in the face of public health and environmental emergencies. *See In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905).

The authority of the State may not be intruded upon unless Congress expressly states its intention to do so. *Alden v. Maine*, 527 U.S. 706,727 (1999) ("[T]he Constitution never would have been ratified if the states and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.") (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 237, n.2

[22] When a state asserts its police powers through litigation, states have a unique role in that they represent not only their own interests as sovereigns, but also the quasi-sovereign interests of their residents' health, well-being, and environment. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982).

(1985). "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014). Thus, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so 'unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (internal citations omitted).

Section 1407(a) is a venue statute that authorizes but does not require the JPML to transfer civil actions with common issues of fact "to any district court for coordination and consolidated pretrial proceedings." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42 (1998). "The rule of law applies to multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case. Nothing in § 1407 provides any reason to conclude otherwise." *In re Nat'l Prescription Opiate Litig.* 956 F.3d 838, 841 (6th Cir. 2020). Cases within an MDL "retain their separate identities," and a court may not "distort or disregard the rules of law applicable to each of those cases." *Id.* "Nor can a party's rights in one case be impinged to create efficiencies in the MDL generally." *Id.* Contrary to the expressed intent of Congress in promulgating Section 1407, however, the JPML ignored the law and fundamental structures established by our Constitution and

transferred the State's case to the AFFF MDL, where the State has been subjected to a further disarming of its Constitutional powers.

In addition to disrupting the system of dual sovereignty, the JPML's transfer of the State's case to the AFFF MDL has improperly divested the duly elected Attorney General and the appointed NMED Secretary of their ability to represent, serve, and protect the people of their State. Prior to the State's transfer, the AFFF MDL court entered a series of Case Management Orders, described above, that effectively hand representation of the State's case to private counsel. The private counsel selected by the MDL court to handle the State's case pursuant to Case Management Order No. 3 (and subsequent orders) do not share the fiduciary authority or responsibilities of the State's Attorney General or the NMED Secretary. Here, where the communities surrounding the Bases are facing a public health and economic emergency in the face of Defendants' unchecked contamination, it is the State and its representatives whose judgment must prevail, not that of counsel for private litigants. *In re Abbott,* 954 F.3d 772 (5th Cir. 2020) ("[I]f the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authority.") (citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905)); *see also Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 604, (1982) ("'[I]f the health and comfort to the inhabitants of a State are threatened, the State is the proper party to represent and defend them.'").

Further still, AFFF MDL Case Management Order No. 3 requires that the State must pay to the MDL court's selected counsel a portion of its recoveries in the form of common benefit fees and costs, thereby improperly commandeering the resources of the State without its consent. *See* Case Management Order No. 3, AFFF MDL Rec. Doc. 72 [A387]; *see also Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 519, 578 (2012) (discussing the risks associated where the federal government attempts to impose federal policy or taxes upon states without providing a choice, thereby threatening the "political accountability key to our federal system"). The severity of the implications associated with these case management orders on the State's case cannot properly be dismissed for the sake of "efficiency" of the MDL as a whole. The JPML erred by failing to consider these effects of the MDL's case management structure when transferring the State's case into its control.

The State's right to relief is clear and indisputable. Because nothing in Section 1407 expresses an intent to interfere with State powers through the MDL process, the system of dual sovereignty must be upheld, and the State's rights granted by the Tenth Amendment restored, by vacating the order of the JPML.

B. RCRA Provides for Prompt Relief as Necessary to Protect Public Health and the Environment that is Threatened by Releases of Hazardous Substances.

New Mexico has brought an action against the United States under the RCRA and the HWA to resolve the imminent and substantial endangerment presented at

Cannon and Holloman Air Force Bases caused by the United States' use of AFFF. RCRA, 42 U.S.C. §§ 6901-92k, is a comprehensive statutory scheme "that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). RCRA is "designed to reduce or eliminate the generation of hazardous waste to minimize the present and future threat to human health and the environment." *See* 42 U.S.C. § 6902(b); *Crandle v. City & County of Denver*, 594 F.3d 1231, 1233 (10th Cir. 2010).

RCRA's citizen suit provision authorizes any person, including a State, to commence a civil action:

> Against any person, including the United States…who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. § 6972(a)(1)(B). This provision authorizes suit against the United States for imminent and substantial endangerment claims under RCRA, and authorizes the district court:

> to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both.

42 U.S.C. § 6972(a).

RCRA also authorizes the State to regulate hazardous wastes within its borders in lieu of the EPA. In doing so, NMED operates under the HWA, Chapter 74, Article 4 NMSA 1978, and regulations promulgated under the Act. This dual regulatory framework presumes cooperation between states and the federal government in reaching the goals of state and federal environmental laws.

Here, the State has not only pursued claims against Defendants under RCRA and the HWA seeking to cure the imminent and substantial endangerment caused by their actions, it has also stressed the need for immediate relief by seeking a preliminary injunction from both the District of New Mexico and the AFFF MDL court. Despite the clear intent of the statute to provide for swift cleanup of hazardous substances, especially where those substances threaten human health and the environment, transfer of the State's case to the AFFF MDL has impeded the State's ability to seek relief to which it is clearly entitled under the law and has disrupted the cooperative state and federal framework promoted by environmental statutes.

III. NEW MEXICO HAS NO OTHER MEANS TO MOVE ITS CASE FORWARD AND LITIGATE ITS MOTION FOR PRELIMINARY INJUNCTION OTHER THAN A WRIT OF MANDAMUS FROM THIS COURT.

The MDL court has made its intentions clear; the State will have to wait for discovery, mostly of manufacturer defendants not party to the State's case, and bellwether trials of water districts before proceeding with its claims, including its

request for limited preliminary relief that is necessary to protect its citizens from ongoing harm resulting from the Defendants' unmitigated releases of PFAS contaminants. The State cannot be deprived of the rightful control of its case under these circumstances. *See Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 604 (1982) ("[I]f the health and comfort to the inhabitants of a State are threatened, the State is the proper party to represent and defend them.").

Issuing the writ that the State requests here will not prejudice the cases that would remain in the MDL. State litigation outside of an MDL can easily coexist with an MDL, as has been demonstrated in a number of prior cases. A state and its agencies have a number of tools available under both state and federal law to act to protect public health and the environment. Whether the State wishes to proceed under state or federal law, as the State has done here in bringing both a claim under RCRA and the HWA, it does not waive its Constitutional rights, including the right to be free of a federal judiciary silently subsuming the role of the state. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (noting that "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Nothing in Section 1407 allows for this result.

Thus, the only way to allow the State to uphold its constitutional obligation to protect the citizens and environment of New Mexico is to reverse the decision of the

JPML and remand this case to the District of New Mexico to allow for the litigation to proceed there.

CONCLUSION

The State has the power and the obligation to protect the health and livelihoods of its citizens, and to protect the environment within its sovereign territory, when they are threatened. Such is the case here, where Defendants have released hazardous substances into the environment over the course of many decades, yet have left these contaminants in the environment unmitigated as they continue to migrate through groundwater into drinking water and agricultural sources of water, among other natural resources. Section 1407 did not intend to infringe on the State's sovereign powers that are protected by the U.S. Constitution. Despite the protections of the Tenth Amendment, and as the people of New Mexico continue to suffer, the State's case must now take a back seat to water providers and other private litigants seeking to recover money damages. The matter has now been pending in the MDL for more than six months, despite the ongoing injuries to human health and the environment.

Essentially, this Court is tasked with weighing two interests against each other. The first is the State's sovereign right to pursue its claim to timely address the needs of the State and its citizens. The other interest is that of the District Court in retaining jurisdiction over these claims indefinitely without any action thereon

due to the District Court's admitted devotion to "efficiency" and deference to counsel for private litigants that do not share the same authority or obligations as the State. The choice seems clear: the JPML's transfer order should be vacated and New Mexico's claims should be remanded to the District of New Mexico to allow the State to move forward with its claims.

Dated this 1st day of February, 2021.

Respectfully submitted,

HECTOR BALBERAS
Attorney General

P. Cholla Khoury
William G. Grantham
Assistant Attorneys General
ckhoury@nmag.gov
wgrantham@nmag.gov
Post Office Drawer 1508
Santa Fe, NM 87504
(505) 717-3500

Christopher Atencio
Assistant General Counsel
Jennifer Hower
General Counsel
Special Assistant Attorneys General
christopher.atencio@statem.nm.us
jennifer.hower@state.nm.us
New Mexico Environment Department
121 Tijeras Ave. NE
Albuquerque, NM 87102
Phone: (505) 222-9554
Fax: (505) 383-2064

KANNER & WHITELEY, LLC

/s/ Allan Kanner
Allan Kanner
Elizabeth B. Petersen
Allison S. Brouk
701 Camp Street
New Orleans, LA 70130
Telephone: (504) 524-5777

Special Counsel for
Plaintiff –Petitioners
Attorney General,
State of New Mexico

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2021, I caused to be served the Petition for Writ of Mandamus or Prohibition and associated Appendix on behalf of the State of New Mexico to the following recipients as indicated:

Via ECF and US Mail to:

U.S. Court of Appeals for the Fourth Circuit	1100 E. Main Street, Suite 501 Richmond, VA 23219 (804) 916-2700

Via US Mail to:

Judicial Panel for Multidistrict Litigation	Thurgood Marshall Federal Judiciary Building One Columbus Circle, NE Room G-255, North Lobby Washington, DC 20544-0005 (202) 502-2800
The Honorable Judge Richard M. Gergel, District Judge U.S. District Court for the District of South Carolina	P.O. Box 835 Charleston, SC 29402 (843) 579-2610

Via electronic transmission to:

Those identified on Certificate of Interested Persons as "Other Interested Parties"

Kanner & Whiteley, L.L.C.

_/s/ Allan Kanner_____
Allan Kanner
a.kanner@kanner-law.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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

1. 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 contains **7,845** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/Allan Kanner

Attorney for the State of New Mexico

Dated: February 1, 2021