Exhibit 1

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL, et al.,	Case No. 3:17-cv-3804-EDL
Plaintiffs,	Consolidated with Case No. 3:17-cv-3885-EDL
v.	Magistrate Judge: Hon. Elizabeth D. Laporte
UNITED STATES BUREAU OF LAND MANAGEMENT, et al.,	***AMICUS CURIAE* BRIEF OF THE TRADE ASSOCIATION COALITION**
Defendants.	
SIERRA CLUB, et al.,	
Plaintiffs,	
v.	
RYAN ZINKE, in his official capacity as Secretary of the Interior, et al.,	
Defendants.	

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Pursuant to this Court's Order Regarding Amicus Briefing dated August 10, 2017, No. 3:17-cv-3804 (Doc. 41), the National Association of Home Builders ("NAHB"), American Fuel & Petrochemical Manufacturers ("AFPM"), American Petroleum Institute ("API"), and the National Mining Association ("NMA") (collectively, the "Trade Association Coalition" or the "Coalition") submit this brief as *amicus curiae.*

The Coalition supports BLM's exercise of discretion to postpone the effective date of agency action pending judicial review under Section 705 of the Administrative Procedure Act ("APA"). The Coalition takes no position on the other grounds for summary judgment advanced by Plaintiffs.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Coalition has a strong interest in ensuring that agencies maintain the flexibility and discretion Congress provided them to issue postponements under Section 705 of the APA. Because the APA governs administrative rulemakings by a wide variety of federal agencies, interpretation of Section 705 has implications beyond the rulemaking at issue in this case. The Coalition and their members are regulated by numerous federal agencies and under a wide range of federal statutes and regulations. In authorizing agencies to stay their own actions pending judicial review, Section 705 allows agencies to prevent any disruption that may result from forcing compliance with a rule that might be vacated or significantly modified as a result of a court decision. The Coalition and their members rely on agencies' ability to use Section 705 to respond to concerns about unjust regulatory impacts in a timely, reliable manner. Unduly restricting agencies' authority and ability to issue stays under Section 705 would create regulatory uncertainty and increase the likelihood of unnecessary regulatory burdens being

imposed on the Coalition and their members across a wide range of statutory and regulatory contexts.

NAHB is a not-for-profit trade association comprised of more than 700 state and local home builders associations. NAHB's purpose is to promote the general commercial, professional, and legislative interests of its approximately 140,000 builder and associate members throughout the United States. NAHB's membership includes entities that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers.

AFPM is a national trade association whose members comprise virtually all United States refiners and petrochemical manufacturers. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses.

API is a national trade association that represents all aspects of America's oil and natural gas industry. API's members include oil producers, refiners, suppliers, marketers, pipeline operators and marine transporters, as well as supporting service and supply companies. API's mission is to promote safety across the industry globally and to support a strong U.S. oil and natural gas industry.

NMA is the national trade association of the mining industry. NMA's members include the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry.

The Trade Association Coalition certifies that no party's counsel has authored this *amicus* brief in whole or in part. Further, no party or party's counsel contributed money that

was intended to fund preparing or submitting this brief, and no person—other than the *amicus curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

1. Does Section 705 of the APA constrain agency authority by requiring agencies to conduct the four-factor preliminary injunction test normally associated with judicial injunctions every time an agency seeks to postpone its own action?

STATEMENT OF FACTS

On June 15, 2017, the U.S. Department of Interior, Bureau of Land Management ("BLM" or the "Agency") published its "*Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates*," 82 Fed. Reg. 27,430 (June 15, 2017) ("Stay Rule"). The Stay Rule announced BLM's postponement pending judicial review of certain compliance dates in its final rule addressing the loss of natural gas through venting, flaring, and leaks during oil and gas production on public lands. *See* 81 Fed. Reg. 83,008 (Nov. 18, 2016) ("Waste Prevention Rule").[1] Although the Waste Prevention Rule went into effect on January 17, 2017, the compliance dates for several significant new requirements are not until January 17, 2018. It is these compliance dates—which have not yet passed—that BLM postponed with the Stay Rule. *See* 82 Fed. Reg. at 27,430.

BLM based its authority to issue the Stay Rule on Section 705 of the APA, which allows an agency to postpone the effective date of its action pending judicial review, when "justice so requires." *Id*. at 27,431 (citing 5 U.S.C. § 705). BLM expressly found that "justice requires it

[1] Various parties filed challenges to the Waste Prevention Rule, which are consolidated in the United States District Court for the District of Wyoming. *See Wyoming v. DOI*, No. 2:16-cv-00285 (D. Wyo.).

to postpone the future compliance dates" of the Waste Prevention Rule pending judicial review. BLM cited several factors to support its "justice so requires" finding, including "the prospect of significant expenditures to comply with provisions of the Rule that will become operative in January 2018" and "the uncertain future these requirements face in light of the pending litigation and administrative review." *Id.* BLM also found that petitioners in the District of Wyoming challenges to the Waste Prevention Rule raised "serious questions concerning the validity of certain provisions of the Rule" and that "[g]iven this legal uncertainty, operators should not be required to expend substantial time and resources to comply with regulatory requirements that may prove short-lived." *Id.*

On July 5 and 10, 2017, Plaintiffs California and New Mexico ("State Plaintiffs") and Sierra Club, *et al.* ("Sierra Club Plaintiffs") (collectively, "Plaintiffs") filed their respective complaints in this Court, alleging that BLM violated the APA in issuing the Stay Rule.[2] Among other claims, Plaintiffs allege that BLM impermissibly issued the Stay Rule "without applying the four-part test required by § 705 to stay a regulation's effective date, including consideration of whether: (1) the action to be stayed is likely unlawful, (2) the party seeking the stay will suffer irreparable harm, (3) the balance of equities favors a stay, and (4) the public interest supports a stay." Sierra Club Pls. Compl., No. 3:17-cv-3885, Doc. 1 ¶ 72 (citing *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012) (holding that "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level; each is governed by the four-part preliminary injunction test.")); *see also* State Pls. Compl., No. 3:17-cv-3804, Doc. 1 ¶¶ 50-52.

On July 26 and 27, 2017, Plaintiffs filed their respective motions for summary judgment, seeking vacatur of the Stay Rule. Based on *Sierra Club v. Jackson*, Plaintiffs argue in part that "BLM failed to support its conclusion that 'justice . . . requires' a stay because the Stay Notice failed to apply the traditional four-part test for issuing a stay." Sierra Club Pls. Mot. for Summ. J., No. 3:17-cv-3885, Doc. 37 at 16:11-13; *see also* State Pls. Mot. for Summ. J., No. 3:17-cv-3804, Doc. 11 at 12:24-13:12. The Sierra Club Plaintiffs also argue that BLM provided "no rational explanation for its belief that its authority exceeds that of the courts." Sierra Club Pls. Mot. for Summ. J., No. 3:17-cv-3885, Doc. 37 at 17:9-10.

On August 25, 2017, BLM filed its consolidated response in opposition to Plaintiffs' motions for summary judgment. BLM maintains that the four-factor preliminary injunction test is not mandatory for agency action under Section 705, which "places no limitations on an agency's determination of what 'justice so requires.'" Defs.' Opp'n to Mots. for Summ. J., No. 3:17-cv-3885, Doc. 52 at 13:7-9. BLM argues that *Sierra Club v. Jackson* was wrongly decided on this point. *See id.* at 13-16.

SUMMARY OF ARGUMENT

Plaintiffs' claim that Section 705 required BLM to conduct the four-factor preliminary injunction test before issuing the Stay Rule rests on a single non-binding case issued by the U.S. District Court for the District of Columbia, *Sierra Club v. Jackson.* However, the plain text and legislative history of Section 705, relevant agency and judicial precedent, and practical considerations associated with an agency's exercise of discretion under Section 705 all demonstrate that *Sierra Club v. Jackson* should not be followed by this Court. Although BLM

[2] This Court consolidated the actions on July 24, 2017. *See* Order Granting Administrative Motion to Consider Whether Cases Should Be Related, No. 3:17-cv-3804, Doc. 10 (July 24, 2017).

may consider the injunction test factors to show that "justice so requires" postponement of agency action, BLM is not required to do so. It would be improper to grant summary judgment to Plaintiffs or to judge BLM's action based on the Agency's decision not to use the injunction test. Instead, to the extent this Court determines that it has jurisdiction to review BLM's action, it should do so under the arbitrary and capricious standard. That standard requires that BLM's determination be reasonable and reasonably explained, but does not require that the Agency make specific findings under the injunction test.

ARGUMENT

I. Congress Plainly Established Different Standards For Agencies And Courts Under Section 705.

The plain text of Section 705 makes clear that Congress intended to establish separate and distinct standards for agencies and courts: agencies may issue stays when "justice so requires," while courts may do so "on such conditions as may be required and to the extent necessary to prevent irreparable injury."

Section 705 provides:

> When **an agency finds that *justice so requires***, it may postpone the effective date of action taken by it, pending judicial review. **On such conditions as may be required and to the extent necessary *to prevent irreparable injury*, the reviewing court** . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705 (emphasis added).

If Congress meant to apply the same standard to both agencies and courts, it would have needed just one sentence in Section 705, not two. Instead, Congress referred only to agencies in the first sentence, when it established the "justice so requires" standard, and referred only to courts in the second, when it applied the separate "irreparable injury" standard. Courts should "give effect, if possible, to every clause and word of a statute," *King v. Burwell*, 135 S.

Ct. 2480, 2498 (2015) (citation omitted), and thus must give effect to Congress's use of entirely different words in two entirely different sentences. Indeed, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

And while Section 705's plain text might support imposing the four-factor injunction analysis as a limit on *judicial* discretion to stay agency action, it does not support limiting *agency* discretion in the same way. Section 705 refers to "irreparable injury," a key factor in the preliminary injunction test that Plaintiffs seek to impose on BLM in this case, *only* in the sentence establishing the standard for courts to apply. The statute makes no reference to "irreparable injury" in the language outlining agency discretion. It therefore would be improper to invalidate BLM's action in this case based on the argument that the Agency failed to find irreparable harm, as Congress expressly declined to include such a requirement. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 n.9 (1984).

II. <u>Section 705's Legislative History Confirms That Congress Did Not Intend To Require Agencies To Conduct The Injunction Test.</u>

The APA's legislative history reiterates Congress's intent to establish separate standards for agencies and courts under Section 705, and confirms that requiring an agency to conduct the injunction test any time it postpones agency action is contrary to Congressional intent.[3] Section

[3] Courts may consider a statute's wording "against the background of its legislative history and in the light of the general objectives Congress sought to achieve" to ascertain Congressional intent. *Wirtz v. Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968).

705 was intended to codify then-existing (*i.e.*, pre-APA) law. When the APA was first enacted in 1946, agencies had broad, flexible discretion over their own actions, while courts were required to consider factors such as "irreparable harm" before intruding in agency matters by issuing a stay. Congress intended to maintain, not eliminate, these traditionally separate authorities.

Under pre-APA law, agencies generally had broadly defined discretion over their own actions. *See FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940) (agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry"). This principle was "an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved." *FCC v. Schreiber,* 381 U.S. 279, 290 (1965) (citing *Pottsville*). Two years before the APA was enacted, the U.S. Supreme Court recognized an agency's "wide discretion as to the time and conditions of [its regulations'] issue and continued effect," including the "wide scope for the exercise of [the agency's] discretionary power to modify or suspend a regulation pending its administrative and judicial review." *Yakus v. United States*, 321 U.S. 414, 438-39 (1944).[4]

Courts, on the other hand, traditionally had more constrained authority over agency action, including the requirement to find irreparable injury before staying agency action. By the time the APA was enacted, it was "a well established principle of law that . . . a court of the

United States will not . . . enjoin the administrative process unless the circumstances alleged demonstrate that irreparable harm and injury will occur." *Reinecke v. Loper*, 77 F. Supp. 333, 335 (D. Haw. 1948) (citing *Nat. Gas Pipeline Co. of Am. v. Slattery*, 302 U.S. 300, 305 (1937)); *see also Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 14 (1942) (courts have "the power to issue a stay [of agency action] in a situation where the function of the stay is to avoid irreparable injury").[5] Likewise, the U.S. Supreme Court had established that courts should not ignore the "vital differentiations" between the historic roles and functions of courts and agency bodies, or else they may "stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Pottsville*, 309 U.S. at 144.[6]

Legislative history reveals that Section 705 was intended to codify this "existing law" (*i.e.*, pre-APA law). Appendix to Attorney General's Statement Regarding Revised Committee Print of October 5, 1945, *reprinted in* Administrative Procedure Act, Legislative History, S. Comm. on the Judiciary, 79th Cong. 223, 230 (1944-46) (attached as Exhibit 3). In analyzing

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[4] *Yakus* addressed the authority of the Office of Price Administration under the Emergency Price Control Act of 1942, which "can be viewed" as an exercise of Congress's constitutional war powers. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring); *id.* at 278-79 (distinguishing *Yakus* on grounds unrelated to an agency's authority to issue stays of its own actions).

[5] The four-factor preliminary injunction test itself has roots in courts of equity. It is a judicially-created doctrine intended for courts, by courts. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006) ("Ordinarily, a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff applies the four-factor test historically employed by courts of equity."); *Bannercraft Clothing Co. v. Renegotiation Bd.*, 466 F.2d 345, 353 (D.C. Cir. 1972) ("Historically, courts sitting in equity have had broad powers to do justice and avoid irreparable injury.").

[6] Even the plaintiffs in *Sierra Club v. Jackson* recognized that "Section 705 recognizes separate agency and judicial powers to stay rules, governed by different standards and arising from different sources." Plfs.' Reply in Supp. Mot. Summ. J. at *12-13, No. 1:11-cv-1278 (Doc. 25) (D.D.C. Sept. 1, 2011) (citing *Scripps-Howard* and *Bannercraft*). The plaintiffs in *Sierra Club v. Jackson* failed to reconcile this observation with their argument that agencies and courts should be held to the same four-factor preliminary injunction test standard under Section 705.

the two sentences of Section 10(d) of the APA (the predecessor to Section 705[7]) enacted in 1946, the Attorney General recognized that the requirement to find irreparable injury applied specifically to courts:

> The first sentence ["When an agency finds that justice so requires, it may postpone the effective date of action taken by it . . ." in the current Section 705] states existing law. The second sentence ["On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings" in the current Section 705] may be said to change existing law only to the extent that [it codifies aspects of the opinion in *Scripps-Howard Radio* that are not pertinent here]. In any event, ***the court*** **must find, of course, that granting of interim relief is necessary to prevent irreparable injury**.
>
> *Id.* (emphasis added) (attached as Exhibit 3).

That both sentences of Section 705 were intended to codify then-existing law, under which agencies and courts had separate powers governed by different standards to stay agency action, is confirmed by commentary in the Attorney General's Manual on the Administrative Procedure Act ("Attorney General's Manual")[8]:

> The first sentence . . . is a restatement of existing law. The second sentence . . . confers upon every "reviewing court" discretionary authority to stay agency action pending judicial review "to the extent necessary to prevent irreparable injury." . . . The stay power conferred ***upon reviewing courts*** is to be exercised only "to the extent necessary to prevent irreparable injury." In other words, **irreparable injury, the historic condition of equity jurisdiction,** is the indispensable condition to the exercise of the power conferred by section 10(d) ***upon reviewing courts***.

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[7] Differences between the two versions are stylistic only. *See Sierra Club*, 833 F. Supp. 2d at n.4 (citations omitted).

[8] The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA," to which Courts have "repeatedly given great weight." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988). The manual was "prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued as a guide to the agencies in adjusting their procedures to the requirements of the Act." *Id.*

> . . . **As in the past**, ***reviewing courts*** **may "balance the equities"** in determining whether to postpone the effective date of agency action. Thus, "In determining whether agency action should be postponed, ***the court*** should take into account that persons other than parties may be adversely affected by such postponement[.]" . . . More broadly, it is clear that ***a reviewing court*** in exercising this power may do so under such conditions as the equities of the situation may require.
>
> U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 105-06 (1973), *unabridged republication of 1st ed.* (1947) (attached as Exhibit 4).

The Attorney General's Manual plainly states that Section 705 was intended to codify the traditional duty of *courts* to consider "irreparable injury," and to exercise their discretion to "balance the equities," prior to staying agency action. The discussion of these factors is linked only to the powers conferred *on courts* by Section 705, and does not indicate that the same factors apply to agency discretion under Section 705. Indeed, the manual clearly differentiates between the two.

In *Sierra Club v. Jackson*, the case upon which Plaintiffs' arguments rest, the D.C. District Court looked to a different part of Section 705's legislative history, citing a committee report passage in concluding that "the standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or to a court." 833 F. Supp. 2d at 31. That cited passage is at best ambiguous:

> [APA Section 10(d)] permits *either agencies or courts*, if the proper showing be made, to maintain the status quo . . . The authority granted is equitable and *should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy*."
>
> *Id.* (emphasis in original) (citing Administrative Procedure Act, Pub. L. 1944-46, S. Doc. 248 at 277 (1946) [an excerpt from H.R. Rep. 79-1980 (1946)].[9]

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[9] The Sierra Club Plaintiffs in the instant litigation cite a legislative history passage with identical language to S. Doc. 248 in their Motion for Summary Judgment. *See* Sierra Club Pls. Mot. for Summ. J., No. 3:17-cv-3885, Doc. 37 at 16:21-25 (citing S. Rep. No. 79-752 at 213 (1945)). That passage suffers from the same flaws as the passage cited by the *Sierra Club v. Jackson* court.

Committee reports, like this one, should not be relied on if they are "imprecise." *See Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S. Ct. 2251, 2258-59 (1994). Even more importantly, legislative history interpretations "cannot lead the court to contradict the legislation itself." *Vasquez v. Grunley Constr. Co.*, 200 F. Supp. 3d 93, 101 (D.D.C. 2016) (citation omitted). The *Sierra Club v. Jackson* court's interpretation of legislative history is at odds with the plain text of the APA and other legislative history. Section 705 plainly states that agencies may stay agency action when "justice so requires," while courts may do so only "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705. Yet the *Sierra Club v. Jackson* court's interpretation ignores the "justice so requires" language in Section 705's first sentence, and improperly reads "agencies" into the second sentence, concerning courts, without explanation.

The *Sierra Club v. Jackson* court erred in contradicting Section 705's plain legislative mandate based on imprecise legislative history. This Court must give effect to Congress's clear intent to establish distinct standards for agencies and courts. *See Chevron*, 467 U.S. at 843.

III. Agency And Judicial Precedent Demonstrate That Section 705 Does Not Require Agencies To Conduct The Injunction Test.

Plaintiffs' exclusive reliance on *Sierra Club v. Jackson* ignores the large body of agency and judicial precedent demonstrating that Section 705 does not require agencies to perform the injunction test. Agencies have issued, and courts have upheld, numerous stays under the "justice so requires" standard of Section 705 without referring to the injunction test factors. The wide range of circumstances under which agencies have exercised their Section 705 authority belies the contention that agencies always must consider the four injunction test factors. The Trade Association Coalition is aware of no other court decision besides *Sierra Club v. Jackson* holding that agencies must satisfy the injunction test before issuing a stay under Section 705.

Agencies have issued Section 705 stays under a wide range of circumstances, without referring to the injunction test factors. *See, e.g.*, Fed. Reg. 67,107, 67,108 (Nov. 13, 2008) (finding that "it is in the interest of justice to postpone the effective date" of a power plant dust control measure pending judicial review where agency "has taken the position in the litigation . . . that it would be appropriate for the Court to remand and vacate the dust control measure"); 60 Fed. Reg. 54,949, 54,952 (Oct. 27, 1995) (finding that stay of reporting requirements "is appropriate and in the interest of justice, given the fact that agency incorrectly categorized the effects observed in certain data . . . prior to promulgation of the final rule"); 59 Fed. Reg. 43,048, 43,050 (Aug. 22, 1994) (finding that stay of reporting requirements "is appropriate and in the interests of justice, given the allegations of procedural and substantive deficiencies surrounding the Agency's listing of these two chemicals, and the resulting controversy and confusion in the regulated community"); 60 Fed. Reg. 26,828, 26,828 (May 19, 1995) (finding that "it would be inequitable not to postpone the effective date" of air emission standards "in light of the possibility of increased compliance flexibility" where agency "has become aware that certain provisions of the final standards may require clarification" and plans to publish a subsequent document "to clarify such provisions"); 76 Fed. Reg. 59, 896, 59,897 (Sept. 28, 2011) (postponing effective date of wage rule in light of two pending challenges and the possibility that the litigation would be transferred to another court); 67 Fed. Reg. 47,296 (July 18, 2002) (staying effectiveness of certain provisions of mine safety rule "to prevent confusion while [the agency] carries out [an] enforcement policy" developed as a result of settlement negotiations and where a stay "may further a full settlement of the court challenge").

Likewise, courts have upheld agency-issued Section 705 stays under the "justice so requires" standard in a wide range of circumstances, without regard to whether the agencies

performed the four-factor test. For example, in *Recording Industry Association of America*, the United States Court of Appeals for the District of Columbia Circuit concluded that an agency's "concern to minimize disruptive impacts" on industry was a sufficient rationale for its delay determination under Section 705. *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir. 1981) (citation and quotations omitted). Similarly, in *Southern Shrimp Alliance*, the court upheld an agency's postponement of the effective date of the distribution of certain funds "pending the judicial challenges to the constitutionality of the [relevant statutory] requirement." *S. Shrimp Alliance v. United States*, 33 C.I.T. 560, 571-72 (2009). Notably, neither opinion mentioned the four-factor preliminary injunction test.

Sierra Club v. Jackson is therefore at odds with other agency and judicial precedent.[10] This Court should decline to follow *Sierra Club v. Jackson*, an outlier decision from another district court that is not binding on this Court. *See United States v. Ensminger*, 567 F.3d 587, 591 (9th Cir. 2009) ("[A] district court opinion does not have binding precedential effect, especially one from another federal circuit.") (citations and quotations omitted). Although there may be some instances in which it is appropriate for agencies to choose to evaluate the injunction test factors before staying their own action, *Sierra Club v. Jackson* went too far in holding that agencies are required to do so every time.[11]

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[10] The two D.C. Circuit cases cited by the *Sierra Club v. Jackson* court, *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972 (D.C. Cir. 1985) and *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958), as well as *Winter v. NRDC*, 555 U.S. 7 (2008), cited by Plaintiffs in their Motions for Summary Judgment, are inapposite. All three cases relate to whether courts, not agencies, must use the four-factor preliminary injunction test to stay agency action. None of them cites Section 705.

[11] Plaintiffs misconstrue *Sierra Club v. Jackson* to the extent they allege the court held that the "justice so requires" standard requires the four-factor preliminary injunction test. *See* California Pls. Mot. for Summ. J., No. 3:17-cv-3804, Doc. 11 at 12:24-13:3; Sierra Club Pls. Mot. for Summ. J., No. 3:17-cv-3885, Doc. 37 at 16:11-13. The *Sierra Club v. Jackson* court failed to

(footnote continued on next page)

Finally, although an agency's authority to stay its own actions under Section 705 is flexible, it is not unbounded. To the extent an agency stay issued under Section 705 is a final agency action subject to judicial review, it may be reviewed under the "arbitrary and capricious" standard of the APA. *See* 5 U.S.C. § 706(2)(A); *see also Recording Indus. Ass'n of Am.*, 662 F.2d at 14 (a court "must uphold" an agency's determination under Section 705 "if the agency's path may reasonably be discerned") (citation omitted); *S. Shrimp Alliance*, 33 C.I.T. at 572 (an agency may delay action under Section 705 "based on a reasoned explanation"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*, 463 U.S. 29, 42-43 (1983) ("[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."). Accordingly, if this Court determines that Stay Rule is a final agency action and reviews the BLM's Section 705 determination, it should do so under the appropriate "arbitrary and capricious" standard, which requires that the agency's determination be reasonable and reasonably explained, but does not require that the agency make specific findings under the four-factor preliminary injunction test.[12]

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give meaning to the "justice so requires" standard in the first sentence of Section 705 at all. Instead, the court appears to have disregarded the first sentence of Section 705 altogether, and improperly read the second sentence as applying to both agencies and courts. *See* 833 F. Supp. 2d at 30-31 (finding that "the standard for the issuance of a stay pending judicial review is the same whether a request is made to an agency or to a court").

[12] The Trade Association Coalition disagrees with Plaintiffs that agencies always must conduct a cost-benefit analysis under the Section 705 "justice so requires" standard. *See* Sierra Club Pls. Mot. for Summ. J., No. 3:17-cv-3885, Doc. 37 at 17:13-25; State Pls. Mot. for Summ. J., No. 17-cv-3804, Doc. 11 at 13:9-11. The Plaintiffs cite no precedent linking that requirement to Section 705, and "[b]eyond the APA's minimum requirements, courts lack authority to impose upon an agency its own notion of which procedures are best or most likely to further some vague, undefined public good." *Perez v. Mortg. Bankers Ass'n*, 135 S.Ct. 1199, 1207 (2015) (citation and quotations omitted).

IV. <u>Different Standards For Agencies And Courts Under Section 705 Make Practical Sense.</u>

Requiring agencies to make injunction test findings in order to postpone deadlines under Section 705 makes little practical sense. It is undisputed that the injunction test was designed for courts, not agencies, and courts "must not impose judicial roles upon administrators when they perform functions very different from those of judges." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168 (D.C. Cir. 1979). Nor should courts constrain agency discretion by "engrafting their own notions of proper procedures upon agencies." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 525 (1978). To do so would deny agencies the flexibility and discretion required to regulate efficiently and fairly.

For instance, Plaintiffs ask this Court to hold that every agency, in order to postpone an action under Section 705, must determine the "likelihood of success on the merits" of a pending judicial review of the agency's action. Such a request is not only impractical, but also borders on absurd. Rarely would an agency be willing to make a determination that it is likely to lose in pending litigation over its rule. To do so would compromise the agency's litigation position. Further, an agency could have many valid reasons to stay a challenged rule, even where the agency does not conclude that challengers are likely to succeed on the merits. *See, e.g.*, 61 Fed. Reg. 28,508, 28,509 (June 5, 1996) (the agency "is not concurring" that parties have established likelihood of success on the merits, but "[r]ather, as a prudential matter . . . believes that a four month delay [of certain emission standards] is appropriate for [other] reasons"). For example, an agency may want to "allow facilities to avoid compliance expenditures . . . which may prove unnecessary." *See id.* at 28,508. Or an agency may want to avoid or reduce the risk of unintended consequences, such as health and safety impacts, alleged to arise from a challenged rule. *See, e.g.*, 60 Fed. Reg. 50,426, 50,428 (Sept. 29, 1995) (staying portions of waste

management rule alleged to "make it more dangerous to manage the waste" by increasing risk of explosion and fire).

Plaintiffs' claims likewise would require that every agency stay issued under Section 705 be accompanied by a finding of "irreparable injury." Again, this requirement, while sensible for courts, makes little sense for agencies. To stay agency action, a court must insert itself into the administrative process, presumably over an agency's objection. Such intrusion should not be tolerated unless there is a compelling reason, such as preventing irreparable injury. *See Reinecke*, 77 F. Supp. at 335 ("where matters peculiarly within the purview of an administrative body are before it for disposition, a court of the United States will not . . . enjoin the administrative process *unless the circumstances alleged demonstrate that irreparable harm and injury will occur* ") (citation omitted) (emphasis added); *see also Clean Air Council*, Opinion at n.1, No. 17-1145, Doc. 1682465 (Brown, J., dissenting) ("By establishing the judiciary as an alternative [to an agency for seeking a stay of agency action under Section 307 of the Clean Air Act], the statute ensures stays result from factual warrant and not simply because the agency wills one."). There is no similar reason to require an *agency* to make a finding of irreparable injury to stay its own action, over which it "normally retains considerable discretion." *See Recording Indus. Ass'n of Am.*, 662 F.2d at 14. It is enough that an agency desires to "minimize disruptive impacts" or has other compelling reasons for finding that a stay is in the interests of justice. *See id*. For instance, an agency may seek to "relieve[] a burden on the regulated community" of having to comply with challenged regulatory requirements that the agency "now considers to be more stringent than may be necessary." *See* 60 Fed. Reg. 22,228, 22,228 (May 4, 1995) (staying certain water quality criteria). Or an agency may seek to avoid imposing what "appear[] to be legitimately infeasible" requirements on regulated parties by a

particular compliance date. *See* 56 Fed. Reg. 27,332, 27,332 (June 13, 1991) (staying hazardous waste listings in order to "conditionally extend the effective date" of certain waste management standards).

Given these considerations, *Sierra Club v. Jackson* is an "unworkable decision" that "may be a positive detriment to coherence and consistency in the law." *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173–74 (1989), *superseded on other grounds*, *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008). By ignoring the "vital differentiations" between agencies and courts, the *Sierra Club v. Jackson* court "stray[ed] outside [its] province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *See Pottsville*, 309 U.S. at 144. This Court should not apply *Sierra Club v. Jackson*'s unworkable holding here.

CONCLUSION

Section 705 of the APA does not require an agency to conduct the four-factor preliminary injunction test before postponing its own action. If this Court reviews BLM's Section 705 determination in the Stay Rule, it should apply the appropriate "justice so requires" standard. The Agency's determination must be reasonable and reasonably explained, but the statute does not require that the Agency make specific findings normally associated with judicial injunctions.

September 6, 2017

Respectfully submitted,

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