IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

STATE OF GEORGIA, *et al.*, *Plaintiffs*, AMERICAN FARM BUREAU FEDERATION, *et al.*, *Intervenor-Plaintiffs,* v. ANDREW WHEELER, *et al.*, *Defendants*.	Case No. 2:15-cv-79

BUSINESS INTERVENOR-PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO AMEND THE COURT'S PRELIMINARY INJUNCTION

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INTRODUCTION

Already having granted preliminary injunctive relief within the borders of the Plaintiff States, the Court held that "[t]hree of the four [preliminary injunction] factors (substantial likelihood of

success on the merits, balance of harms, and public interest) weigh overwhelmingly in Plaintiffs' favor." *Georgia v. Pruitt*, 2018 WL 2766877, at *9 (S.D. Ga. June 8, 2018). Only the question of irreparable injury, the Court said at the time, was "a closer call." *Id.*

In the meanwhile, two critical developments have taken place. *First*, the Applicability Date Rule has been enjoined nationwide. Irreparable harm is therefore no longer a close call—the WOTUS Rule has come into effect in those States where it has not been preliminarily enjoined, and it is fundamentally disrupting landowners' use and enjoyment of their lands. *Second*, the Court has granted leave to the Business Intervenors to participate in this action as party plaintiffs. That matters because the Business Intervenors are national organizations, with national memberships, suffering irreparable injury wherever the WOTUS Rule is in effect. We agree with the government that the Court should not alter its preliminary injunction to apply to non-parties—our point is that the parties presently before the Court represent national interests warranting nationwide relief.

We accordingly moved this Court for an order expanding the preliminary injunction to protect the Business Intervenors and their members nationwide, or at least in the 22 States and the District of Columbia where the WOTUS Rule is not preliminarily enjoined by this or any other court. Granting our request would entail a common-sense extension of the Court's original order to match the nature of the parties before it.

Neither the Federal Defendants nor the Intervenor-Defendants deny that the WOTUS Rule is probably unlawful. And they do not disagree that the balance of harms and the public interest strongly favor preliminarily enjoining its enforcement while these proceedings are ongoing. Instead, the Federal Defendants insist that we have not demonstrated nationwide standing or irreparable injury. That is wrong. The Business Intervenors represent members and economic interests *nationally*; the Federal Defendants are components of the *national* government; and the WOTUS Rule is an enormously consequential regulation with *national* scope. The scores of declarations

submitted in this case—declarations that clearly establish that the Business Intervenors' members are incurring non-recoverable compliance costs and forever-lost development opportunities all across the country—are therefore sufficient to establish entitlement to *nationwide* relief.

For their part, the Intervenor Defendants resort to technicalities, asserting that our motion is noncompliant with the Federal Rules of Civil Procedure and barred by collateral estoppel. That is also wrong. A federal district court has broad equitable discretion to modify a preliminary injunction previously entered as the need arises; the Intervenor Defendants' contrary position would freeze a preliminary injunction in place once entered, putting it beyond the power of the Court to modify except in the narrowest of circumstances. That makes no sense. And because the Texas court expressly ruled without prejudice, collateral estoppel plainly doesn't apply here.

ARGUMENT

A. The Business Intervenors have standing to seek nationwide relief and have established irreparable injury

The Federal Defendants suggest that the Business Intervenors lack standing to seek a national injunction (Fed. Opp'n 2, 9) and that we have not established irreparable harm (*id*. at 6-9). Neither contention holds water.

1. The Business Intervenors have established standing many times over—and in the course of doing so, they have established irreparable injury. "An organizational plaintiff has standing to enforce the rights of its members 'when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1342 (11th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181 (2000)). Critically, an organizational plaintiff is not limited to pursuing equitable relief on behalf of those members who individually establish injury. In

other words, "to sue on behalf of its members, organizational plaintiffs need not establish that *all* of their members are in danger of suffering an injury." *Id*. (emphasis added). "Rather, the rule in this Circuit is that organizational plaintiffs need only establish that 'at least *one* member faces a realistic danger' of suffering an injury" for standing to pursue relief on behalf of *all* of their members. *Id*. (emphasis added) (quoting *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1163 (11th Cir. 2008)).

The Federal Defendants nonetheless insist that the Business Intervenors must show that their "members [are] suffer[ing] cognizable injuries over the full geographic span" of the Nation in order to obtain a nationwide injunction. Fed. Opp'n 5. This presumably means, in the government's view, that the Court lacks the authority to extend its preliminary injunction into the territorial limits of any State where there is no resident declarant within the State. That is nonsense.

The Court has the authority over *parties*, not *territory*. The parties before the Court here (namely, the Business Intervenors) have demonstrated that they are national organizations with members all across the country; and that their members are being harmed irreparably by the WOTUS Rule, which is a national rule inflicting substantial and non-recoverable compliance costs, including hard costs and foregone development and production opportunities. *See infra*, pp. 6-8 (discussing declarations in detail). Where precisely the declarants are located is a red herring; it is the national character of the parties—the Business Intervenors and the Federal Defendants themselves—that provides one basis for a nationwide order.

Even a *state* court "with adjudicatory authority over the subject matter and persons governed by the judgment" has the authority to enter a judgment entitled to "recognition throughout the land," with "nationwide force." *Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (construing the Full Faith and Credit Clause). It would surpass strange to say that a state court can enter nationwide relief against a national defendant for the benefit of national plaintiffs while a

federal court cannot. In fact, the baseline rule in the federal system is that "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the violation inherent in the WOTUS Rule's enforcement, as well as the irreparable harm shown to the Business Intervenors, is national. Thus, it should be enjoined nationwide.

The Court's authority to enter such relief is beyond dispute. That much is proven by the Supreme Court's recent decision in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam). In that case, district courts in Hawaii and Maryland entered nationwide preliminary injunctions against enforcement of Executive Order No. 13780, popularly known as the "international travel ban," and the Fourth and Ninth Circuits affirmed the injunctions. On the United States' application for a stay of the injunctions pending review on certiorari, the Supreme Court modified the substance of the injunctions but affirmed their nationwide scope. Three Justices dissented from the proposition that the injunction could reach beyond the "[plaintiffs] themselves" to apply nationally (*id.* at 2090), but the majority affirmed the injunction's nationwide scope to benefit all of those who are "similarly situated." *Id.* at 2087.

That ruling confirms the Court's authority to enter nationwide relief. But this Court does not even have to go as far as the Supreme Court went in *International Refugee Assistance Project*, because the parties before the Court in this case are, as we have said repeatedly, *national*. This is not a matter of granting relief to "similarly situated" nonparties—it is a matter of granting relief simply to the parties themselves. Put simply, a national injunction is necessary and appropriate to afford relief to the parties before the Court.

2. As a fallback, the Federal Defendants assert that the supporting declarations are not adequately specific, in that they do not identify specific members who will be harmed. Fed. Opp'n 7. The government could not be more wrong. As we showed in the opening memorandum (at 12-14), the declarations attached to both our motion to intervene (Dkt. 178) and the motion to expand the

preliminary injunction (Dkt. 208) demonstrate beyond any serious dispute that the WOTUS Rule is inflicting irreparable injury on the Business Intervenors and their individual members all across the country.[1] For example:

- Amanda Aspatore declared that the **National Mining Association** (NMA) "is a national trade association that represents the interests of the mining industry," including "the producers of most of America's metals, coal, and industrial and agricultural minerals." Dkt. 178-1, at 1a. She testified that NMA members were already expending resources to comply with the WOTUS Rule, "including hiring outside consultants and attorneys" to "ascertain the extent of their potential new liability under the Rule." *Id*. at 2a.
    - C. Crellin Scott, in turn, declared that **Murray Energy** is a member of the NMA with multistate operations in Ohio, Illinois, Kentucky, Pennsylvania, Utah, and West Virginia. Dkt. 178-2, at 143a-144a. He stated that Murray's operations are "directly impacted" by the WOTUS Rule because newly covered features under the Rule "pervade the eastern and western coalfields and, as a result, are frequently encountered during routine activities such as construction and maintenance of access and haul roads" and "roadside ditches." *Id.* at 145a. He identified, in particular, the Nolan Run Saddle Dike Extension, where permitting for "ditches" that are "jurisdictional under the Final Rule, but are not jurisdictional under the old rule" would reach $1.9 million. *Id*. at 145a-146a.
- Emily Coyner declared that the members of the **National Stone, Sand, and Gravel Association** (NSSGA) "produce more than 90% of the crushed stone and 70% of the sand and gravel consumed annually in the United States," employing "about 100,000 men and women nationally." Dkt. 208-4, at A-1; Dkt. 178-1, at 28a. She testified that the 2015 WOTUS Rule will "impose additional permitting and mitigation costs and add significant time delays" for wide swaths of mining activities that are "proxim[ate] to natural wetlands, flood plains, and intermittent streams." Dkt. 208-4, at A-2; *see also* Dkt. 178-1, at 29a.
    - Mark Williams, in turn, declared that **Luck Companies** is an NSSGA member, that it has expended non-recoverable resources on compliance with the WOTUS Rule, and that the Rule will "increase [Luck's] mitigation costs for [a] proposed site" for quarry development. Dkt. 178-2, at 201a-202a. Luck Companies has multistate operations throughout Georgia, the Carolinas, and Virginia.

[1] Each association's declaration explains expressly how the interests at stake in this litigation are germane to each association's mission. The government does not challenge that point, and so we do not dwell on it here. There also is no dispute that each association has members with standing to sue in their own right or that the participation of those individuals is unnecessary. We do not dwell on those points either. So far as standing is concerned, it also bears mention that the Business Intervenors have standing in their own right insofar as they have been aggrieved by the agencies' failure to provide an adequate opportunity for public comment. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994).

- Alan Parks likewise testified that **Memphis Stone & Gravel Company** is an NSSGA member, that it too has already expended resources on compliance with the WOTUS Rule, and that the expansion of jurisdiction entailed by the Rule will disrupt its operations and add significant expense. *Id*. at 108a-109a. Memphis Stone & Gravel has multistate operations in Tennessee and Mississippi. *Id*. at 108a.

- Don Parrish testified that the **American Farm Bureau Federation** (AFBF) has member farmers and ranchers in every State where there is currently no preliminary injunction in effect. Dkt. 208-4, at A-9, A-10; *see also* Dkt. 178-2, at 110a. And the WOTUS Rule has "significantly expanded the scope of Clean Water Act jurisdiction" to regulate "countless sometimes-wet landscape features that are ubiquitous in and around farmland," including "drains carrying rainfall away from farm fields, ordinary farm ditches, and low areas in farm fields where water channels or temporarily pools after heavy rains." Dkt. 208-4, at A-9, A-10.

  - Numerous members throughout the country submitted declarations testifying to the harms inflicted on their farming and ranching operations by the WOTUS Rule, including **Tim Canterbury** (Dkt. 178-1, at 9a) and **Jim Chilton** (*id*. at 11a), both ranchers in the arid Southwest; **John Duarte**, a nursery owner in California (*id*. at 33a); **Jack Field**, an owner of a cow-calf operation in Washington State (*id*. at 50a); **Robert Reed**, a farmer in Texas (Dkt. 178-2, at 122a); **Joy Reznicek**, a farmer in Alabama and Mississippi (*id*. at 125a); **Wallace Roney**, a rancher in California (*id*. at 127a); and **Victor Stokes**, a rancher in Washington State (*id.* at 173a). Each of these declarants testified at length about the very real and concrete burdens that are being imposed on their farming and ranching operations by the WOTUS Rule, including hard costs that will never be reimbursed. Mr. Roney even declared that the "many thousands of dollars in costs" necessary to comply with the WOTUS Rule will even make his ranch "economically unviable." *Id*. at 129a.

- Nick Goldstein declared that the **American Road & Transportation Builders Association** (ARTBA) is "America's oldest and most respected national transportation construction related association" whose membership includes "more than 6,500 private and public sector members that are involved in the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems." Dkt. 178-1, at 61a-62a. Mr. Goldstein testified about the WOTUS Rule's impact on "roadside ditches," noting in particular that additional delay from new regulation of such ditches will impose non-recoverable financial costs and cause ARTBA's members to "scale back transportation improvement projects." *Id*. at 63a-64a.

  - Chris Hawkins, in turn, declared that **Hawkins Construction Company**, which "provides construction services in nearly all sectors of the construction industry," is a member of ARTBA and is—like so many of the other declarants at issue here—facing irreparable harm in the face of the WOTUS Rule. Dkt. 178-1, at 65a. In particular, the WOTUS Rule will "lead to delays in the project review and approval process" at the federal level, as well as "increased material costs and uncertainty of work schedules." *Id*. at 66a. In fact, the WOTUS Rule is so broad that it will "leave no transportation project untouched." *Id*. at 67a.

- Similarly, Stephen Wright testified that **Wright Brothers Construction Company** is a member of ARTBA and has "projects located across the Southeast," including in Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia. Dkt. 178-2, at 204a-205a. Mr. Wright explained that Wright Brothers has already spent money to ascertain the implications of the WOTUS Rule and to ensure compliance with it. *Id*. at 205a. Indeed, Wright Brothers "has concluded that the final rule will expand federal jurisdiction under the Clean Water Act and require permits for features which had not previously been defined as 'waters of the United States,' including waters on our lands and the lands that we develop for our clients." *Id*. What is more, the "lack of clarity" in the rule will require Wright Brothers "to obtain permits defensively." *Id*. at 206a.

- William Murray declared that the **National Alliance of Forest Owners** (NAFO) represents "the interests of owners and managers of over 80 million acres of private forests in 47 states." Dkt. 178-1, at 84a. He explained that the 2015 WOTUS Rule "creates uncertainty," in response to which members "may have to alter their behavior" and will have to "expend resources to determine the applicability of, and compliance with, the Rule." *Id*. at 85a.

  - Janet Price testified that **Rayonier Inc.**, which is a NAFO member, has extensive multistate foresting operations in Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, Oklahoma, South Carolina, Washington, and Oregon. Dkt. 208-4, at A-12. She explained that "it is not certain which features" on its vast lands now qualify as waters of the United States under the WOTUS Rule. *Id*. The company has now had to "undertake[] a detailed internal review of the 2015 Rule in an effort to interpret the requirements and determine the impact to timberland operations encompassing [its] multi-state land base," costing it "substantial time and resources." *Id*. at A-12, A-13. Ms. Price testified further than the Rule is complicating Rayonier's ability to qualify for and comply with pesticide-application general permits, which in turn is likely to require the company "to establish additional buffering" around features now potentially covered by the WOTUS Rule, taking the land out of production. *Id*. at A-13.

  - Terrance Cundy testified that that **Potlatch Land and Lumber Corporation** is a NAFO member. Dkt. 178-1, at 31a. He explained that Potlatch, too, is incurring additional compliance costs with respect to the WOTUS Rule's application to its "multi-state" operations. *Id*. at 32a.

The list could go on—the Business Intervenors have submitted literally *scores* of declarations before this Court in support of their motion for relief. These declarations—all of which were cited in the opening memorandum (at 12-14)—demonstrate that the Business Intervenors have members in, and represent economic interests in, all 50 States and the District of Columbia. They also demonstrate that those members subject to regulation under the WOTUS Rule are suffering irreparable harm in the form of, at minimum, "nonrecoverable compliance costs." *Thunder Basin Coal Co. v.*

Reich, 510 U.S. 200, 220-221 (1994); *see also* Opening Mem. 15. It is clear, too, that some members are irreparably having to take land out of production (*e.g.*, Dkt. 208-4, at A-13 (Decl. of Janet Price); Dkt. 178-2, at 122a (Decl. of Robert Reed)) and may even have to close their businesses (*e.g.*, Dkt. 178-2, at 129a (Decl. of Wallace Roney)).

It is irrelevant to our demonstration of nationwide irreparable injury that some declarants testified about their injuries in States where the WOTUS Rule is now enjoined, such as Texas. Many declarants operate in States in which no injunction applies (including California, Oklahoma, Oregon, Tennessee, Virginia, and Washington), or across multiple States inside and outside the scope of the current injunctions. But even those declarations that concern pre-injunction costs incurred in States now subject to an injunction are probative evidence of the irreparable harm and sunk costs caused by the Rule to the Business Intervenors' members nationwide. They accordingly support the requested extension of preliminary relief.

In sum, clearer case of irreparable harm would be hard to imagine. As the district court in Texas concluded, these "harmful effects" of the WOTUS Rule are "overwhelming" and "irreparable." Order 2-3, *Am. Farm Bureau Fed'n v. EPA*, No. 15-cv-165 (S.D. Tex. Sept. 12, 2018) (Dkt. 87). As we explained in the opening memorandum (at 15-16), moreover, other courts have found injuries like these sufficient to satisfy the irreparable-injury prong of the preliminary injunction test, sufficient to enter a nationwide injunction. We cited, in particular, the Fifth Circuit's decision *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016). Neither of the defendants dispute that *Texas* is directly on point and supports finding irreparable injury in this case.

3. Finally, the Federal Defendants assert the our declarations are "stale and lack[] facial probative value." Fed. Opp'n 6. But the only explanation that the Federal Defendants give for this otherwise bald assertion is that many of the declarations were not written for the "purpose" of establishing irreparable harm. *Id*. But it does not matter what the declarants' "purpose" was in

preparing their declarations; the question is only whether the facts that they establish are sufficient as a legal matter to establish irreparable harm. They *are*, because they establish that the Business Intervenors' members are incurring significant compliance costs (as common sense suggests they would), in addition to other harms. As we explained in the opening memorandum (at 15), incurring unrecoverable compliance costs is an irreparable harm sufficient to warrant injunctive relief. *See, e.g.*, *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (compliance costs that leave a plaintiff with "no monetary recourse" are irreparable). The defendants notably do not disagree.

B. The Court has continuing jurisdiction and inherent authority to modify a preliminary injunction whenever equity requires

The Intervenor Defendants quibble that our motion "never mention[s] what rule the[] request is filed under, nor cite the standard that should govern this request for amendment." NGO Opp'n 2. They then purport explain why relief is unavailable under Rules 59(e) or 60(b)(6). NGO Opp'n 2-4. The Intervenor Defendants' position thus appears to be that the Court is without power to modify its preliminary injunction, except in the narrowest of circumstances. This position is bizarre.

There is "no dispute" that "a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Sys. Fed'n No. 91, Ry. Emps.' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961). "The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court." *Id*. Thus, as the Fifth Circuit put it before the Eleventh Circuit's creation, "[t]here is no doubt that the district court has continuing jurisdiction over a preliminary injunction" and "is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law, or for any other good reason." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 578 (5th Cir. 1974); *accord,*

e.g., *Catrone v. Mass. State Racing Comm'n*, 535 F.2d 669, 672 (1st Cir. 1976) ("[S]hould new data or changing circumstances so indicate, the court shall have the usual discretion to modify, amend or even vacate its preliminary injunction.").

It hardly could be otherwise. The Intervenor Defendants' view is that a preliminary injunction cannot be modified unless a party moves under Rule 59(e) within 28 days of its entry, or from "relief" from a "final judgment" under Rule 60(b)(6). *See* NGO Opp'n 2-4. If that were correct, preliminary injunctions would be fixed in place once entered, hamstringing the court from exercising its "continuing jurisdiction" to do equity "in light of subsequent changes in the facts or the law, or for any other good reason." *Canal*, 489 F.2d at 578. There is no basis in common sense or the law for such strained (and constraining) reading of the rules. *Cf. Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1125 (9th Cir. 2005) (holding with respect to a permanent injunction that "a motion to vacate or dissolve an injunction based on changed circumstances is *not* subject to the . . . time limit in Rule 59(e)" (emphasis added)).

Rules 59(e) and 60(b)(6) simply do not apply. On the contrary, "[a] trial court's power to modify, like the power over all its orders, is inherent." *Sierra Club v. Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984). And "[w]hen modifying a preliminary injunction, a court is charged with the exercise of the same discretion it exercised in granting or denying injunctive relief in the first place," which is to say that modification is warranted "where conditions have so changed as to make such relief equitable." *Id.; accord Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1225 (1st Cir. 1994). That is precisely what we have shown.[2]

[2] To the extent that the motion *must* proceed under a particular Rule of Civil Procedure rather than this Court's inherent authority—and we do not concede that it does—the most natural choice would be Rule 65, which permits parties to move for preliminary injunctions in the first place. One way to construe our motion, after all, is as a motion for a second preliminary injunction alongside the Court's original injunction. The Federal Defendants admit as much when they acknowledge the possibility of "a separate motion for a preliminary injunction." Fed. Opp'n 1.

C. Collateral estoppel is plainly inapplicable because Judge Hanks's decision was avowedly tentative and entered without prejudice

Finally, the Intervenor Defendants assert that we are barred by collateral estoppel from obtaining relief before this Court. That is incorrect because Judge Hanks's denial of nationwide relief was avowedly tentative and entered without prejudice to reconsideration. *See* Order at 3, *Am. Farm Bureau Fed'n v. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018) (Dkt. 87).

"The objective of the doctrine of issue preclusion . . . is judicial finality." *Kennedy v. Boardman*, 233 F. Supp. 3d 117, 121 (D.D.C. 2017) (quoting *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992)). Accordingly, issue preclusion, like claim prelusion, requires *finality*. *E.g.*, *Baker*, 522 U.S. at 233 n.5.

Of course, "[i]t is widely recognized that the finality requirement for issue preclusion is less stringent than for claim preclusion." *Nicor Int'l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1368 (S.D. Fla. 2003) (citing *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)). "For purposes of issue preclusion," therefore, "'final judgment' means any prior adjudication of an issue in another action that is determined to be *sufficiently firm* to be accorded conclusive effect." *Id*. (emphasis added) (citing same). Critically, when an interlocutory ruling is "avowedly tentative," it "cannot be regarded as 'sufficiently firm' to warrant giving [it] preclusive effect." *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 755 (S.D.N.Y. 1990) (rejecting the preclusive effect of a preliminary injunction ruling). Put another way, "[i]f the decision was 'avowedly tentative,' preclusion should be refused." *GMAC Inc. v. Sullivan*, 2009 WL 10670871, at *3 (M.D. Fla. Nov. 23, 2009) (citing *Christo*, 223 F.3d at 1339 n.47); *accord, e.g.*, Restatement (Second) of Judgments § 13 cmt. g ("[P]reclusion should be refused if the decision was avowedly tentative.").

That is precisely the case here. As a starting point, preliminary injunctions are virtually always provisional and thus "commonly lack preclusive effect in other proceedings." 18A Charles

Alan Wright et al., *Federal Practice and Procedure* § 4445 (2d ed., 2018 update). But more specifically in this case, Judge Hanks expressly stated that his decision denying nationwide relief was tentative only: "[T]he Court declines to enjoin the Rule nationwide at this time," Judge Hanks stated, but "[t]his ruling is without prejudice to the Court's reconsideration of this issue based on future decisions and developments in this case." Order at 3, *Am. Farm Bureau Fed'n v. EPA*, 3:15-cv-165 (S.D. Tex. Sept. 12, 2018) (Dkt. 87). Judge Hanks also emphasized the avowedly tentative nature of his ruling on nationwide relief at the hearing on the motion, stating: "I'm not closing your door to that relief eventually," and "to make it clear, I'm denying that relief at this time without prejudice to being – it being re-urged at a later date." *See* Tr. at 44-45, *State of Texas v. EPA*, 3:15-cv-162 (S.D. Tex. Sept. 18, 2018) (Dkt. 145) (Ex. A). He further suggested at the hearing that, among the "future decisions" that he wished to await were those of *this Court* (along with any decisions of the District of North Dakota, the District of South Carolina, and any potential appellate courts). *See id*. at 45. That is precisely why we moved this Court to modify its injunction to apply nationwide following Judge Hanks's ruling.

The issue of nationwide relief was not finally resolved by Judge Hanks, whose decision was avowedly tentative. It therefore remains open to this Court to address.

CONCLUSION

The motion to expand the scope of the preliminary injunction to apply nationwide—or alternatively to apply additionally to the District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and Washington—should be granted.

Dated: October 17, 2018

Respectfully submitted,

/s/ *Timothy S. Bishop*

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CERTIFICATE OF SERVICE

I hereby certify that, on October 17, 2018, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the Southern District of Georgia on all parties registered for CM/ECF in the above-captioned matter.

/s/ *Timothy S. Bishop*