IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff,* v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant.*	§ § § § § § § § § § § §	NO. 9:01-CV-00299

DEFENDANT ALABAMA-COUSHATTA TRIBE OF TEXAS'S MOTION TO STAY PENDING APPEAL

The Tribe respectfully requests that the Court stay its Order [DE 129] ("Order") pending appeal. As the Court observed at the May 11th hearing, this case involves "important" and "intertwined" issues that depend on the resolution of complex questions of administrative law. Tr. of Hr'g at 4:1–8 [DE 115]. The Order acknowledges that those issues are "complicated," Order at 25, and the Fifth Circuit reasonably could decide them differently. That relief, however, will come too late for the Tribe, its members, and the many others who will suffer immeasurably from Naskila's closure. The appellate process could take over a year to play out, and even longer if the parties seek en banc or Supreme Court review. In the interim, hundreds of people will lose their jobs and health insurance; the Tribe will forego funds for education, welfare, economic development, and public safety; and the public fisc will shoulder the burden of providing benefits to those now able to provide for themselves. The State's sovereign immunity precludes recovery for any of this harm. These circumstances more than adequately justify the exercise of the Court's discretion to preserve the status quo pending appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Contempt and Relief Motions [DE 74 & 76] describe the factual and procedural history of the dispute between the Tribe and the State. Relevant here, the Court denied the Tribe's Relief Motion in the Order, holding that the Court owes no deference to the NIGC's approval of the Tribe's Class II gaming Ordinance under *Chevron* and that, instead, the Tribe's gaming remains subject to the Restoration Act per the Fifth Circuit's opinion in *Ysleta I*. *See* Order at 19–25. Based on those holdings, the Order further denied the Tribe's Motion for Partial Summary Judgment [DE 99] and effectively requires the Tribe to show cause why it should not be held in contempt after a bench trial currently scheduled for February 28, 2018. Because the Order has the effect of "refusing to dissolve or modify" the injunction, the Tribe has appealed as of right pursuant to 28 U.S.C. § 1292(a)(1) [DE 130].

II. MOTION TO STAY STANDARD IN THE FIFTH CIRCUIT

As the Supreme Court long ago recognized, parties and the public can suffer "irreparable injury" from "the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942). The analysis of whether to issue a stay pending appeal requires consideration of four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

The Fifth Circuit has cautioned, however, that these "factors" should not be applied "in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir.

1983). "In assessing this standard," for example, "'the movant need not always show a "probability" of success on the merits.'" *Moore v. Tangipahoa Parish Sch. Bd.*, 507 F. App'x 389, 393 (5th Cir. 2013) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). In cases like this, where "a serious legal question is involved," a party seeking a stay "need only present a substantial case on the merits . . . and show that the balance of the equities weighs heavily in favor of granting a stay." *Ruiz*, 650 F.2d at 565.

III. ARGUMENT

The Tribe satisfies each of these factors on their own terms and easily meets the *Ruiz* standard: There is no question that this case involves "serious" legal issues for which the Tribe has advanced "substantial" arguments. It is indisputable that closing Naskila will have dire consequences—both public and private—that cannot be remedied even if the Tribe prevails on appeal. And it is undeniable that "'little if any harm will befall the State,'" *id.* (citation omitted), which initially agreed to allow Naskila to open and subsequently declined to seek preliminary injunctive relief against its operation, *see Cayuga Nation v. Tanner*, 108 F. Supp. 3d 29, 35 (N.D.N.Y. 2015) (finding that "Standstill Agreement" between municipality and tribe about operation of tribe's gaming facility prevented municipality from showing that it would suffer "substantial injury" if the facility were allowed to continue operating during appeal). The Tribe respectfully requests that the Court stay application of the 2002 injunction to the Tribe's current gaming operations pending appeal.

A. The Tribe's Appeal Presents a Substantial Case on the Merits of a Serious Legal Question.

The first stay factor under *Ruiz* requires the Tribe to make two separate showings. First, the Tribe must establish that its appeal concerns a "serious legal question." *Ruiz*, 650 F.2d at

565. Once that element has been established, the Tribe must also demonstrate that it has "substantial" arguments in its favor on that legal question. *See id.*

The central issue in this case is serious: whether the NIGC's conclusion that IGRA governs the Tribe's gaming is entitled to *Chevron* deference and, thus, controls over the Fifth Circuit's prior conclusion to the contrary in *Ysleta I*. That alone is sufficient to satisfy the first element for a stay pending appeal. Courts have viewed as sufficiently serious to warrant a stay the determination of what level of deference to give to an administrative act. *See, e.g.*, *LabMD, Inc. v. FTC*, 678 F. App'x 816, 820–21 (11th Cir. 2016). Resolution of that question here, moreover, requires consideration of two Supreme Court decisions issued since the 2002 injunction was entered,[1] and involves background issues of tribal and state sovereignty. The Court recognizes the importance and complexity of these issues, and the Tribe is not the first to raise them. *See Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 626 n.6 (1st Cir. 2017) (declining to reach *Chevron* question), *cert. denied*, — S. Ct. —, 2018 WL 311322 (Jan. 8, 2018).

The Tribe has, further, presented at least a prima facie case on the merits and therefore satisfies the "substantial argument" standard. *See Janvey v. Alguire*, 647 F.3d 585, 596, 599 (5th Cir. 2011) (prima facie case); *Ruiz*, 650 F.2d at 565. The Court is familiar with the argument: *Brand X* allows the NIGC to administratively abrogate circuit court precedent, *see* 545 U.S. at 982–85, and *City of Arlington* affords *Chevron* deference to the NIGC's determination of the scope of its jurisdiction, *see* 133 S. Ct. at 1869–71. To that end, the NIGC administers IGRA, *see* 25 U.S.C. § 2704, and Congress expressly delegated to it the authority to determine whether a particular form of gaming is "specifically prohibited on Indian lands by Federal law" as part of

[1] *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

its approval of Class II gaming ordinances, *id.* § 2710(b)(1)(A), which is "final" agency action under IGRA, *id.* § 2714.

For this reason, the Tribe further argued that, in adjudicating the Tribe's Class II Ordinance, the NIGC stayed within the bounds of its statutory authority. Congress made as a prerequisite to approving an ordinance that a tribe's proposed Class II gaming be "located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)." 25 U.S.C. § 2710(b)(1)(A). In other words, before the NIGC may approve a Class II gaming ordinance, IGRA requires that the NIGC perform three specific tasks: (1) determine if the state in which the tribe is located permits Class II gaming for any purpose by any person, organization, or entity, *id*. § 2710(b)(1)(A); (2) verify the land on which the tribe is planning to offer Class II gaming was held in trust for the tribe by the United States prior to October 17, 1988, *id*. §§ 2703(4)(A), 2719; and (3) confirm that such gaming is not otherwise specifically prohibited on the tribe's land by another federal law, *id.* § 2710(b)(1)(A). In the Tribe's view, this third task affirmatively obligates the NIGC to look at extrinsic state and federal law in adjudicating Class II gaming ordinances. Such a congressional delegation is a jurisdictional determination subject to *Chevron* deference under *City of Arlington*. *See* 133 S. Ct. at 1874–75.

Although the letter communicating the NIGC's decision indicates that the NIGC independently concluded that the Tribe's request complied with IGRA and notes that the Department of the Interior "concurred" in that decision, *see* Relief Mot. Ex. A at 2 [DE 76-1], *Chevron* deference nevertheless applies if the NIGC "principally" relied on IGRA in adjudicating the Tribe's gaming Ordinance. *See Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822,

834 (D.C. Cir. 2000) ("[B]ecause the [agency's] actions derive principally from its interpretation of [a statute], which it does administer, the two-step *Chevron* inquiry is appropriate here.").

The Tribe acknowledges that the Court reached a contrary conclusion in evaluating the application of these complex legal doctrines here. But the issues are important enough, and the Tribe's arguments are sufficiently worthy of consideration on appeal, that the first *Ruiz* factor is satisfied. *See Ruiz*, 650 F.2d at 565 ("If a movant were required in every case to establish that the appeal would probably be successful, the Rule would not require as it does a prior presentation to the district judge whose order is being appealed. That judge has already decided the merits of the legal issue.").

B. The Balance of the Equities Strongly Favors the Tribe.

The remaining *Ruiz* factors also weigh heavily in the Tribe's favor. The Tribe, its members, and the surrounding community will suffer dire consequences if Naskila closes, and under the unique circumstances of this case, that harm cannot be ameliorated during appeal or remedied thereafter should the Tribe prevail. The State, by contrast, would endure only theoretical harm to an abstract interest in law enforcement, an interest which the State essentially consented to endure at the outset of this litigation and that concerns state laws that—if the Tribe is correct—do not apply to its electronic bingo. The Tribe respectfully requests that the Court stay enforcement of its order to preserve the status quo pending appeal.

1. *The Tribe and Others Will Suffer Irreparable Injury If a Stay Is Denied.*

Shuttering Naskila would devastate the Tribe and wreak substantial harm on the community. Naskila currently employs 318 individuals, 87 of whom are tribal members. *See* Burns Decl. ¶ 4 (Ex. A). It is one of the largest employers in Polk County. *See* Burns Decl. ¶ 5. Naskila takes care to treat its employees well. Knight Decl. ¶¶ 7–8 (Ex. B); Burns Decl. ¶¶ 6–7. They earn good wages, starting at $10.00 per hour—well above the $7.25 prevailing minimum

wage—and have health care, retirement, and other benefits. Burns Decl. ¶ 6–7; Knight Decl. ¶¶ 7–8; *see also* White Decl. ¶ 4 (Ex. C); Flores Decl. ¶¶ 10–12 (Ex. D). Virtually all of Naskila's employees will lose their jobs if it closes. The local economy cannot supply comparable employment to those affected and will in turn suffer harm from decreased levels of consumer spending. *See* White Decl. ¶¶ 4–6; Knight Decl. ¶ 9. Such a large loss of jobs at one time also will strain social services, as many former Naskila employees will be forced to apply for food, healthcare, and housing assistance. *See, e.g.*, *Winnebago Tribe of Neb. v. Stovall*, 216 F. Supp. 2d 1226, 1233–34 (D. Kan. 2002) (considering loss of jobs and resulting strain on social services as factors that supported preliminarily injunction against state law).

The Tribe also allocates funds from Naskila for the Tribe's education, infrastructure, and government programs. These programs include the Tribe's Police and Fire Departments, court system, Public Works Department, social services programs, Head Start and daycare facilities, elder and youth programs, and economic development. Battise Decl. ¶ 6 (Ex. E). Although the federal government provides some funding for these purposes through the Bureau of Indian Affairs ("BIA"), that funding has decreased in recent years, and the BIA's budget for such programs is expected to be cut by over $300 million this year. Battise Decl. ¶ 8. Beyond these programs, moreover, the Tribe has used Naskila-derived funds for charitable purposes for Hurricane Harvey relief efforts. Battise Decl. ¶ 7.

Under IGRA, the Tribe's sovereignty permits it to conduct Class II gaming just as much as it allows it to operate these essential tribal services. *See Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1086 (7th Cir. 2015) ("IGRA creates a regulatory scheme that respects tribal sovereignty . . . ."). And "[w]here, as here, enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty, federal courts have found the irreparable harm

requirement satisfied." *Seneca Nation of Indians v. Paterson*, 2010 WL 4027795, at *2 (W.D.N.Y. filed Oct. 14, 2010) (collecting cases); *see also Cayuga Nation*, 108 F. Supp. 3d at 34–35 (holding that Tribe would suffer irreparable harm from closure of gaming facility where tribal members "depend heavily on the facility to provide funding for public services"); *United States v. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d 1219, 1225 (E.D. Wash. 1999) (holding that tribes established irreparable harm where they "use[d] the proceeds from gambling devices to fund a number of useful programs").

These injuries will compound with each day Naskila cannot operate, and it will be many days until the appellate courts resolve the Tribe's appeal. "It takes time to decide a case on appeal," *Nken*, 556 U.S. at 421, especially complex cases like this one that are likely to receive oral argument and that present issues worthy of en banc and certiorari review. In the Fifth Circuit, the median time to disposition in appeals decided after oral argument during the 2012–2013 Term was 13.4 months. *See* Lyle Cayce, *Fifth Circuit Court of Appeals Clerk of Court Operational Update* at 53 (Oct. 7, 2013). The Tribe's appeal likely will take at least that long: litigants filed over 1200 more appeals in the Fifth Circuit in 2016 than in 2013. *See* Clerk's Annual Report (July 2015–June 2016), Judicial Workload Statistics, United States Court of Appeals for the Fifth Circuit at 1 (2016). Add to that the time allotted to file petitions for rehearing en banc and certiorari, as well as any time allowed for merits briefing and oral argument associated with those petitions, and the Tribe's appeal reasonably could take 18 months—and possibly more than two years—to reach final disposition. In the meantime, hundreds if not thousands of people will endure the harms discussed above—and potentially for naught. *See Scripps-Howard Radio*, 316 U.S. at 9.

If the Tribe prevails on appeal, those harmed by Naskila's closure will have no recourse from the State, even to recoup financial harm. Because this case involves two sovereigns as parties, background principles of sovereign immunity control the availability of relief. Here, the State's sovereign immunity forecloses remedial relief if the Tribe is wrongfully enjoined from operating Naskila during appeal, establishing irreparable harm as a matter of law. *See, e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001); *see also LabMD*, 678 F. App'x at 822 ("'[T]he inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.'" (citation omitted)). Under these circumstances, the Tribe indisputably satisfies the irreparable-harm element. *See, e.g.*, *Cayuga Nation*, 108 F. Supp. 3d at 34–35.

2. *No One Will Be "Substantially Harmed" by a Stay.*

The State, on the other hand, will suffer no real harm from a stay pending appeal, let alone the "substantial harm" it must demonstrate to meet this element of the *Ruiz* standard. 650 F.2d at 565. Naskila's continued operation causes no direct financial injury to the State. *See 1020 Electronic Gambling Machines*, 38 F. Supp. 2d at 1225. And the loss of any other potentially applicable downstream taxes due to competition by Naskila's gaming are insufficient to constitute substantial harm. *Cf. Seneca Nation*, 2010 WL 4027795 at *3 (loss of cigarette taxes insufficient to outweigh tribe's harm); *Winnebago Tribe*, 216 F. Supp. 2d at 1233 (same, for fuel taxes; holding that stay would not affect state's finances or sovereignty "in any appreciable way"). The State cannot even raise the specter of increased criminal activity—a dubious argument of state actors in gaming cases—because the operation of Naskila has had no noticeable effect on local crime rates. Guthrie Decl. ¶ 6–8 (Ex. F); *cf. Cayuga Nation*, 108 F. Supp. 3d at 35 (rejecting municipality's argument that the "reopening" of the gaming facility in

that case could "give[] rise to violence necessitating police intervention" and, thereby, cause substantial harm to the municipality).

The State no doubt plans to argue that it suffers harm whenever it is enjoined from enforcing its laws. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). But that theoretical and at most *de minimis* injury—present anytime a preliminary injunction or stay on appeal affects the application of a state law—cannot carry the State's burden here. "If it [did], then the rule requiring 'balance' of 'competing claims of injury' would be eviscerated." *Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (citation omitted), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal. Inc.*, 565 U.S. 606 (2012); *see also Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (reasoning that state's interest in enforcing its laws could not overcome showing of irreparable harm).

That is especially true here because the very issue to be litigated on appeal is whether State or federal law governs the Tribe's gaming—in other words, which of the laws of two sovereigns controls. If IGRA controls, the State can have no interest in seeing its laws applied to the Tribe's Class II operations and can suffer no harm if they are not. Federal rights, after all, "are not submitted to state vote and may not depend on the outcome of state legislation or a state constitution." *DeLeon v. Perry*, 975 F. Supp. 2d 632, 664 (W.D. Tex. 2014) (citing *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). The State's generic interest in law enforcement plays an even more muted role in this case because the law enjoined by a stay pending appeal would not be a "'statute[] enacted by representatives of [the State's] people,'" *Maryland*, 133 S. Ct. at 3, but the Restoration Act, which already precludes the State from exercising civil or criminal regulatory jurisdiction over the Tribe's gaming, 25 U.S.C. § 737(b).

As the Tenth Circuit explained at length in an early IGRA case in which a tribe preliminarily enjoined a state from applying its gaming laws to the tribe's bingo operations, "state interests are not of great weight in circumstances" where a State tries "to assert the authority to regulate activities established by Indians under tribal ordinances and operating in Indian Country." *Seneca-Cayuga Tribe*, 874 F.2d at 713; *cf. Prairie Band of Potawatomi Indians*, 253 F.3d at 1252 (holding that risk of injury to tribe's sovereign interests outweighed state's interest in avoiding "interference with [its] sovereignty" where a preliminary injunction temporarily foreclosed application of state law "only with respect to the tribe and its members"—not "wholesale" as to the public at-large—and "without the preliminary injunction, the tribe's [activity] would likely have come to an end").

The State's anticipated protestations about harm to its sovereignty also lack merit because it has essentially consented to Naskila's operation as the status quo. *See Nation*, 108 F. Supp. 3d at 35. Before this litigation resumed, the State agreed it would not seek prior injunctive relief to stop Naskila's opening in exchange for the right to conduct a future inspection of the Tribe's bingo operations. *See* Pre-Litigation Agreement ¶ 5 [DE 96-3]. Although the State reopened this proceeding after its inspection, it apparently decided not to seek the immediate closure of Naskila, despite having reserved the right to move for such relief in its Agreement with the Tribe. *Id.* Courts have refused to find that government entities suffer substantial harm in analogous cases. *Cayuga Nation*, 108 F. Supp. 3d at 35 (observing that municipality and tribe executed a pre-litigation "Standstill Agreement" that allowed gaming facility to reopen); *Seneca Nation*, 2010 WL 4027795, at *3 (finding that state's pre-litigation policy of "forbearance" showed that it would not suffer "substantial injury"). Allowing Naskila to remain open during appeal—after the State agreed to its opening and where the State has not moved for preliminary

relief in the almost twenty-one months since—could not possibly impair the State's sovereignty "in any appreciable way." *Cf. Winnebago Tribe*, 216 F. Supp. 2d at 1233. This factor also weighs in the Tribe's favor.

3. *A Stay Greatly Serves the Public Interest.*

A stay pending appeal also promotes the public interest. The economic consequences of closing Naskila—even if only temporarily—are severe and will be felt by tribal members, employees, and the surrounding community, whereas the State will suffer no remotely comparable injury from its continued operation. *See id.* at 1233–34 (finding that the potential loss of "social services, public safety and educational programs that benefit tribal members" caused public interest factor to weigh in tribes' favor; "reject[ing]" state's opposition to such "economic harm argument[s]"); *1020 Electronic Gambling Machines*, 38 F. Supp. 2d at 1225 (crediting tribes' argument that public interest would be "served best by allowing [the tribes] to sustain jobs on their reservations, and by enabling their members to avoid dependence upon government-provided benefits," over state's interest preventing the tribes from "operating gambling devices").

Courts have also found the public interest served where a stay supports important principles of tribal sovereignty. *See Seneca Nation*, 2010 WL 4027795, at *3; *Winnebago Tribe*, 216 F. Supp. 2d at 1233–34. Like a preliminary injunction, a stay pending appeal "does not permanently impose on the state's" sovereignty, *see Winnebago Tribe*, 216 F. Supp. 2d at 1233–34, and as discussed above, the State's sovereignty-related interest in law enforcement is at a nadir in this case. The disposition of the Tribe's appeal, however, has critical implications for its "self-government, self-sufficiency, and self-determination," *id.* at 1233, all aspects of tribal sovereignty expressly furthered by IGRA, *see* 25 U.S.C. §§ 2701(4)–(5), 2702(1). The sovereign interests of the United States are also at issue because the State contests the application of federal

law, and the federal agencies tasked with regulating Indian gaming already have concluded that the Tribe's gaming is not governed by Texas law. The State simply cannot claim the public interest factor for itself when the issue to be litigated on appeal implicates the public interests of multiple sovereigns. *Cf. Prairie Band of Potawatomi Indians*, 253 F.3d at 1253 ("[T]ribal self-government may be a matter of public interest," which is served by "'Indians develop[ing] independent sources of income.'" (citation omitted)).

IV. CONCLUSION

The Tribe has shown that the issues it intends to raise on appeal have "'patent substantial merit'" and that the balance of the equities are "'heavily tilted in its favor.'" *See United States v. Transocean Deepwater Drilling, Inc.*, 537 F. App'x 358, 361 (5th Cir. 2013) (citation omitted). No more is required to obtain a stay pending appeal under *Ruiz*. *Id.* The Tribe therefore respectfully requests that the Court stay the Order and this case pending final disposition of the Tribe's appeal. *Cf. 1020 Electronic Gambling Machines*, 38 F. Supp. 2d at 1225 (granting a stay pending appeal because, even "[i]f it [were] debatable whether the Tribes [would] succeed on appeal, it [could not] be disputed that their cases raise[d] significant questions of law" and the balance of hardships "tip[ped] sharply in [the tribes'] favor" (citing *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988)).

Dated: February 6, 2018

Respectfully submitted,

By: */s/ Danny S. Ashby*

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, I caused a true and correct copy of the foregoing *Motion for Stay Pending Appeal* to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: February 6, 2018

By: */s/ Danny S. Ashby*
Danny S. Ashby

CERTIFICATE OF CONFERENCE

I, Danny S. Ashby, counsel for Defendant the Alabama-Coushatta Tribe of Texas, hereby certify, pursuant to Local Rules CV-7(h) and (i), that on February 6, 2018, I personally conferred by telephone with counsel for Plaintiff the State of Texas, Michael Abrams, regarding the relief requested by the foregoing *Motion to Stay Pending Appeal*. Following that conference, the State remains **OPPOSED** to the relief sought herein. Plaintiff believes that the Court's ruling should be given immediate effect. Only limited time remains before the contempt trial currently scheduled for February 28, 2018. The discussions between counsel therefore "have conclusively ended in an impasse, leaving an open issue for the court to resolve." L.R. CV-7(i).

Dated: February 6, 2018

By: */s/ Danny S. Ashby*
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