No 23-35166

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAUREEN MURPHY, individually and on behalf of a class of similarly situated individuals; JOHN HUDDLESTON, individually and on behalf of a class of similarly situated individuals,
Plaintiffs-Appellants,

v.

GINA RAIMONDO, in her official capacity as Secretary of Commerce; DEPARTMENT OF COMMERCE; ROBERT SANTOS, in his official capacity as Director of the Bureau of the Census; BUREAU OF THE CENSUS,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:22-cv-05377
Hon. David G. Estudillo

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Federation of Independent Business Small Business Legal Center, Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than 10% of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Amicus files here because Census Bureau (Bureau) surveys, such as the American Community Survey (ACS) and the Annual Business Survey (ABS), are burdensome and potentially detrimental for individuals and small businesses. The district court's incorrect application of *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000), if left to stand, would effectively prevent small businesses from challenging unconstitutional statutory interpretations and diminish the rule of law.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), counsel for *amicus* states that all parties have consented to the filing of this brief. Counsel further affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The rule of law is a bedrock principle of our constitutional order, one that insists on legal clarity and enforceability. "Living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The Fifth Amendment right to due process is based on this supposition—the government cannot attempt to enforce "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). When the government conforms to these "ordinary notions of fair play," *id.* (internal quotations omitted), the public knows what is expected and can conduct themselves accordingly.

The district court ruling below relies on the opposite supposition: that government agencies are entitled to treat a statute as perennially enforceable, though always unenforced; that a law may be used to jail people but never will; that disobeying such a law is criminal, yet the law can't be challenged because there's no threat of prosecution. This creates a myriad of confusion about what is commanded or forbidden; allowed or punished. It undermines both justice and the public's belief that laws ought to be followed.

The promulgation of the ACS serves as a prime example of this sort of unjust, confusing scenario. Conducted by the Bureau, the ACS asks a selection of Americans—approximately 3.5 million people per year—to disclose a wide variety of highly personal information. The Bureau asserts that under relevant provisions of the Census Act, it can enforce criminal penalties against those who fail to answer the ACS. People like Appellants, who object to disclosing sensitive information and choose not to complete the survey, face civil fines and criminal penalties. To that end, they have been subject to threats of prosecution, including Bureau demand letters and unannounced home visits by Bureau agents.

The Bureau argues that threatening letters and banging on people's doors is not evidence of "'a genuine threat of imminent prosecution,'" *Union Pac. R.R. Co. v. Sacks*, 309 F.Supp.3d 908, 918 (W.D. Wash. 2018) (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010)). Thus, the agency claims that Appellants' case isn't ripe. How this claim—or any claim—might become ripe under the agency's theory, short of the government jailing people who fail to answer the survey, is unclear.

The district court granted the agency's motion for summary judgment, agreeing that the case was not ripe under *Thomas*. *Murphy v. Raimondo*, No. 3:22-cv-05377-DGE, 2023 WL 22035, at *2–6 (W.D. Wash. Jan. 3, 2023).

This was error. *Thomas* sets forth two mechanisms for determining whether there is a threat of prosecution and therefore ripeness: a constitutional and prudential component. The district court improperly applied *Thomas*, contravening Ninth Circuit and Supreme Court precedent. Had the court correctly analyzed the facts under each component of the *Thomas* test, it would have held that the claims here are ripe. Thus, the district court's ruling should be reversed with directions to properly apply *Thomas* to the facts of this case.

The rule of law suffers grave harm when government agencies are permitted to rely on past use of prosecutorial discretion as evidence that they will never enforce a statute, without stating unequivocally their intent to never enforce the law. If left undisturbed, the district court ruling would allow government actors to pull the ultimate sleight-of-hand: enforce compliance with a law via threat of prosecution, without prosecuting anyone, then claim that the law isn't enforced, so therefore it cannot be challenged. Allowing the district court opinion to stand would diminish respect for the law and permit the government to lull the public into noncompliance and expose them to criminal liability.

Finally, this Court should recognize the detrimental effect that criminal enforcement of non-decennial census surveys like the ACS and ABS have on individuals and businesses. Some may view these surveys with skepticism, for fear

of the government mishandling personal or business information. This Court should take these concerns seriously.

Amicus urges this Court to reverse the lower court ruling.

ARGUMENT

I. The District Court Severely Erred in its Ripeness Analysis.

Traditionally, a case is deemed to be ripe when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.,* 312 U.S. 270, 273 (1941). This Court has long recognized, however, that an expanded definition of ripeness applies in the regulatory context. *See In re Coleman*, 560 F.3d 1000, 1006 (9th Cir. 2009).

For a pre-enforcement regulatory challenge to be ripe, plaintiffs must show (1) an "intention to engage in a course of conduct arguably affected with a constitutional interest," (2) "but proscribed by a statute," and (3) "a credible threat of prosecution." *Babbitt v. Farm Workers,* 442 U.S. 289, 298 (1979). In *Thomas*, this Court adapted and expounded the *Babbitt* test, as explained in further detail below.

But a thorough inquiry under *Thomas* is not necessary to find ripeness under these circumstances. One "major exception" to traditional ripeness analysis exists where, as here, "a substantive rule which as a practical matter requires the plaintiff

to adjust his conduct immediately." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). A challenge to "[s]uch agency action is 'ripe' for review at once." *Id.*

This Court has fleshed out the contours of this test further. "[I]f, in effect, the agency action presents a comply-or-defy decision that amounts to a 'Hobson's choice,'" that satisfies *Lujan*'s exception. *Confederated Tribes & Bands of Yakama Nation v. United States*, 296 F. App'x 566, 569 (9th Cir. 2008). To be sure, the choice must be directly before the plaintiff, not merely some hypothetical future decision that depends on the result of another agency action. *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 784 (9th Cir. 2000). And if a plaintiff has to make such a choice, the underlying regulation must not merely "limit access to a benefit" but instead must "impose [a] penalt[y] for violating any newly imposed restriction." *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 60 (1993).

These standards are easily met here. This case involves a criminal law (substantive rule). The Bureau has prompted and threatened individuals into compliance (a practical requirement). And the Bureau engages in this conduct to force Appellants and similarly situated individuals to fill out the survey (adjust their conduct immediately). The result? A Hobson's choice—fill out the survey (comply) or face fines/jail time (defy). Additionally, the statute has long since taken effect, and the choice is not only before Appellants—they have already made it. And unlike in

Reno, the substantive rule at issue here is clearly a penalty, not a benefit. Ripeness ought to be a foregone conclusion.

And yet the district court also erred in its application of *Thomas*. Its holding cannot stand on those grounds, either.

A. The District Court's Application of *Thomas*'s Constitutional Component Conflicts with Ninth Circuit and Supreme Court Jurisprudence.

This Court's decision in *Thomas* builds on *Babbitt*'s foundation by providing a three-factor test for determining the constitutional component of ripeness: 1) "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question," 2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and 3) "the history of past prosecution or enforcement under the challenged statute." *Thomas*, 220 F.3d at 1139 (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996)).

The first question is "whether the plaintiffs have articulated a 'concrete plan' to violate the law in question." *Thomas*, 220 F.3d at 1139. On this point, there is no dispute. Appellants not only planned to, but did, violate the law in question by refusing to complete the ACS.

Thomas next asks "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings." *Id.* Essentially, a threat to initiate proceedings is a threat of injury which makes a claim ripe. However, "neither the

mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Id.* at 1139. Instead, to satisfy the injury requirement, the injury must be "real and concrete" rather than "speculative and hypothetical." *Id.*

This Court's recent cases confirm this factor is satisfied here. In both *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644 (9th Cir. 2021), and *Arizona v. Yellen*, 34 F.4th 841 (9th Cir. 2022), the government "'sent letters . . . notifying [plaintiffs]' of its interpretation of a new requirement." *Yellen*, 34 F.4th at 850 (quoting *Cal. Trucking Ass'n*, 996 F.3d at 653). In each case the Court held that such notification letters satisfied the threat of prosecution factor because they "show[ed] an intent to enforce" federal law, in part because they detailed the consequences of noncompliance.

Cal. Trucking Ass'n and *Yellen* are just the latest application of a long-standing rule. In *Sacks v. Off. of Foreign Assets Control*, this Court reached the same conclusion by observing that "a prepenalty notice"—e.g., a threatening letter—from an agency to a plaintiff would have provided sufficient evidence of a genuine threat of prosecution. 466 F.3d 764, 774 (9th Cir. 2006). *Sacks*, for its part, relied on *Jacobus v. Alaska*, where the Court held that a dispute was ripe where an agency letter that "[did] not threaten to initiate enforcement proceedings in so many words," because it was nevertheless sufficiently clear that the plaintiffs "w[ould] be

subjected to either criminal or civil penalties" for defying the agency's directive. 338 F.3d 1095, 1105 (9th Cir. 2003).

Just as in *Cal. Trucking Ass'n*, *Yellen*, and *Jacobus*, the Census Bureau sent letters to Appellants reminding them of the legal requirements associated with the ACS. The agency cannot pretend that sending such letters is meaningless. Rather, it attempted to compel compliance through the threat of punishment.

That's not all. In conjunction with the letters themselves serving as evidence, "the [Bureau's] refusal to disavow enforcement" is evidence of "a credible threat" of its intent to enforce the law. *Cal. Trucking Ass'n*, 996 F.3d at 653; *see Yellen*, 34 F.4th at 850 ("That the federal government has not disavowed enforcement of the [law] is evidence of an intent to enforce it."). Until the Bureau swears off enforcement of ACS criminal penalties and civil fines, a threat of enforcement exists against those individuals subject to the ACS.

Perhaps of greatest importance, Appellants have raised First Amendment compelled speech claims. This Court has previously held that when speech is implicated, the threat of enforcement factor can be satisfied by the statute itself. "In the context of First Amendment speech, a threat of enforcement may be inherent in the challenged statute, sufficient to meet the constitutional component of the ripeness inquiry." *Wolfson*, 616 F.3d at 1059; *accord LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1172 (9th Cir. 2000) ("when the threatened enforcement effort implicates First

Amendment rights, the [standing] inquiry tilts dramatically toward a finding of standing."). The district court failed to consider *Wolfson* in its disposition of Appellants' compelled speech claims. The court instead concluded that without an "imminent and actual threat of enforcement," plaintiffs can't present compelled speech claims. *Murphy*, 2023 WL 22035, at *5. *Wolfson* says otherwise. This Court should correct the district court's erroneous application of *Thomas*'s second factor and its flawed compelled speech analysis.

Finally, *Thomas* examines "the history of past prosecution or enforcement under the challenged statute." 220 F.3d at 1139 (citation omitted). In weighing the third factor, the district court concluded this case was not ripe, since the Bureau had not consistently fined or jailed people. *Murphy*, 2023 WL 22035, at *4–5. However, the Supreme Court rejected the same argument in *Babbitt*, requiring instead that the government "disavo[w] any intention of invoking the criminal penalty provision" to defeat a ripeness claim. 442 U.S. at 302. The Court thus gave more weight to the threat of prosecution than the history of prosecution. This Court has explained in similar terms that "the state's refusal to disavow enforcement . . . is strong evidence that the state intends to enforce the law and that [Plaintiffs] face a credible threat." *Cal. Trucking Ass'n*, 996 F.3d at 653; *see also LSO, Ltd.*, 205 F.3d at 1155 (collecting cases holding that "the Government's failure to disavow application of the challenged provision [is] a factor in favor of a finding of standing").

This Court also held in *Cal. Trucking Ass'n* that the government's "history of enforcement" has "'little weight'" in certain instances, such as "when the challenged law is 'relatively new and the record contains little information as to enforcement or interpretation.'" 996 F.3d at 653 (quoting *Wolfson,* 616 F.3d at 1060). Though the ACS is not new, the point stands: the third *Thomas* factor is not dispositive. This Court said the same in *Sacks*, holding that the second factor of the *Thomas* test is dispositive and, if found lacking, defeats the challenge even when the other two are satisfied. 466 F.3d at 774.

When a threat to prosecute is clear, the third factor should take on significantly less weight. The Ninth Circuit has recognized this reality. *See Wolfson,* 616 F.3d at 1059. Otherwise, a newly enacted law couldn't be challenged, either, because it lacks a history of prosecution. If history of prosecution is indeed dispositive, then challenges can only ripen after a history of prosecution is firmly established, after the first person is prosecuted. Presumably, if one prosecution doesn't establish enough of a history[2], it could take several prosecutions. This would run counter to the purpose of the first and second factors of the *Thomas* test. There's no sense in asking about *plans* to violate a law and *threats* of prosecution if only *actual* violations and *actual* prosecutions can do the trick. This is a far cry from what the

[2] Five prosecutions when the ACS was called the long form census weren't enough for the district court here, Pl. Br. at 40, *Murphy v. Raimondo*, No. 3:22-CV-05377-DGE, 2023 WL 22035 (W.D. Wash. Jan. 3, 2023).

Supreme Court required in *Babbitt*: "When . . . there exists a credible threat of prosecution" plaintiffs "'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" 442 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

This Court should take the opportunity provided with this case to clarify the third *Thomas* factor's application and weight. Under the district court's reasoning, the first person to be threatened with prosecution under any statute is necessarily doomed to have his challenge tossed out for lack of ripeness. Instead, this Court ought to affirm the obvious: a gap in enforcement is only relevant when the government hasn't sent so much as a letter of warning to plaintiffs. The third factor should thus be deemed to follow the second factor—as logic dictates, it already does.

The district court erred in applying *Thomas*'s constitutional component. Correct application of the threat and history-of-prosecution factors confirms that Appellants' challenge was ripe.

B. The District Court Incorrectly Applied *Thomas*'s Prudential Component.

In addition to the constitutional test, the Supreme Court applies a prudential component to administrative ripeness review. This is a two-part test that weighs "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 220 F.3d at 1141 (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967)).

The first prong, fitness for judicial consideration, is satisfied when the issue presented is a "purely legal question"—that is, "purely one of statutory interpretation that would not benefit from further factual development of the issues presented." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001). To that end, courts must ask "whether the administrative action is a definitive statement of an agency's position; whether the action has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009) (quoting *Ass'n of Am. Med. Colleges*, 217 F.3d at 780). In other words, if a regulation "currently has the force of law and would be binding on [the party] as written absent the existence of preliminary relief," *id.*, then the first prong of the prudential component is met.

The claims here satisfy this consideration because they represent a single legal question: whether the Bureau has statutory authority to enforce legal penalties against people who refuse to answer the ACS under 13 U.S.C. §§ 141, 193, 221, and 18 U.S.C. §§ 3559, 3571. The Bureau's interpretation of the law is a longstanding policy, is immediately binding on Appellants, and has the effect of law. The Bureau readily admits as much, and this dispute is crystalized in the agency's demand letters to Appellants and its refusal to foreswear prosecution. The facts here are far from hypothetical—there is a legal question, and Appellants have already taken action

exposing them to criminal liability. They can take no further action that would contribute to a "developed factual record," *see Thomas,* 220 F.3d at 1142—all that awaits is the Bureau's prosecution. The facts are thus fit for judicial consideration and satisfy the first prong of the prudential component.

The second prong, hardship to the parties, is met when a regulation "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Ass'n of Am. Med. Colleges*, 217 F.3d at 783 (internal quotations omitted). This hardship must "entail more than possible financial loss." *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir. 1999) (internal quotations omitted). But this Court has unambiguously stated that "[a] threat of criminal penalty is considered hardship." *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1435 (9th Cir. 1996) (citing *San Francisco Cnty. Democratic Central Comm. v. Eu,* 826 F.2d 814, 821 (9th Cir.1987)). Appellants easily meet the hardship threshold here, since failing to complete the ACS exposes them to criminal penalties. *See* 13 U.S.C. § 224.

The district court thus erred in its analysis of the prudential ripeness considerations.

II. Non-Decennial Census Surveys Conducted by the Bureau Harm Individuals and Small Businesses.

The implications of the district court decision touch not only the ACS, but also the Annual Business Survey (ABS), which since 2017 has been issued to over

one million randomly selected businesses. The ABS, like the ACS, comes with harsh penalties attached: fines of up to $5,000 for failing to complete the survey, and up to $10,000 for intentionally providing false information. *Annual Business Survey FAQs*, Census.gov, accessed May 23, 2023, https://bit.ly/45tEklE.

As with the ACS, the ABS mandates disclosure of highly personal information, including sex, ethnicity, race, and age of business owners. *See ABS-1, 2022 Annual Business Survey Worksheet*, Census.gov, Apr. 4, 2022, https://bit.ly/45s6mhx. The ABS also demands sensitive business information, such as sales, operating expenses, and details about the business's contracting and manufacturing practices. *Id.* Public release of this information could lead to financial harm for small businesses. Under threat of heavy fines, small business owners have little choice but to give the government what it wants and risk government mishandling of sensitive information.

Though the statute under which the Bureau seeks to compel the furnishing of sensitive information also exempts it from disclosure, *see* 13 U.S.C. § 9(a), government agencies routinely fail to withhold information that is supposed to be kept confidential.

Take, for instance, the Department of Labor (DOL)'s recent decision to release EEO-1 reports that were exempt from release under statute—much like the data provided for the ACS and ABS—and since the DOL interpreted the statute to

only govern EEOC conduct, the agency argued that it could release the reports. 87 *Fed. Reg.* at 51146, col. 1. While 13 U.S.C. § 9(a) wouldn't allow for this particular scenario, the point remains that agencies often develop creative constructions of statutes when they want to release information. It's not a stretch to imagine that ACS or ABS information could be the subject of FOIA litigation, wherein a plaintiff argues that 13 U.S.C.'s authorizations do not apply to those surveys, and thus neither do its restrictions on disclosure. The agency—either through an adverse decision or a settlement—might end up releasing the information in such a situation.

Or consider the 2018 example of the National Organization for Marriage (NOM) suing the IRS, alleging that the agency illegally disclosed confidential information from NOM's tax documents. *Nat'l Org. for Marriage, Inc. v. United States*, 24 F. Supp. 3d 518 (E.D. Va. 2014); Peter Reilly, *National Organization for Marriage Denied Attorney Fees in IRS Lawsuit*, Forbes (Dec. 9, 2015), https://tinyurl.com/mvrxs3jv. After the illegal disclosure, the information made its way to the Huffington Post. Reilly, *supra*. The IRS admitted fault and settled the case with NOM. *Id.*

In another instance, 75,000 individuals had personal information compromised due to a HealthCare.gov-related hack. Richard Alonso Zaldivar, *Hackers Breach HealthCare.gov System, Get Data on 75,000*, Associated Press (Oct. 19, 2018), https://tinyurl.com/mujjs6uk.

Even if the government keeps to the language of the statute and releases only anonymized survey information, it is not truly anonymous. Data released to the public can be "unlocked" with commercial or other data. Take for instance a case in which an agency proved that, in some instances, "with the aid of publicly-available information, the public can connect [information sought in a FOIA request] to . . . individuals or entities and reveal their personal information." *Telematch, Inc. v. United States Dep't of Agric.,* No. CV 19-2372 (TJK), 2020 WL 7014206, at *7 (D.D.C. Nov. 27, 2020). In short, information provided to the government, despite all assurances, is not truly kept private. Individuals and business owners are justified in their fear.

In addition to the danger of confidential information being released, surveys like the ACS and ABS are one of many federal regulatory requirements that drain small businesses of time and resources. Businesses spend about 200 hours per year just on regulatory compliance, and on average it costs them 60% more to do so than it does large companies. Abigail Thorpe, *Infographic: The Cost of Compliance*, NFIB.com, Oct. 24, 2016, https://bit.ly/3qa1P32. That cost is rising—globally, compliance costs went up by $33 billion in 2020, and as of 2021, reached $213.9 billion. Kayvan Alikhani, *The Pandemic Drove Up Compliance Costs; Here's How To Get Back On Track*, Forbes, Jan. 12, 2022, https://bit.ly/430iwfT. These costs are overwhelmingly borne by American companies, *id.*, 99.9% of which are small

businesses. *Frequently Asked Questions About Small Business 2023*, U.S. Small Business Administration Office of Advocacy, Mar. 27, 2023, https://bit.ly/3MyX8au.

Small businesses reeling from labor shortages, supply chain disruption, and inflation need fewer burdens, not more. Yet, the Bureau insists on attaching fines and jail time to surveys like the ACS and ABS. When the government engages in such behavior, individuals and businesses should at least be able to have the merits of their challenge heard in court.

CONCLUSION

For the reasons above, *Amicus* urges this Court to reverse the decision below and remand for further proceedings.

Respectfully submitted,

s/ Stephen M. Duvernay

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 4,079 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: June 16, 2023

s/Stephen M. Duvernay_
Stephen M. Duvernay

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Stephen M. Duvernay__
Stephen M. Duvernay