No. 20-35721, No. 20-35727, and No. 20-35728

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, et al.,
Plaintiffs-Appellees,
v.

DAVID BERNHARDT, in his official capacity as
Secretary of the U.S, Department of the Department of Interior et al.,
Defendants/Appellants, and

KING COVE CORPORATION, et al. (KCC)
Intervenor-Defendants/Appellants,
and

STATE OF ALASKA,
Intervenor-Defendant/Appellants.

Appeal from the United States District court, District of Alaska, Anchorage
Honorable John W. Sedwick Case No. 3:19-cv-00216

INTERVENOR-DEFENDANT-APPELLANT KCC'S BRIEF OPPOSING PLAINTIFF APPELLEES' PETITION FOR *EN BANC* REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Intervenor-Appellants inform the Court that: (1) The King Cove Corporation is an Alaska Native Village Corporation organized under the laws of the State of Alaska and the Alaska Native Claims Settlement 43 U.S.C 1601 et. seq. The King Cove Corporation does not offer shares

to the public; (2) the Agdaagux Tribe of King Cove and Native Village of Belkovsky are federally recognized tribes. No Defendant-Intervenor-Appellant is an entity which offers shares to the public. This 2nd day of August 2022.

s/Steven W Silver
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INTRODUCTION

In 2019 in exchange for lands owned by the federally created King Cove Corporation along with the Agdaagux Tribe of King Cove, the Native Village of Belkofski, and two local governments (hereinafter collectively referred to as KCC), Department of Interior (DOI) then Secretary David Bernhardt (Bernhardt) agreed to convey a narrow corridor of Native ancestral land within the Izembek Wildlife Refuge connecting the City of King Cove to an all-season, all-weather airport at the nearby town of Cold Bay. Emergency cases could then be flown from the Cold Bay Airport for treatment in Anchorage and Seattle.

Bernhardt provided two independent, stand-alone reasons to justify his decision: 1) he described how the facts had changed in the six years since DOI then Secretary Sally Jewell (Jewell) had denied a road in her 2013 Record of Decision (ROD);[1] and 2) he found that even accepting the key facts on which Jewell had decided, he would have authorized the exchange because he placed greater weight on the unmet need of the indigenous people for emergency medical access to the Cold Bay Airport than her decision had.

[1] In the Omnibus Public Land Management Act of 2009 (Public Law 111-11), Title VI, Subtitle E (OPLMA) Congress gave the Secretary discretion to authorize a land exchange and road construction. In selecting the "No Action" alternative in the 2013 ROD Jewell explained the ecological damages she thought would occur were either of the two road alternatives selected.

Bernhardt determined that inadequate access from King Cove to the Cold Bay Airport in emergencies had resulted in eighteen deaths between 1980 and 2013. He found that the land exchange was necessary to prevent the further loss of life of indigenous people by providing them safe, reliable, and affordable access to the Cold Bay Airport:

> I remain concerned regarding the persistent and substantial number of emergency medevacs and periodic deaths that continue to occur. Since Secretary Jewell's decision, there have been over 70 emergency medevacs from King Cove, a number that demonstrates there will unquestionably be many more in the years to come. Bernhardt Decision at 17. ER 231.

In March 2022, a Panel of this Court found that each of Bernhardt's standalone reasons satisfied the Administrative Procedure Act 5 U.S.C. 706 (2) (APA). *Friends of Alaska National Wildlife Refuges v. Haaland,* 29 F.4th 432, 441-442. (9th Cir. 2022). The district court and the Panel Dissent (Dissent) assert that, notwithstanding his second stand-alone justification, Bernhardt violated the APA because they disagree with some of his first stand-alone reasons for reversing Jewell's denial.

On May 16, 2022, this Court ordered DOI, and Defendant-Intervenors (the State of Alaska (Alaska), and KCC) to respond to Friends' petition for rehearing *en banc*. This brief explains why this case does not qualify to be reheard *en banc*.

I. The History of The Izembek Land Exchange Demonstrates a Thorough Justification For DOI's Policy Change.

A. KCC's 2017 Land Exchange Request

In 2017 KCC petitioned DOI's then Secretary Zinke (Zinke) for an equal value land exchange by which KCC would convey to the United States the surface estate of certain Native-owned ancestral lands within the Izembek and Alaska Peninsula National Wildlife Refuges and relinquish selection rights to 5,430 additional acres within the Izembek Refuge. In return, DOI would convey to KCC the surface and subsurface estates of former ancestral lands not exceeding 500 acres.

Zinke signed the land exchange agreement with KCC on January 22, 2018, which Friends challenged in Alaska Federal District court. Judge Gleason set aside the land exchange because Zinke failed to provide an inadequate explanation for facts underlying his decision that contradicted facts in Jewell's 2013 ROD. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1142-44 (D. Alaska 2019).

B. Bernhardt's Decision on KCC's 2019 Land Exchange Request.

KCC did not appeal Judge Gleason's Order. Instead, it filed a new land exchange request with DOI's new Secretary David Bernhardt. On July 12, 2019, Bernhardt issued a 20-page decision approving the new land exchange (not including a road). Bernhardt Decision. ER 215-234. Because, as shown below, Bernhardt's decision deliberately followed Judge Gleason's analytic framework for compliance with the seminal APA cases of *FCC v. Fox Television*, 556 U.S. 502 (2009) (*Fox*)

and *Organized Village of Kake v. U.S. Department of Agriculture,* 795 F.3d 956 (*en banc*) (9th Cir. 2015) (*Kake*), (Bernhardt Decision at 12. ER 226) an *en banc* hearing is not "necessary to secure or maintain uniformity of this court's [APA] decisions" in *Fox* and *Kake*.

1.Bernhardt Did Not Dispute Jewell's Ecological Reasons For Denying the 2013 OPLMA Land Exchange, but, Notwithstanding Them Approved the 2019 Land Exchange to Resolve the Unmet Emergency Health Access Needs of King Cove's Indigenous People.

For example, Judge Gleason found that the 2018 [Zinke] "Exchange Agreement [did] not … contain any discussion of the environmental impact of the road." *Friends, supra.* 381 F. Supp. 3d 1127, at 1140-1141. In contrast Bernhardt accepted Jewell's contentions that the road would not be in the public interest because it could "lead to significant degradation" of the environment and because "viable transportation alternatives exist" to address the healthcare needs of the residents of King Cove. Bernhardt Decision at 6. ER 231-233.

Moreover, Bernhardt specifically reviewed the reasons Secretary Jewell gave for her conclusions:

1. **Wildlife and Habitat Considerations**. Bernhardt recognized: "[t]he 2013 ROD concluded '[b]y keeping the isthmus roadless, a no road alternative best protects the habitat and wildlife of the Izembek Refuge'" (Decision at 6) and "'the 2013 ROD found "construction and use of a road corridor would be likely to have negative effects on each of the species referenced.' Bernhardt Decision at 6-7. ER 220-21.

2. **Wilderness Considerations.** Bernhardt said, "the 2013 ROD briefly considered the impacts to wilderness of a potential road corridor, noting the 'no action alternative protects nearly 300,000 acres of Wilderness.' It further observed that the proposed road corridors would jeopardize between 131 and 152 acres (or approximately 1/20th of one percent) in a manner entirely inconsistent with Wilderness purposes. Bernhardt Decision at 7. ER 221.

3. **Refuge Management Considerations**. Bernhardt acknowledged that 'the 2013 ROD discussed concerns "[i]n addition to the direct impacts of construction and vehicle traffic associated with the proposed road, there is high potential for increased off-road access with the proposed construction of a maintained, all-season gravel-surface road." Bernhardt Decision at 7. ER 221.

4. **Viable Transportation Alternatives**. Bernhardt recognized that Jewell found flights from King Cove to Cold Bay, boat transportation, a hovercraft, and an aluminum landing craft were acceptable alternatives to a road notwithstanding the community's negative experience with each. Bernhardt Decision at 7-8. ER 221-222.

The determinative factor that caused Bernhardt to reach a different policy conclusion than Jewell (that is given little to no consideration by Petitioners, the Amici, and the Dissent) was Bernhardt's "paramount" concern regarding the competing, unmet need of KCC's indigenous community for safe, reliable, and affordable access to Alaska's transportation network for medical emergencies. Bernhardt Decision at 18-19. ER 232-233:

> A rebalancing of the factors involved, weighted by the responsibility to the Alaska Native people in the implementation of ANCSA and ANILCA, requires a different policy result for the ANILCA land exchange considered

here than the policy conclusion drawn in the 2013 ROD pursued under the authority of OPLMA.

2. Bernhardt Provided Two Independent Sets of Reasons for Reversing Jewell's Denial of OPLMA's Land Exchange and Road Construction.

Bernhardt gave two stand-alone, independent sets of reasons for reversing Jewell's 2013 decision. The first described new evidence gathered from numerous medical evacuations by air since execution of the 2013 ROD:

(1) The acute necessity, underestimated in the 2013 EIS and ROD, for a road connecting King Cove and Cold Bay to serve the future emergency medical and other social needs of the Alaska Native residents of King Cove and the Alaskan people.

(2) Changed information concerning the viability and availability of alternative means of transportation that have since proven to be neither viable nor available.

(3) A previous failure to take into consideration the high ongoing and future costs to the taxpayers of continuing emergency medical evacuations from King Cove by the U.S. Coast Guard.

(4) The substantial benefits to the citizens of the United States and residents of Alaska in increasing the total amount of acreage in the Izembek National Wildlife Refuge and adjacent Alaska Peninsula National Wildlife Refuges for the protection of scenic, natural, cultural, and environmental values by way of a land exchange with King Cove Corporation.

Bernhardt Decision at 8-11 and 17-18. ER 222-225 and ER 231-232.

His second, independent set of reasons for a change in policy explicitly stated that human life must be given greater weight among the competing considerations "even **if *the facts are as stated*** in the 2013 ROD:"

(5) My determination that, **even if the facts are as stated in the 2013 ROD; that is, that a road is a viable alternative but (a) there are "viable, and at times preferable" transportation alternatives for medical services and (b) resources**

would be degraded by the road's construction -- human life and safety must be the paramount concern in this instance. (Emphasis added). Bernhardt Decision at 19. ER 233. This rationale fully conforms to the law of this Circuit. As the Majority said at *Friends, supra.,* 29 F. 4th 432, 441-442 (9th Cir. 2022):

> The choice to place greater weight on the interests of King Cove residents sufficiently explained the change in policy. And the Secretary was entitled in 2019 "to give more weight to socioeconomic concerns" than his predecessor had in 2013, "even on precisely the same record." *Organized Vill. of Kake* , 795 F.3d at 968.

Neither of Bernhardt's two separate, independent lines of reasoning creates a "direct and entirely unexplained, contradiction of Jewell's finding," (even though his land exchange did not authorize, and would thus cause less ecological damage than, a road). Bernhardt Decision at 2. ER 216. Bernhardt's first reasons provide a full explanation of facts bearing on his decision to approve the land exchange that had been learned since Jewell's 2013 decision – most importantly the indigenous people's need for access to medical treatment from the Cold Bay Airport to Anchorage and Seattle which had continued to remain unmet since Jewell's denial of a road. Bernhardt Decision at 17. ER 231.

Bernhardt's second reasons reach the same conclusion by subsuming, but not contradicting, Jewell's 2013 factual findings regarding the availability of potential transportation alternatives and the adverse impacts of a road on the Refuge. Friends, Amici, the Dissent and the District Court do not explain how, if Bernhardt's decision

accepted ***all*** the prior factual findings in the 2013 ROD, it can be logically argued that any were discarded. *Kake* 795 F.3d at 968.

Bernhardt's deliberate adherence to Judge Gleason's APA analytical framework and consideration and acceptance of all major decisional facts in the 2013 ROD assured compliance and uniformity with *Fox's* core APA requirement for an agency change in policy. Accordingly, his decision is consistent with the law of this Circuit and the Supreme Court and an *en banc* hearing is not "necessary to secure or maintain uniformity of this court's decisions."

C. Judge Sedwick's Order and Opinion.

Friends again filed suit, claiming that Bernhardt's decision did not comply with *Fox* and *Kake*. In a June 2020 Order and Opinion Judge Sedwick set aside Bernhardt's findings. *Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 463 F. Supp. 3d 1011 (Alaska 2020). Importantly, Judge Sedwick did not conclude that Bernhardt's reasoning conflicted with the uniformity of Ninth Circuit law as applied to an agency's change in policy.

Rather, Judge Sedwick's Opinion and Order focused solely on what he called "unexplained contradictions" in Items 1-4 (Bernhardt Decision at 8 – 11 and 17 -

18).[2] ER 222-225 and ER 231-232.The Majority correctly found that Judge Sedwick had mischaracterized what Bernhardt had said in one instance and that Bernhardt had adequately explained what Judge Sedwick called a contradiction in another. *Friends, supra.* 29 F.4th 432, 442-443.

Because he failed to even address Bernhardt's second set of reasons (Bernhardt's Decision at 19. ER 233) Judge Sedwick does not explain how, since Bernhardt considered "all the facts as stated in the 2013 ROD" in approving the land exchange (Bernhardt Decision at Page 19, ER 234), Bernhardt could have logically contradicted the facts on which Jewell relied in her 2013 ROD.[3]

II. ARGUMENT

A. FRIENDS' PETITION DOES NOT QUALIFY FOR *EN BANC* CONSIDERATION UNDER FED. R. APP. P. 35 (A).

Friends seek a remedy that is as inappropriate here as it is disfavored by the Court. Fed. R. App. P. 35(a) provides that ~~a~~n *en banc* hearing or rehearing "is not favored and ordinarily will not be ordered unless:

> (1) *en banc* consideration is necessary to secure or maintain uniformity of this court's decisions; or

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[2] The Dissent and the Law Professors' Amicus brief focus solely on similar disagreements with Bernhardt's additional facts and dismiss Bernhardt's alternative finding as a "sleight of hand." *Friends, supra*., 29 F.4th 432, at 450.

[3] Neither the Dissent nor Law Professors' Amicus Brief (at 14) explain this either.

(2) the proceeding involves a question of exceptional importance."

Friends and Amici petition for rehearing *en banc* should be denied because they have not shown that either situation exists here. They have only explained why they think the Majority reached the wrong decision.

This Court has noted the rehearing *en banc* process is "seldom used merely to correct errors of individual panels … even in cases that particularly agitate judges," but instead is employed sparingly when needed to answer questions of great importance. *Hart v. Massanari,* 266 F.3d 1155, 1172 n.29 (9th Cir. 2001) (internal quotation marks and citation omitted). This is not such a case. For reasons described below the Majority correctly found that Bernhardt provided a satisfactory explanation for his decision to approve the Izembek land exchange that was consistent with relevant APA Supreme Court and Ninth Circuit precedent.

B. The Ninth Circuit Majority Decision Correctly Concluded that Bernhardt's Decision Complied with *Fox* and *Kake* 29 F4th 432, (9th Circuit 2022).

Friends contend:

> The Majority's decision eliminates the long-standing requirement that federal agencies must provide adequate justification when making a decision that reverses a prior agency policy. *FCC v. Fox Television Stations, Inc. (Fox*), 556 U.S. 502, 515–16 (2009). (Friends' petition page 1).

Friends are wrong. The Majority upheld Bernhardt's Decision to reverse Jewell's 2013 for two separate, independent reasons: 1) it disagreed with the district

court and Dissent that Bernhardt arbitrarily contradicted Jewell's factual findings; and 2) it found that even if the facts were the same as Jewell had determined, Bernhardt would have authorized the land exchange because he placed greater weight than Jewell on the unmet need of King Cove's indigenous people for reliable and affordable access to the Cold Bay Airport in a medical emergency.

As to the first independent reason, the Majority determined that it did "not agree with the district court that Secretary Bernhardt arbitrarily contradicted Secretary Jewell's factual findings." The Majority correctly found that Judge Sedwick had mischaracterized what Bernhardt had said in one instance and that Bernhardt had explained the contradiction that Judge Sedwick had asserted in another. *Friends, supra.* 29 F.4th 432, 442-443.

As to the second independent reason, the Majority found at *Friends, supra.,* 29 F.4th 432, at 442 that Bernhardt's decision to authorize the land exchange - even if the facts were the same as those in the 2013 ROD - satisfied the APA because it "did not rely on new facts, **but rather on a reevaluation of which policy would be better in light of the facts**. *National Ass'n of Home Builders*, 682 F.3d at 1038; see *Fox,* 556 U.S. at 514–16. For that reason, Judge Sedwick's criticisms of the Secretary's first independent reason is "beside the point." *Friends, supra.,* 29 F.4th 432, at 441-442. (Emphasis added).

The Majority explained:

> [A]n agency may offer alternative rationales for its decision, and if the agency makes clear that one would have been independently sufficient to justify its action, then a court need not consider the others if it finds the first to be valid. See *National Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 839 (D.C. Cir. 2006); *United States v. Ross,* 848 F.3d 1129, 1135 (D.C. Cir. 2017). Plaintiffs do not dispute that both components of Secretary Bernhardt's decision—his new factual findings and his determination that changed policy priorities would lead him to the same result even without the new factual findings—were "genuine justifications" for his action. See *Department of Com. v. New York,* 139 S. Ct. 2551, 2575–76 (2019). *Friends, supra.,* 29 F.4th 432, at 442.

The Majority concluded: "There is therefore no reason to look beyond the valid justification that Secretary Bernhardt offered." *Id.*

The Dissent disagreed:

> To determine that the Secretary relied on new factual findings rather than on reweighing the same facts in the 2013 ROD, one need only observe the lack of analysis in the Secretary's purported "reweighing." After purportedly assuming the same facts, ***the Secretary did not engage in any real analysis of how the facts as they were in 2013 prompted the decision he reached, exactly what led him to reweigh them, or the specific factors he was reweighing***, aside from his pronouncement that "human life and safety must be the paramount concern." (Friends, supra., 29 F.4th 432, at 448). (Emphasis added).

The Dissent is incorrect. Bernhardt did explain why he reweighed the 2013 facts. See ER 222-225. Moreover, *Fox* does not require the additional analysis sought by Friends, the Dissent, and the Law Professors Amicus Br. at 14. The Supreme Court held in *Fox*:

> The Court of Appeals for the District of Columbia Circuit has similarly indicated that a court's standard of review is "heightened somewhat" when an agency reverses course. *NAACP v. FCC*, 682 F.2d 993, 998 (1982).

> We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.

556 U.S. 502, 514. The Court continued: "it is not that further justification is demanded by the mere fact of a policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox* at 556 U.S. at 515. Bernhardt's finding that he would have reached the same decision even if all the facts in the 2013 ROD were true assured that the decisional facts that underlay the 2013 ROD were not disregarded.

C. *Kake* Does Not Require That the 2013 and 2019 Records Be Exactly the Same; Just That the 2019 Facts Do Not Contradict the 2013 Facts.

Friends argue that because the records are not the same, the Secretary "could not exchange lands assuming all the facts as stated in the 2013 ROD." Friends Br. at 6. They contend "the present exchange involves substantially less acreage coming into federal ownership and allows for gravel mines and commercial road use." *Id.*

Friends are correct - the records are not the same. Had Secretary Jewell selected alternatives 2 or 3 in the 2013 ROD instead of the No Action alternative, Alaska and KCC would have had Congressional authorization under OPLMA to build the road. Bernhardt's Findings only approve a land exchange that will not cause the ecological damage from road construction described in Jewell's 2013 ROD. Any

future road will have to be permitted, at which time such issues as gravel[4] use and commercial use will be considered. Bernhardt Decision at 16. ER 231.

But *Kake* does not require that the records be the same. Rather, it says: "*State Farm* teaches that even when reversing a policy after an election, **an agency may not simply discard prior factual findings** without a reasoned explanation." 795 F.3d 968. (Emphasis added). By considering "all the facts as stated in the 2013 ROD" Bernhardt clearly did not discard or contradict Jewell's prior factual findings.

D. Bernhardt's Decision Did Not Attempt to Evade *Fox's* Explanation Requirement

Friends claim: "It would negate the requirements of *Fox* and its progeny if an agency could meet its burden by simply stating that it reached a new conclusion "even assuming all the contrary facts as stated." Friends' Br. at 7. This is similar to the Dissent's argument that by "assuming all the facts in the 2013 ROD he would" authorize the land exchange are "magic words . . . for surviving APA review of a

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[4] The 2013 EIS does not mention "gravel mines," but contemplates that "[o]ne or more material sites" are anticipated for use in road construction in the Alternative 2 alignment. AR 00179343 Just like the current corridor, the road corridor for the 2013 EIS anticipates that "[t]he road would be constructed with both cuts and fills; cuts and fills will be balanced [i.e., without [importing materials] to the maximum extent practicable." AR 00179346.

change in agency policy." *Friends, supra*., 29 F.4th 432, at 448. The Dissent contends that the "magic words" would allow "agencies to evade *Fox's* explanation requirement so easily that it actually eliminates it." *Id.*

"Magic words" is a catchy, dismissive rhetorical phrase that could be levied as an "evasion" of any agency's policy change which considers all the facts of a prior decision and reaches a different policy conclusion – just as *Fox* and *Kake* allow. Its use in this case also ignores Bernhardt's detailed discussion of the facts surrounding his first set of reasons for changing the 2013 ROD decision.

Moreover, as the Majority observed, Friends do not dispute that *Fox* and *Kake* allow an agency to consider all the facts of a prior decision and reach a different conclusion or that "both components of Secretary Bernhardt's decision—his new factual findings and his determination that changed policy priorities would lead him to the same result even without the new factual findings—were "genuine justifications" for his action. *Friends, supra.,* 29 F.4th 432, at 442. Friends thus contradict the Dissent's "magic words" evasion argument as applied to this case.

In sum, Friends contradict, and the Dissent cites no record or legal support for, their "evasion" claim. Bernhardt's conscious, thorough assessment of the situation in 2013 relative to his 2019 decision described above proves the contrary and satisfies the *Fox* APA factors for the reasons discussed above.

E. Bernhardt's Decision Is Supported by the Record.

Friends claim that Bernhardt's decision is not supported by the record (Friends Petition at 9) is without merit because, as the Majority pointed out, his actual Findings were either mischaracterized by the District Court or adequately explained by the Secretary. *Friends, supra*. 29 F.4th 432, 442-443.

III. The ANILCA Decision Is Consistent with Supreme Court and Ninth Circuit Court Precedent

KCC defers to, and incorporates by reference, the brief of the State of Alaska on this point.

IV. The Panel Majority's ANILCA Title XI Decision Is Correct.

KCC defers to, and incorporates by reference, the brief of the State of Alaska on this point.

CONCLUSION

Friends petition for rehearing *en banc* must be denied because, ironically, it would create the exact type of confusion and dissonance it purports to remedy and does not meet the Fed. R. App. P. 35 (a)(1) threshold burden for an *en banc* hearing.

DATED this 2nd day of August 2022.

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CERTIFICATE OF COMPLIANCE FOR BRIEF PURSUANT TO

FEDERAL RULE OF APPELLATE PROCEDURE 32(a)AND FORM B

The undersigned attorney certifies that:

1. This brief contains 3913 words and thus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the type face volume of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2010 font size 14 and Times New Roman type style.

Signature: /s/ Steven W. Silver Date: August 2nd, 2022

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August 2022 I caused to be electronically filed the foregoing Defendant-Intervenor-Appellants' KCC'S Brief Opposing Plaintiff Appellees' Petition For *En Banc* Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Steven W, Silver