Nos. 20-35721, 20-35727, 20-35728

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 Interior, et al.,
*Defendants/Appellants*,

and

KING COVE CORPORATION, et al.,
*Intervenor-Defendants/Appellants*

and

STATE OF ALASKA,
*Intervenor-Defendant/Appellant*

Appeal from the United States District Court
For the District of Alaska
No. 3:19-cv-00216 Hon. John W. Sedwick

# INTERVENOR-DEFENDANT APPELLANT STATE OF ALASKA'S RESPONSE TO THE PETITION FOR REHEARING EN BANC

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## EN BANC REHEARING IS NOT APPROPRIATE

A rehearing en banc is only appropriate when: (1) en banc consideration is necessary to secure uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed R. App. P. 35(a). Neither of those circumstances arise from the panel majority's opinion. The petition for rehearing from the Friends of Alaska National Wildlife Refuges, et al. (Friends) expresses impassioned dissatisfaction with the panel majority's opinion. However, the petition fails to identify an inconsistent opinion from this Court or the Supreme Court and fails to articulate how the opinion "substantially affects a rule of national application in which there is an overriding need for national uniformity." Circuit Rule 35-1. Having failed to demonstrate either condition for rehearing en banc, the petition should be denied.

## SUMMARY OF THE ARGUMENT

The Friends' petition argues that the panel majority misreads the Alaska National Interest Lands Conservation Act (ANILCA) on two issues: (1) the majority held the enumerated purposes of ANILCA include the consideration of the economic and social needs of the State of Alaska and its people; and (2) the majority held that a land exchange authorized by ANILCA's section 1302 is not subject to ANILCA Title XI's procedures for the approval of transportation or utility systems. If the Friends' presentation of law was adopted by an en banc

panel, the resulting decision would be in direct conflict with the Supreme Court's decision in *Sturgeon v. Frost*, 139 S.Ct. 1066, 1075 (2019) and this Court's decision in *City of Angoon v. Marsh*, 749 F.2d 1413, 1415-16 (9th Cir. 1984). Accordingly, the Friends petition for rehearing en banc should be denied.

## BACKGROUND

### I. Historical Context of ANILCA.

When Alaska became a state in 1958, the federal government owned virtually all land in Alaska. *Sturgeon*, 139 S.Ct. at 1073. To propel industry and to create a tax base, the Alaska Statehood Act authorized the State to select for itself 103 million acres of "vacant, unappropriated, and unreserved" federal land. Pub. L. No. 85-508 §§ 6(a), (b), 72 Stat. 339 (1958). Over the course of the State's land selections, it became readily apparent that Alaska Natives asserted aboriginal title to much of the State's selected lands. *Sturgeon*, 139 S.Ct. at 1073. Congress attempted to resolve the competing land claims when it passed the Alaska Native Claims Settlement Act (ANCSA) in 1971, which created Alaska Native corporations that were authorized to select 40 million acres of federal land. 43 U.S.C. § 1611. Congress sought to implement the settlement "rapidly, with certainty, in conformity with the real economic needs" of Alaska Natives. 43 U.S.C. § 1601(b).

ANCSA also directed the Secretary of the Interior to select up to 80 million acres of unreserved federal land, subject to congressional approval, for additional national parks, forests and wildlife systems. 43 U.S.C § 1616(d)(2). Congress refused to ratify the selections of President Carter's administration, and instead enacted ANILCA to set aside 104 million acres of federal land in Alaska as new or expanded national parks, monuments, and preserves "but on terms different from those governing such areas in the rest of the country." *Sturgeon*, 139 S.Ct. at 1075. One of those newly established refuges was the Izembek National Wildlife Refuge, which became a conservation system unit (CSU) under ANILCA. 16 U.S.C. § 668dd note; ANILCA § 303(3).

When setting the boundaries of these newly created CSUs, Congress made "an uncommon choice—to follow 'topographic or natural features,' rather than enclosing only federally owned lands." *Sturgeon*, 139 S.Ct. at 1075 (quoting, 16 U.S.C. § 3103(b)). Congress's prior grants to the State and to Alaska Native corporations created a "confusing patchwork of ownership" that made it impossible to exclude non-federal lands from these new and expanded parks and preserves. *Id.* (quoting, C. Naske & H. Slotnick, Alaska: A History 317 (3d ed. 2011)). Ultimately, 18 million acres of State, Native, and private land wound up inside CSUs established by ANILCA. *Id.* at 1075-76. The land owned by the King Cove Corporation (KCC) that the Department of Interior seeks to acquire in the

2019 Exchange Agreement is one such inholding located within the CSU. 2-ER-35 (Native Corporation Lands within Izembek National Wildlife Refuge Complex).

Not surprisingly, ANILCA's expansive drawing of CSU boundaries concerned the people of Alaska. As Alaska's Senator Gravel noted: "[If] there is no real provision mandatorily that Alaskans can get to our land of our will, then there is something wrong, because what is being breached is the compact under the Statehood Act and the law of great justice which gave the Natives of Alaska their rightful legacy." 126 Cong. Rec. 11062 (1980). Alaska's Senator Stevens suggested that ANILCA authorize the Secretary of the Interior to reacquire these State or Native holdings "wherever possible." *Sturgeon*, 139 S.Ct. at 1075 (quoting 126 Cong. Rec. 21882 (1980)).

In March 1998 the Department of the Interior identified the KCC land that it seeks to acquire through the challenged land exchange as a "high priority" for acquisition. 2-ER-36 (Land Protection Priorities within Izembek National Wildlife Refuge Complex).

## II. The 2019 Exchange Agreement.

The 2019 Exchange Agreement clearly expresses that the exchange of lands with KCC will "serve the purposes of ANILCA by [(a)] striking the proper and appropriate balance between protecting the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska and [(b)] providing

an adequate opportunity for satisfaction of the economic and social needs of the State of Alaska." 2-ER-236. Secretary Bernhardt's decision to enter into the Exchange Agreement expands on this reasoning by explaining that meeting these dual purposes would be accomplished:

> by adding substantial acreage to the Izembek and Alaska Peninsula refuges that has been previously identified by the FWS [U.S. Fish and Wildlife Service] as being important habitat while offering KCC the opportunity to explore improved public safety through a safer and more reliable means of emergency access to the Cold Bay airport for the residents and visitors to King Cove.

2-ER-233.

More specifically, the shorelands identified by KCC for exchange under the 2019 Land Exchange are recognized for their biological importance by the Ramsar Convention on Wetlands of International Importance, a treaty for the conservation and wise use of wetlands and their resources. 2-ER-200. KCC also agreed to relinquish rights under ANCSA to 5,340 acres of land within the Izembek NWR selected by KCC but not yet conveyed by the federal government. 2-ER-238. In exchange, the federal government would transfer title to a narrow strip of uplands totaling less than 500 acres that would begin and end at the existing road systems on each end of the Izembek isthmus. 2-ER-225, 235. If a gravel road is ever constructed on the exchanged land, the total footprint of disturbed land is only

expected to be 155 acres that were carefully located in manner to avoid and minimize environmental impacts to wetlands and wildlife. 2-ER-199.

The 2019 Land Exchange Agreement is the product of a discretionary policy decision that weighs two independently valuable and competing resources. As Secretary Bernhardt explained in his decision:

> Just as Secretary Jewel noted in her review years ago, a decision addressing the KCC request and evaluating the new proposed land exchange agreement must "weigh[ ] on the one hand the concern for more reliable methods of medical transportation from King Cove to Cold Bay and, on the other hand, a globally significant landscape that supports an abundance and diversity of wildlife unique to the Refuge …" Whether to proceed under the Congressional grant of authority in the Omnibus Public Management Act of 2009 (OPLMA) is a discretionary policy decision, as is whether to make an exchange under section 1302(h) of ANILCA.

2-ER-216 (internal quote to 2013 Record of Decision, at 2; 2-ER-38). Secretary Bernhardt quite succinctly captures the competing purposes that federal land managers face when implementing the "Janus-faced nature in [ANILCA's] statement of purpose" that arose from "ANILCA's grand bargain" between Federal, State, and Native land holders. *Sturgeon*, 139 S.Ct. at 1083-84.

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## ARGUMENT

### I. Supreme Court and Ninth Circuit precedents recognize the stated purpose of ANILCA to provide for the economic and social needs of the State of Alaska and its residents.

The U.S. Supreme Court is clear and direct in articulating ANILCA's competing goals: "The Act was designed to 'Provide[ ] sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska.' . . . '[A]nd at the same time,' the Act was framed to 'provide[ ] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." *Sturgeon*, 139 S.Ct. at 1075 (quoting 16 U.S.C. § 3101(d)). The Ninth Circuit's *City of Angoon v. Marsh* description of ANILCA's dual purposes is equally clear: "ANILCA was passed to furnish guidelines for the protection for the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska *and* to provide an adequate opportunity for satisfaction of the economic and social needs of the people of Alaska." 749 F.2d 1413, 1415-16 (9th Cir. 1984) (emphasis added).

The Friends' petition does not address these clear recitations of ANILCA's two-fold directive but, instead, attempts to glean ANILCA's statement of intent from select pages of the *Sturgeon* decision where the Court discusses Congress's creation of CSUs. Docket 85 at 19. The Friends' selective reading of *Sturgeon* to justify ANILCA as a conservation-only statute begs the question: Why did the

Supreme Court dedicate one-half of its unanimous opinion to the history of the present patchwork of Federal, State, and Native lands and ANILCA's creation of the State, Native, and private inholdings—such as the community of King Cove—that resulted from ANILCA's over-inclusive CSU boundaries? *Sturgeon*, 139 S.Ct. at 1073-77. The answer is that the history and the current status of the inholdings within the federal protected areas confirms ANILCA's "grand bargain" of both "safeguarding 'natural, scenic, historic[,] recreational, and wildlife values,'" and "'providing for' Alaska's (and its citizens') 'economic and social needs,'" which supported both the Court's interpretation of ANILCA in *Sturgeon* and the Secretary's application of it here. *See Sturgeon*, 139 S.Ct. at 1083–84 (quoting 16 U.S.C. § 3101(a), (d)).

Rather than accepting the clear statements of law from Supreme Court and Ninth Circuit precedents, the Friends' petition mischaracterizes the plain language of ANILCA's § 101(d) by ascribing to Congress an understanding that "it had achieved the proper balance of conservation and economic and social needs." Docket 85 at 18. The Friends' argument uses past tense verbs to argue that Congress determined this balancing was done with the passage of ANILCA. But what Congress actually said, using the present tense, is that ANILCA "*provides adequate opportunity* for satisfaction of the economic and social needs of the State of Alaska and its people." ANILCA § 101(d); 16 U.S.C. § 3101(d)(emphasis

added). That means the opportunity for the economic and social needs of Alaskans, as well as the protection of natural resources, was not only considered by Congress when it enacted ANILCA, but must also be considered in the implementation of ANILCA. *See Sturgeon*, 139 S.Ct. at 1083-84 ("ANILCA announced its Janus-faced nature in its statement of purpose.").

The only statement of congressional achievement in ANILCA § 101(d) is the second sentence's statement that the need for future legislation "has been obviated thereby," which provides the rationale for Congress's restrictions on the expansion of ANILCA's CSUs. 16 U.S.C. § 3101(d). *See Se. Conference v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.C. Cir. 2010); *see also* ANILCA § 1326, 16 U.S.C. § 3213 (prohibition of executive branch actions withdrawing greater than 5000 acres of public lands in Alaska). The Carter administration's overreaching and unpopular designation of vast swaths of Alaska for conservation was why Congress reacted with the "grand bargain" of ANILCA, "but on terms different from those governing such areas in the rest of the country." *Sturgeon*, 139 S. Ct. at 1075. The amicus brief of President Carter quotes the past tense language from this second sentence of ANILCA § 101(d) to argue that there is no present requirement to balance conservation needs with the needs of people living within and surrounded by ANILCA's CSUs. Docket 88-2 at 11. This selectively misleading focus on the past tense phrasing in the second sentence of ANILCA § 101(d)

ignores the present tense of the first sentence of ANILCA § 101(d) and the Act's historical context. Neither this Court nor the U.S. Supreme Court have read ANILCA's purposes as frozen in time. *Sturgeon*, 139 S.Ct. at 1075 (quoting 16 U.S.C. § 3101(d)) and *City of Angoon*, 749 F.2d at 1415-16 (same). Rather, the purposes continue to inform the present day interpretation and application of the Act. In line with the present-tense language of ANILCA § 101(d), the economic and social needs of Alaskans must be considered when a federal official is implementing ANILCA.

## II. The 2019 Exchange Agreement is permissible under ANILCA and does not affect a rule of national application in which there is an overriding need for national uniformity.

### A. The petition does not state with particularity the question of exceptional importance or the rule of national application needing national uniformity.

The Friends characterize Secretary Bernhardt's approval of the 2019 Exchange Agreement under the authority of ANILCA § 1302(h), rather than ANILCA Title XI, as presenting a "question of exceptional national importance" and a "question of first impression." Docket 85 at 17, 20. Neither statement is correct. The Friends therefore cannot meet the standards for en banc rehearing set by F.R.A.P. Rule 35(a) this Court's Circuit Rule 35-1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding

need for national uniformity, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc.").

The Secretary of Interior's power to acquire lands by exchange under ANILCA § 1302(h) may only be exercised in Alaska with Native entities, Alaskan state or municipal governments, or other Alaskan landowners. *See* 16 U.S.C. § 3192(h). The narrow geographic scope and the limited availability of this federal land exchange authority is in line with the Supreme Court's acknowledgement that ANILCA "repeatedly recognizes that Alaska is different." *Sturgeon*, 139 S.Ct. at 1077 (quoting *Sturgeon v. Frost ("Sturgeon I")*, 577 U.S. 424, 438 (2016)). The panel majority's affirmance of the Secretary's Exchange Agreement therefore has a narrow potential application—if any—outside of the context of the specific exchange at issue, and there is no need for uniformity with rules of national application. The panel majority's decision, therefore, does not meet this Court's standards for rehearing en banc.

Not only are there no conflicting opinions by this Court or another court of appeals, there is a district court decision that analyzed a land exchange that included plans for transportation infrastructure and the district court nowhere mentioned ANILCA Title XI. In *National Audubon Society v. Hodel*, the U.S. District Court in Alaska examined a proposed exchange of lands under the authority of ANILCA § 1302(h) that would enable an Alaska Native corporation's

acquisition of a parcel within the St. Mathew Island wilderness area. 606 F. Supp. 825, 828 (D. Alaska 1984). The wilderness area parcel, which is part of the larger Alaska Maritime National Wildlife Refuge, was needed for the construction of a 3000-foot airstrip, a 400-by-400-foot gravel pad for a camp, and a connecting 9000-foot road. 606 F.Supp. at 845. Although roads and airports are certainly transportation systems, the district court did not require an ANILCA Title XI process for the Alaska Native Corporation to complete a land exchange with the Department of Interior. *Id.* at 828 ("The exchange provision in § 1302(h) of ANILCA imposes two requirements before a land exchange may be approved. First, the Secretary must determine that the exchange will result in 'acquiring lands for the purposes of [ANILCA].' Second, the exchange must further the 'public interest' if the lands exchanged are of unequal value." (quoting 16 U.S.C. § 3192(h))). Although the district court invalidated the land exchange for other reasons, the decision's interpretation of ANILCA § 1302(h)'s requirements clearly did not include an ANILCA Title XI prerequisite to the land exchange.

### B. The 2019 Land Exchange is consistent with the text and context of ANILCA §1302(h) exchanges.

The Friends' petition offers an unusual argument that ANILCA § 1302(h) is "principally to enable the Secretary to acquire private inholdings within units without resorting to condemnation." Docket 85 at 19; *see also* Bruce Babbitt amicus, Docket 89 at 14 ("Congress intended to provide limited Secretarial

authority to acquire inholdings by exchange for conservation and subsistence purposes."). These arguments fail to recognize that these inholdings are populated by communities, non-federal public lands, Alaska Native properties, and homesteads, and they are the location of all associated activities that were occurring prior to Congress's wrapping the lands into the CSUs. As the *Sturgeon* decision recognizes, "Over three-quarters of Alaska's 300 communities live in regions unconnected to the State's road system." 139 S.Ct. at 1087. Congress certainly did not intend for the federal government to relocate inholder people or communities by eminent domain or otherwise. Secretary Bernhardt's decision gives a much more accurate description of the exchange authority in ANILCA § 1302(h) as "an important tool provided to the Secretary by Congress to adjust broad Conservation System Unit designations to reflect the health, safety, and other interests of local people in concert with the national interest in conservation." 2-ER-228.

Similarly, the panel majority's interpretation of ANILCA § 1302(h) does not give the Secretary of the Interior "boundless discretion to redraw boundaries" or to "trade away North America's tallest mountain—Denali in the Denali National Park—for economic gain" as argued by the Friends. Docket 85 at 20. As recognized by the *Hodel* decision, the Secretary's acquisition of lands by exchange is limited and must meet the purposes of ANILCA. 606 F.Supp. at 828. It is

extremely unlikely that the Secretary could complete an equal value exchange for Denali; but the Secretary likely could provide a rural community with access to a geothermal or hydropower source so the community could end its reliance on diesel fuel power generation. The Secretary could also complete an equal value exchange with a homesteading family or historic hunting lodge for safer transportation by improved shoreline access or lengthening an airstrip. Congress created landlocking issues when it drew over-inclusive CSU boundaries, and Congress gave the Secretary of the Interior tools to remedy the problems that Congress created.

### C. The 2019 Land Exchange has no ANILCA Title XI requirements.

ANILCA § 1302 sets out the Secretary of the Interior's general authority "to acquire by purchase, donation, exchange, or otherwise any lands within the boundaries of any conservation system unit." 16 U.S.C. § 3192(a). Subsection (h) authorizes the Secretary to acquire lands for the purposes of ANILCA by "exchange [of] lands (including lands within conservation system units and within the National Forest System) or interests therein (including Native selection rights) with the corporations organized by the Native Groups." 16 U.S.C. § 3192(h). Congress intended that the Secretary's authority to exchange land for the purposes of ANILCA remain separate and distinct from the Secretary's ANILCA Title XI authority to allow an applicant to use federal land for transportation and utility

purposes by easement, permit, or license. Thus, the petition is incorrect when it argues that the fee simple exchange under ANILCA § 1302(h) is subject to the processes of Title XI. Docket 85 at 23. Likewise, the Friends are incorrect in their conclusion that Section 1302 "is an 'applicable law' subject to Title XI." Docket 85 at 23.

The legislative history of the land exchange authority in ANILCA noted that the Secretary would have "great flexibility" in making land exchanges even when the land exchange would result in conservation system land moving into private hands. 3-ER-167; H.R. Rep. No. 95-1045, pt. I, at 211-12 (1978). When discussing the ramifications of including non-federal property in the newly created conservation system units, Congress recognized that ANILCA's Title XI and ANILCA § 1302(h) were separate and distinct authorities to resolve issues associated with the landlocking of rural Alaskan communities: "The Committee recognizes that many of the units will contain State and Native inholdings; however the Committee anticipates that the Secretary will use his authority under Title XI to work out voluntary, cooperative agreements with the other owners in planning and managing these lands, *and* his authority under section 1201(f) to make exchanges of lands." 3-ER-311; H.R. Rep. No. 95-1045, pt. I, at 211 (1978)

(emphasis added).[1] Thus, Congress clearly intended two separate and distinct authorities that the Secretary could rely on to provide access to the individual and community inholdings that became landlocked by the creation of the surrounding ANILCA CSUs.

Further evidence that ANILCA § 1302(h) is a freestanding authority for the Secretary's use, and not an "applicable law" requiring procedural compliance with ANILCA's Title XI, can be found in the Department of the Interior's 1986 final rulemaking to implement the provisions of Title XI. *See* Transportation and Utility Systems in and Across, and Access Into, Conservation System Units in Alaska, 51 Fed. Reg. 31,619 (Sept. 4, 1986). That rulemaking clarified "which laws and regulations administered by which agencies are meant within the ambit of 'applicable law'" by listing the Department of the Interior authorities to grant rights-of-way over federal lands for roads or utilities. *Id*. at 31,620 (referencing: the Bureau of Land Management's 43 U.S.C. § 1761 and 30 U.S.C. § 185; the Fish and Wildlife Service's 16 U.S.C. § 668dd and 50 CFR § 29.21; the National Park Service's 54 U.S.C. § 100902 and 36 C.F.R. § 14; and the general right-of-way granting authority for federal-aid highways at 23 U.S.C § 317). Each of these

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[1] The referenced exchange provision at section 1201(f) became ANILCA's section 1302(h) exchange provision.

authorities provides a federal agency discretionary jurisdiction to transfer an easement, permit, or license for the limited use of a road or utility crossing federal land, which is consistent with Title XI's definition of "applicable law." *See* ANILCA § 1102(1); 16 U.S.C. § 3162(1). None of the listed statutes and regulations authorize the federal agency to acquire land, and none authorize the federal agency to dispose of a fee interest. Because Title XI's definition of "applicable law" does not include a land exchange authority, and Congress intended the Secretary to have two distinct tools to remedy ANILCA's landlocking of State and Native properties inside CSUs, the majority opinion was correct when it determined that ANILCA § 1302(h) does not fall within the ambit of Title XI.

Because the panel majority held that the 2019 Exchange Agreement is not subject to Title XI's requirements, it did "not consider the alternative argument advanced by the State that the land exchange is exempted from Title XI by 16 U.S.C. § 3170(b), which guarantees a right of access to inholdings of state and native land within conservation system units." *Friends of Alaska Nat'l Wildlife Refuges v. Haaland*, 29 F.4th 432, 443 (9th Cir. 2022). The Friends and amici incorrectly argue that if Title XI is applicable (it is not), then KCC must receive additional approvals by the President and Congress before building a road. Docket 85 at 24 (citing ANILCA § 1106(b); 16 U.S.C. § 3166(b)); *see also* President Carter amicus, Docket 88-2 at 14 (same); and Law Professors' amicus, Docket 86-

2 at 18 (same). ANILCA § 1106(b), the most onerous procedural process of Title XI, does not apply to ANILCA's requirement that the Secretary shall provide access rights to inholdings that are effectively surrounded by CSUs. *See* ANILCA § 1110(b); 16 U.S.C. § 3170(b) ("[T]he State or private owner or occupier shall be given adequate and feasible access for economic and other purposes to the concerned land . . . ."); *see also* 43 C.F.R. § 36.10 (procedures to provide adequate and feasible access to inholdings). Since the community of King Cove is an inholding surrounded by CSUs, the community would be exempt from ANILCA § 1106(b) if it were to seek a road easement under Title XI.

Additionally, Congress recognized the inholding status of King Cove when it approved the concept of the King Cove Road in the Omnibus Public Lands Management Act of 2009 (OPLMA). Congress made clear that nothing in that law would amend or modify King Cove's right of access as an inholding under ANILCA § 1110. 2-ER-212; OPLMA § 6403(d) ("Nothing in this section ['King Cove Road'] amends, or modifies the application of, section 1110 . . . ."). The community of King Cove's right to access under ANILCA's § 1110(b) was unaffected by Secretary Jewell's decision to reject the land exchange and construction contemplated by the OPLMA and, likewise, the inholding's right to access is unaffected by the 2019 Land Exchange between the Secretary and KCC.

## CONCLUSION

The State respectfully requests this Court to deny the Friends' petition for a rehearing of the arguments en banc. The petition does not meet the requirements of Fed R. App. P. 35(a) and Circuit Rule 35-1.

Date: August 5, 2022.

TREG TAYLOR
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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Circuit Rules 35-4 40-1 (a) because this brief contains 4177 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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)(5) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: August 5, 2022.

TREG TAYLOR
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 5, 2022, 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 appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 5, 2022.

TREG TAYLOR
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