No. 19-15707

In the United States Court of Appeals for the Ninth Circuit

KIMETRA BRICE, EARL BROWNE, and JILL NOVOROT,
on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees,

v.

PLAIN GREEN LLC,
Defendant,

and

HAYNES INVESTMENTS, LLC, and L. STEPHEN HAYNES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California at San Francisco
No. 3:18-cv-01200 (The Hon. William Horsley Orrick)

PLAINTIFFS-APPELLEES' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(B)(1) STATEMENT

The majority of this sharply divided panel fashioned a first-of-its-kind reading of tribal lending arbitration contracts that, if left uncorrected, will spark an intolerable circuit split and force vulnerable consumers to arbitrate federal- and state-law claims before an arbitrator who is forbidden from applying federal or state law.

Until the panel majority's ruling in this case, the federal circuits had been unanimous: The tribal arbitration contracts at the heart of this case are unlawful because they are designed to exempt online lenders and their investors from any federal or state law and rob consumers of any meaningful ability to pursue their rights. Four times the Fourth Circuit has considered these contracts—including the exact one at issue here. And four times it struck them down. *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330 (4th Cir. 2017); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332 (4th Cir. 2020); *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286 (4th Cir. 2020). The Third Circuit has considered them twice, and twice struck them down. *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229 (3d Cir. 2020); *MacDonald v. CashCall, Inc.*, 883 F.3d 220 (3d Cir. 2018). Ditto for the Eleventh Circuit. *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331 (11th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014). Add to that the Second Circuit, *Gingras*

v. Think Fin., Inc., 922 F.3d 112 (2d Cir. 2019), as well as the Seventh, *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014).[1]

Ten separate panels from five circuits, all unanimous, and dozens of district courts have concluded that these contracts may not be enforced under the Federal Arbitration Act. That is because, as Judge Wilkinson explained, they are a "farce," designed to "game the entire system" by deploying arbitration in a "brazen" attempt to avoid state and federal law that would otherwise apply. *Hayes*, 811 F.3d at 674, 676.

The panel majority explicitly cast aside these decisions, opting instead for an unsupportable interpretation that would allow these contracts to be enforced in the Ninth Circuit and nowhere else. Not only does that decision create an irreconcilable split, it runs afoul of foundational contract interpretation principles and flouts decades-old Supreme Court case law on arbitration.

Nor should the ruling's practical consequences be understated. Left to stand, this decision will hand any unscrupulous company a blueprint for how to draft its way around federal and state laws it deems inconvenient for its bottom line. This would leave millions of residents across the Western states vulnerable to usurious and predatory lending practices. And the Court's dramatic turn would render state and

[1] Up until this panel majority's decision, only the Sixth Circuit had enforced one of these contracts, and only then because the plaintiff failed to properly challenge it. *See Swiger v. Rosette*, 989 F.3d 501, 506 (6th Cir. 2021).

federal regimes enacted to protect consumers a dead letter, affecting not just payday lending but a potentially enormous range of consumer and commercial relationships.

Rehearing is urgently needed to avoid these consequences and restore the "just and efficient system of arbitration intended by Congress when it passed the FAA." *Id.* at 674.

STATEMENT

A. Factual background

Plain Green and Great Plains are online lenders that offer low-dollar, high-interest loans over the internet to consumers across the country. *See* 2-ER-244–47. Both companies hold themselves out as tribal entities, but both were fronts—the consumer-facing websites of a lending scheme that is the brainchild and profit center of non-tribal participants, including the defendants in this case. 2-ER-244, 253–65.

Like other tribal lending schemes, the defendants' scheme was predicated on a contractual web of liability shields—including an integrated set of choice-of-law provisions, forum-selection clauses, and arbitration requirements. It works like this: *First,* each loan contract includes an arbitration provision, and that provision requires arbitration of any "dispute." 2-ER-106; *see also* 2-ER-117. "Dispute" is defined broadly to include "all federal, state or Tribal Law claims or demands (whether past, present, or future), based on any legal or equitable theory and regardless of the type of relief sought." 2-ER-70. The definition of "Dispute" also includes a delegation clause,

which requires arbitration of "any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate." 2-ER-76.

Second, the arbitration contracts contain choice-of-law provisions, the most prominent of which mandates: "**THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW**. The arbitrator shall apply Tribal Law and the terms of this Agreement, including this Agreement to Arbitrate and the waivers included herein." 2-ER-128. The loan contracts contain additional choice-of-law provisions, which forbid the arbitrator from applying any rules or law that would "contradict this Agreement to Arbitrate or Tribal Law," and specifically instruct that any "arbitration under this Agreement" may not "allow for the application of any law other than Tribal law." ER106–07, 128.

These choice-of-law limitations were intentional. Under the relevant tribal codes, "a claimant would be unable to assert" either a RICO or any state-law claim "against entities associated with a tribal lender" and, "even if he or she were able to assert such a claim, the relief" sought would "remain unavailable." *Haynes*, 967 F.3d at 344 (discussing the tribal codes at issue here); *see also* 1-ER-17.

Third, the contracts shield the arbitrator's decision from any federal- or state-court review. They do this by restricting any "judicial review" to "a Tribal court" and for only "(a) whether the findings of fact rendered by the arbitrator are supported by substantial evidence," "(b) whether the conclusions of law are erroneous under

Tribal law," or (c) whether the decision was "consistent with this Agreement and Tribal law." 2-ER-107, 128.

Taken together, these provisions lay bare the purpose of the contracts: to insulate the defendants from ever facing scrutiny from federal or state courts or liability under any federal or state laws and to leave prospective litigants without a fair chance of prevailing in arbitration. The process, as the Seventh Circuit observed, is a "sham from stem to stern." *Jackson*, 764 F.3d at 779.

B. Procedural background

The plaintiffs in this case represent a class of California residents who obtained Great Plains and Plain Green loans. Although California caps loans at 10% APR, the loans here carried significantly higher rates—up to 448%. 2-ER-264. The lawsuit asserted violations of California and federal laws related to the defendants' illegal lending and sought damages, reimbursement, and injunctive relief. 2-ER-265–79.

Relying on the contracts' arbitration provisions, the defendants moved to compel arbitration. The district court denied the motion, holding that the arbitration provisions were unenforceable because they prospectively waived the plaintiffs' right to pursue federal statutory claims. 1-ER-15–16. On the eve of trial, after the district court had certified a class and issued its pretrial rulings, a divided panel of this Court reversed.

The panel majority acknowledged that the plaintiffs "have a reasonable argument that the arbitration agreement as written precludes them from asserting their RICO claims or other federal claims in arbitration." Op. 28. But it nonetheless concluded that the contracts' delegation provisions were enforceable. *Id.* at 29. In the majority's view, because the "description of what an arbitrator can decide expressly includes enforceability disputes arising under '*federal, state, or Tribal Law* . . . based on *any legal or equitable theory*,'" "[t]his necessarily means that Borrowers' rights to pursue their federal prospective-waiver argument remains intact . . . and the delegation provision is not facially a prospective waiver." *Id.* at 15.

Judge Fletcher "strongly" dissented. *Id.* at 53. The contract's multiple choice-of-law provisions, he explained, expressly prohibit the application of state or federal law. Although "dispute" is defined broadly to include "precisely the claims dissatisfied borrowers are most likely to bring when challenging the loan agreements," that broad definition is not itself a choice-of-law clause. *Id.* at 50. And it does not override the contract's repeated prohibition on applying state or federal law. To the contrary, the definition of dispute that the majority relied on merely sweeps into arbitration consumers' most-likely claims, where the contract then holds that state or federal law may not be applied to them. That means the arbitrator, in evaluating whether the arbitration agreement is invalid, cannot apply state or federal law to do so. By design, the inquiry is "illusory, with the foreordained result that

Plaintiffs will be required to arbitrate under an agreement that categorically forecloses relief on their federal and state claims." *Id.* at 47.

REASONS FOR GRANTING THE PETITION

I. The panel majority's opinion sparks an intolerable circuit split.

Rehearing is warranted because the panel's opinion admittedly splits from the decisions of five other circuits, all of which refused to compel arbitration because the entire tribal lending contracts, including their delegation clauses, are unenforceable.

In *Hayes*, the Fourth Circuit considered a tribal loan contract that, like the contracts here, paired choice-of-law provisions specifying the supremacy of tribal law with an arbitration clause. 811 F.3d at 670. Judge Wilkinson condemned the arbitration contract—as well as its delegation clause—as a "farce," an impermissible scheme that, "[w]ith one hand . . . offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other . . . proceeds to take those very claims away." *Id.* at 673–74. "[A] party may not," he explained, "underhandedly convert a choice of law clause into a choice of no law clause—it may not flatly and categorically renounce the authority of the federal statutes to which it is and must remain subject." *Id.* at 675.[2]

Following *Hayes*, the Fourth Circuit confronted attempts to compel arbitration in tribal lending cases three more times—including two cases involving contracts

[2] Unless otherwise specified, internal quotation marks, citations, emphases, and alterations omitted through the brief.

identical to the one at issue here. And three more times it unanimously struck them down. *Hayne*, 967 F.3d 332; *Sequoia,* 966 F.3d 286; *Dillon*, 856 F.3d 330.

The Second Circuit also held these contracts and their delegation clauses "unenforceable because they are designed to avoid federal and state consumer protection laws." *Gingras*, 922 F.3d at 127. "By applying tribal law only," the court explained, the arbitration contract "appears wholly to foreclose [the borrowers] from vindicating rights granted by federal and state law." *Id*. Notably, *Gingras* involved a materially identical contract to the contracts at issue here.

And in *Williams v. Medley Opportunity Fund*, a unanimous Third Circuit panel joined the Fourth and Second Circuits in concluding that these tribal lending contracts are unenforceable. Like *Gingras*, *Williams* confronted a materially identical contract. The Third Circuit found that "the plain language of the arbitration agreement and the loan agreement shows that only tribal-law claims may be brought in arbitration," and thus "the arbitration agreement . . . requires a borrower to prospectively waive claims based on any other law," 965 F.3d at 239, 241.

Unanimous panels of the Eleventh and Seventh Circuits have likewise invalidated similar tribal lending contracts, though on slightly different grounds. *See Parm,* 835 F.3d at 1332 (refusing to compel arbitration because the choice-of-arbitrator provision mandated an illusory forum); *Inetianbor*, 768 F.3d at 1353–54 (same); *Jackson*, 764 F.3d at 768 (same).

The panel majority here expressly split from these unanimous opinions. In its view, those "decisions considered prospective waiver in the context of the arbitration agreement as a whole—not as applied to the delegation provision." Op. 26. The Supreme Court, the majority suggested, requires more: a "substantive argument that the delegation provision *in and of itself* is unenforceable." *Id.* at 28.

But the decisions dismissed by the panel majority *directly* addressed how the delegation provisions were unenforceable. As but one example, the Third Circuit pointedly explained that an arbitrator evaluating the threshold enforceability question would, because of the choice-of-law clauses, "be expressly forbidden from relying on any federal or state law." *Williams*, 965 F.3d at 243 n.14. As a result, "the arbitrator could not ask whether the arbitration clause—and its complete exclusion of federal law—would violate the federal public policy against arbitration clauses that operate as a prospective waiver," meaning that "there would be no principle of federal law standing in the way" of the contract's enforcement. *Id. See also, e.g.*, *Haynes*, 967 F.3d at 338, n.3.

Bottom line: As the panel majority itself ultimately recognized, there is no way to reconcile its holding with the unanimous view of every other circuit. The result is a lopsided split on the enforceability of tribal arbitration contracts that leaves this Circuit alone on one side.

II. The panel majority's opinion flouts decades of Supreme Court precedent.

The panel majority's rejection of the unanimous view of the other circuits is reason enough to grant rehearing. But the majority's errors run deeper still. Its decision contradicts years of basic Supreme Court teaching on contract interpretation and the FAA.

It is black letter law that a court must take an arbitration contract—no less than any other—as it comes. A court's job is simply to interpret arbitration contracts "according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). It may not override those terms or "reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

Nor may a court expand the arbitrator's authority beyond the limitations imposed by the contract. As the Supreme Court has repeatedly explained, under the FAA, arbitrators derive their "powers from the parties' agreement," so they "wield only the authority they are given" by the contract. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)); *see also United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community

which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties").

The panel majority flouted these fundamental principles in two distinct ways. First, by interpreting a definitional clause to contradict the contracts' controlling choice-of-law limitations, the majority authorized the arbitrator to wield power that the contracts affirmatively prohibited. And second, in a backstop attempt to downplay the consequences of its ruling, it conjured from whole cloth an avenue for federal judicial review that directly conflicts with the contracts' plain terms.

The delegation clause. As noted, each arbitration contract contains a delegation provision nestled into the definition of "Dispute":

> A "Dispute" is any claim or controversy of any kind between you and us or otherwise involving this Agreement or the Loan. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all federal, state or Tribal Law claims or demands (whether past, present, or future), based on any legal or equitable theory and regardless of the type of relief sought (i.e., money, injunctive relief, or declaratory relief). *A Dispute includes any issue concerning the validity, enforceability, or scope of this Agreement or this Agreement to Arbitrate*.

2-ER-117 (emphasis added); *see also* 2-ER-106.

As Judge Fletcher admonished, the majority's "fundamental mistake" was treating this paragraph as if it were not subject to the contracts' clear and controlling choice-of-law limitations. Op. 50. From the words "The term Dispute . . . includes, without limitation, all federal, state or Tribal Law claims . . . based on any legal or

equitable theory," the majority discerned a "plainly stated mandate that the arbitrator decide" any state or federal claim using law "from whatever source they arise." Op. 16, 50. Applying that interpretation, the majority then held that the delegation clause did not operate as a prospective waiver because it empowered an arbitrator to decide those claims using federal law—the "source" from which "they arise." *Id.*

In reaching this conclusion, the majority simply rewrote the contract. The "mandate" the majority described—that the arbitrator must decide claims by applying the law "from whatever source they arise"—appears nowhere in the contract. The cited language says nothing about the arbitrator at all, much less what law the arbitrator may use when deciding a dispute. Those parameters are set out in the contract's choice-of-law provisions—all five of them. *See* 2-ER-128 ("**APPLICABLE LAW . . . THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW**."); 2-ER-116 ("This Agreement and the Agreement to Arbitrate are governed by Tribal Law and such federal law as is applicable under the Indian Commerce Clause. . . ."); [3] 2-ER-128 ("The arbitrator shall apply Tribal Law and the terms of this Agreement. . . ."); *id.* ("The arbitration award . . . must be consistent with this Agreement and Tribal Law. . . ."); 2-ER-129

[3] While this provision references certain federal laws, as Judge Fletcher explained, Op. 42, it includes only non-relevant federal law.

("[Y]ou [] understand, acknowledge and agree that . . . this Loan is governed by the laws of the Otoe-Missouria Tribe and is not subject to the provisions or protections of the laws of your home state or any other state.").

Still other provisions underscore the "primacy and effective control" of tribal law. *Haynes*, 967 F.3d at 343 (construing an identical contract). For example, the arbitration contract provides that, even if a claimant opted out of arbitration, "ANY DISPUTES SHALL NONETHELESS BE GOVERNED UNDER TRIBAL LAW AND MUST BE BROUGHT WITHIN THE COURT SYSTEM OF THE OTOE-MISSOURIA TRIBE." 2-ER-116–17. The contract also makes clear that the plaintiff's choice of forum "shall not be construed in any way . . . to allow for the application of any law other than Tribal Law." 2-ER-118. And, as discussed below, judicial review of any arbitration reward is limited to "review in a Tribal court" on limited grounds, most notably "whether the conclusions of law are erroneous under Tribal Law." *Id.*

In the face of this overwhelmingly clear command, the panel majority purported to find ambiguity about what law an arbitrator would apply, and then used that judge-made ambiguity to fashion a "mandate" that the arbitrator apply federal law when deciding a federal claim. But the words "based on" in the definition of "Dispute" do not mean what the majority said they mean: that the arbitrator could *decide* the claims using federal, state, or tribal law. These words plainly mean that the

disputes subject to arbitration include any claim a consumer brings alleging that the defendants violated federal, state, or tribal law. But those claims, the contract repeatedly states in its multiple choice-of-law clauses, must be decided solely under tribal law.

Reading the provision where it is situated in the contract—a definition of "Arbitration" and "Dispute"—makes this abundantly clear. An arbitrator asking what law applies would look not to the definition of "Dispute" but to the section titled, unambiguously, "APPLICABLE LAW AND JUDICIAL REVIEW OF ARBITRATOR'S AWARD," which provides that "THIS AGREEMENT TO ARBITRATE SHALL BE GOVERNED BY TRIBAL LAW." Indeed, if the majority's view were correct, the "mandate" it described would apply equally in all disputes—not just enforceability disputes—because the language it points to plainly encompasses all "Disputes." Such an interpretation unavoidably "reach[es] a result inconsistent with the plain text of the contract." *Waffle House,* 534 U.S. at 294.

Back-end review. The panel majority opinion ran afoul of this foundational contract principle in yet another way. By their plain terms, the contracts foreclose any federal court from reviewing an arbitrator's decision. They require that any arbitrator's decision "be filed with a Tribal court" and allow only that "it may be set aside by a Tribal court." 2-ER-107. Even then, the arbitrator's decision may only be

set aside if "the conclusions of law are erroneous under Tribal law." 2-ER-118. There is no exception to this mandatory requirement. 2-ER-107, 118.

Notwithstanding this plain language, the panel majority effectively severed these provisions and wedged in a mechanism for federal judicial review that does not exist. It reasoned that, in the event the arbitrator concluded that she could not consider a prospective-waiver challenge, the plaintiffs could simply "return to court and argue the arbitrator exceeded her powers." Op. 29.

But this backdoor to federal judicial review, just like the majority's interpretation of "Dispute," impermissibly rewrote the contracts. As other circuits have recognized, the contracts' back-end review provisions were intentionally drafted to "insulate[] the tribe from any adverse award" and to "leave[] prospective litigants without a fair chance of prevailing in arbitration." *Gingras*, 922 F.3d at 128. When the parties have "chosen to include that language, [the court is] bound to define the scope of this agreement by those limitations." *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 797 (9th Cir. 2017). And where that choice is part and parcel of the entire contract's illegality, a court's job is not to rewrite the contract but to refuse its enforcement. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017). The majority opinion flatly contradicted these basic, bedrock principles.

III. Left to stand, the panel majority's opinion would extinguish the rights and remedies available to millions of consumers across the Western states, erode federal and state regulatory regimes, and trigger a race to the bottom for unscrupulous companies.

The panel majority's split from the unanimous weight of circuit authority and contravention of Supreme Court precedent is far from trivial. Every state in the Ninth Circuit regulates payday lending. *See* Alaska Stat. §§ 06.50.010 *et seq*.; Cal. Fin. Code §§ 23000–23106; Haw. Rev. Stat. § 480F-1; Idaho Code § 28-46-401; Mont. Code § 31-1-701; Nev. Rev. Stat. § 604A.010; Or. Rev. Stat. § 725A.010; Wash. Rev. Code § 31.45.010. Arizona prohibits it outright. Ariz. Rev. Stat. § 6-601. Additionally, seven states have enacted usury laws that cap interest rates and provide usury penalties. *See* Alaska Rev. Stat. § 45.45.010; Ariz. Rev. Stat. § 44-1201; Cal. Const., Art. XV § 1; Cal. Civ. Code §§ 1916-2, 1916-3; Haw. Rev. Stat. § 478-4, *et seq*., 31-1-107; Mont. Code § 31-1-108; Or. Rev. Stat. § 82.010; Wash. Rev. Code § 19.52.020.

The panel majority opinion would render these protections, not to mention federal laws like RICO, a dead letter, at least with respect to consumers' ability to enforce them. And private litigation is a crucial complement to public enforcement of regulatory regimes. "Private enforcement provides, in many respects, a direct response to the functional limitations of public regulatory bodies in the enforcement of various laws," including by supplementing limited government resources. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1142 (2012).

But the Court's ruling would extinguish the remedies these states and Congress intended would compensate harmed borrowers and deter proliferation of illegal loans. What's more, because the opinion upholds the same contract invalidated by the Second, Third, and Fourth Circuits, the residents of the Western states who fall victim to the defendants' predatory practices will have virtually no rights and remedies compared with those who live in the rest of the country, even though their loans are governed by the same contracts. That is intolerable.

If past is prologue, the defendants' illegal lending practices are only the beginning. This opinion hands a blueprint to any unscrupulous company to opt out of inconvenient federal and state laws. Cunning drafting would make it trivially easy for lenders to evade the FAA's prohibition on contracts that seek to avoid otherwise applicable federal and state laws. Already, the tribal-lending market "is exploding." Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, Wall Street Journal (Feb. 10, 2011), https://perma.cc/6628-TX92. One consultant disclosed that "more than 1,000 payday lenders have expressed interest in cloning" the Tribal lending model. *Id.* The appeal is obvious. As one major lender observed, tribal lending is "the new financial strategy that many are using as a loophole through the strict payday loan laws." Nathalie Martin, *The Alliance between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Washington and Lee L. Rev. 751, 766 (2012).

The majority's opinion, if left intact, would only make matters worse. And the impact would be felt far beyond the payday lending context. Any consumer or commercial arbitration contract—indeed, any company that contracts for arbitration—could adopt this three-step opt-out recognized as a "farce" in every other circuit, safe in the knowledge that it would be upheld under the panel majority's opinion in the Ninth Circuit.

It does not have to be this way. Before this outlier opinion, every Court of Appeals to have directly considered this type of contract has found it unenforceable. This Court should grant rehearing, bring the Ninth Circuit back into conformity with the other circuits, and restore the full range of remedies legislatures intended to make available to their residents.

CONCLUSION

The Court should grant the petition for rehearing or for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Circuit Rule 40-1(a) because it contains 4,195 words excluding the parts exempted by Rule 32(f). This petition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

/s/Matthew W.H. Wessler
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I electronically filed the foregoing petition with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Matthew W.H. Wessler
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Counsel for Plaintiff-Appellee

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 19-15707

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I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,195.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Matthew W.H. Wessler **Date** Nov 1, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*