No. 17-17320

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Diné Citizens Against Ruining Our Environment, *et al.*,
Plaintiffs-Appellants,

vs.

U.S. Bureau of Indian Affairs, *et al.*,
Defendants,

and

Arizona Public Service, and Navajo Transitional Energy Company
Intervenor-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CASE NO. 3:16-cv-08077-PCT-SPL

APPELLANTS' PETITION FOR REHEARING EN BANC

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STATEMENT OF BASIS FOR REHEARING EN BANC

The Panel's unprecedented ruling that Federal Rule of Civil Procedure 19 bars judicial review of federal agency actions—review specifically authorized by Congress under the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA)—undermines enforcement of federal statutes and directly conflicts with controlling Ninth Circuit precedents, Supreme Court precedents, and precedents of all sister circuits addressing the issue. These cases include *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999), *Heckman v. United States*, 224 U.S. 413 (1912), *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), and *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940). Rehearing en banc is necessary to assure uniformity of the Court's decisions. The issue on which the panel ruling diverges from precedent is also one of exceptional importance: whether Rule 19 bars appropriate relief from violation of bedrock federal laws on (and potentially off) tribal land at a moment when rapid industrial development on tribal lands and elsewhere threatens public health and welfare.

Before the Panel's ruling, federal appellate courts unanimously held that Rule 19 does not bar public interest suits under the federal ESA and NEPA against federal defendants for actions on tribal lands. Relying on Supreme Court precedent, this Court's prior decisions hold that (1) federal defendants can adequately represent absent tribes in suits against the United States unless there is a *direct conflict* between the two, and (2) public litigation against federal defendants under the ESA and NEPA should not be dismissed where it seeks to enjoin unlawful *federal* action. The Panel's novel contrary ruling undermines the clear intent of Congress and threatens foundational constitutional values: the supremacy of federal law and the separation of powers.

BACKGROUND

I. The mine and power plant.

This action concerns the federal decisions to prolong by 25 years the operations of the Navajo Mine, a 33,000-acre coal mine and the adjacent, coal-fired Four Corners Power Plant (the "Project"). ER16-17, 36-37, 44-45. The coal complex is located in northwestern New Mexico on the Navajo Nation. ER16-17, 40. The power plant, one of the western hemisphere's largest sources of air pollution, harms people and

endangered species throughout the Four Corners region beyond the tribal boundary. ER17, 38.

A conglomerate of non-tribal utilities, including Arizona Public Service, own the majority of the power plant. ER18-19, 37. The Navajo Transitional Energy Company (NTEC), a limited liability company incorporated under Navajo law, owns the coal mine. *See* ER37.

II. The federal agency decisions at issue.

In 2015, agencies within the U.S. Department of the Interior approved the Project, extending operations of the coal complex for another quarter century. ER14, 16-17, 134-37. Authority for these approvals rests by congressional design with *federal agencies* rather than the Navajo Nation. 30 U.S.C. § 1260 (mine-permit approval); 25 U.S.C. § 415(a) (plant lease); 25 U.S.C. § 323 (transmission easement).[1] Because these decisions are major federal actions with significant effects on the environment and endangered species, the federal agencies

[1] Statutes enable the Navajo Nation to assume jurisdiction over these activities if it accepts limitations on its sovereign immunity. 30 U.S.C. § 1300(j)(1)-(4); 25 U.S.C. § 415(h). The Navajo Nation has chosen not to do so.

prepared an Environmental Impact Statement (EIS) under NEPA and a Biological Opinion under the ESA. ER15-16, 44.

In approving the Project, the federal agencies expressly exercised their trust responsibility toward the Navajo Nation. *E.g.,* ER126 ("The Proposed Action would be accomplished in a manner consistent with Federal Indian trust policies, including but not limited to, a preference for tribal self-determination and promoting tribal economic development for all tribes affected by the Proposed Action."); *accord* ER128-29.

III. The litigation and the Panel's decision.

Plaintiffs, a coalition of tribal, regional, and national organizations, whose members are harmed by interstate pollution from the Project, sued the federal agencies under the ESA, NEPA, and the APA. ER19-24, 49-67. Plaintiffs sought only declaratory and prospective injunctive relief against the Federal Defendants. ER 67-69. Plaintiffs did not seek any relief from NTEC or the Navajo Nation and did not seek to cancel or modify any contract to which either is a party. *See* ER68-69.

Federal Defendants answered, defending their approval of the Project and requesting the district court to "dismiss Plaintiffs' complaint in its entirety." ER75-76. Arizona Public Service intervened to defend its interest in the Project and likewise requested that the court "deny all relief sought by plaintiffs." ER77-78, 85.

NTEC subsequently intervened solely to move for dismissal under Rule 19(b). ER88. NTEC argued it was a required party because of its economic interest in the Project, that it could not be joined due to sovereign immunity, and that the action should not proceed in its absence. ER103-04. NTEC asserted that any ruling or relief in the Plaintiffs' favor would shut down the mine and power plant. ER104. Both the Plaintiffs and Federal Defendants opposed NTEC's motion. *See* ER111-19 (Federal Defendants' opposition).

The district court granted NTEC's motion, and Plaintiffs appealed. Federal Defendants, appearing as *amicus curiae*, reasserted their argument that the suit should not be dismissed under Rule 19. (Dkt. #20.) The Panel, however, affirmed. *See* attached Slip Op. The Panel held that despite the absence of any actual conflict between Federal Defendants and NTEC, the mere *potential* for future conflicts

required dismissal. Slip Op. at 22. The Panel further ruled that even though Plaintiffs sought only to enforce federal law against the federal government, and that remedies such as remand for further analysis may be available that would *not* shut down the Project, the "public rights" exception to Rule 19 did not allow the suit to proceed. *Id.* at 32-33.

ARGUMENT

I. En banc review is needed to ensure uniform application of Rule 19.

A. Under controlling precedent, Federal Defendants can adequately represent absent tribes in ESA and NEPA suits absent a direct conflict.

This Circuit has long held that "[t]he United States may adequately represent a tribe unless there is a conflict between the United States and the tribe." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (citing *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 774-75 (D.C. Cir. 1986)); *accord, Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999); *Sw. Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992). This rule rests on the United States' trust obligation to tribes, as articulated in *Heckman v. United*

States: "There can be no more complete representation than that on the part of the United States in acting on behalf of [tribes] …." 224 U.S. 413, 444-45 (1912), *quoted in Wichita*, 788 F.2d at 774-75.

Based on this venerable principle, this Court previously held in *Daley* that, in an ESA suit, "Tribes are not necessary parties because there is no *direct conflict* between the federal defendants and the Tribes." 173 F.3d at 1168-69 (emphasis added). In *Daley,* a fishing group sued federal defendants under the ESA over regulations allocating a portion of a fishery to four tribes. *Id.* at 1164. The Court rejected Rule 19 arguments based on a mere "*possibility of conflict*" between the federal defendants' "obligations to the Tribes and [their] obligations to protect the fishery resource." *Id.* at 1168 (emphasis added). Because the federal defendants and the tribes agreed about the litigated issues, the Court held that they had "virtually identical interests," precluding dismissal under Rule 19(b). *Id.* at 1168.

Consistent with *Daley*, this Court has repeatedly held that federal agencies adequately represent absent tribes with a derivative interest in litigation against the agencies for violating federal law. Representation is adequate absent an *actual* and *direct* conflict between

federal agencies and absent tribes—the mere possibility of future conflict is insufficient. *Alto v. Black*, 738 F.3d 1111, 1128 (9th Cir. 2013) (holding federal defendants could represent tribe because of "trust responsibility" and because, even though "conflicts can arise," "no such conflict has surfaced to this point in this case"); *Sw. Ctr.*, 150 F.3d at 1154 (holding federal defendants could represent tribe in ESA and NEPA suit because of "trust obligations" and rejecting "possibility of conflict" as insufficient).

The Panel's ruling directly conflicts these precedents. Without distinguishing *Daley* or acknowledging Federal Defendants' trust obligation, the Panel held Federal Defendants could *not* adequately represent NTEC. Notably, however, the Panel recognized Federal Defendants shared NTEC's interest in "defending their decisions," Slip Op. at 21, and it identified no argument or evidence Federal Defendants had not presented or would not present in their defense. The Panel's holding contrasts markedly with *Alto*'s holding that an agency could adequately represent a tribe that had failed to "present[] any arguments that it would offer in defense of the [agency decision] which the BIA has not or would not make." 738 F.3d at 1128.

The Panel hypothesized that "[i]f the district court were to hold that NEPA or the ESA required more analysis that would delay mining activities, or that one of the federal agencies' analyses underlying the approval was flawed, Federal Defendants' interest might diverge from that of NTEC," and their position "could" change. Slip Op. at 22.[2] In so doing, the Panel deviated from the controlling rule from *Daley* and *Heckman*, as well as the analyses of *Southwest Center* and *Alto*, that an actual and direct conflict of interest is required.

The Panel based its decision on two cases, neither of which supports displacing *Daley*, *Southwest Center*, and *Alto*, or disregarding *Heckman*. *First*, the Panel relied on *White v. University of California*, in which scientists sued the University of California and university administrators under the Native American Graves Protection and Repatriation Act to prevent the return of human remains to the Kumeyaay Nation. 765 F.3d 1010, 1021-22 (9th Cir. 2014), *cited in* Slip

[2] These hypothetical circumstances would not amount to a genuine conflict in any event. If a court ordered Federal Defendants to conduct further analysis, NTEC might prefer that they refrain from doing so, but it would have no legitimate interest in the agencies' ignoring a court order. *See Makah*, 910 F.2d at 559 ("[A]ll of the tribes have an equal interest in an administrative process that is lawful.").

Op. at 14, 18-20, 22, 26, 28. *White* affirmed dismissal under Rule 19, reasoning that the *University of California* did not adequately represent the Tribe because "the different motivations of the two parties could lead to a later divergence of interests." *White*, 765 F.3d at 1027. Misreading *White*, however, the Panel erroneously stated that the case was a "suit against the Department of the Interior." Slip Op. at 18. In fact, no federal agency or official was a party.

This critical mistake nullifies the Panel's reliance on *White*. When a plaintiff sues federal defendants—as in this case but not *White*—an absent tribe seeking dismissal under Rule 19 must demonstrate "a direct conflict between the federal defendants and the Tribes." *Daley*, 173 F.3d at 1169. The reason is that the federal government—unlike the University of California—"has a trust responsibility to the Tribes." *Id.* at 1168; *Alto*, 738 F.3d at 1128; *Heckman*, 224 U.S. at 444-45. Here, Federal Defendants undisputedly invoked and acted pursuant to their trust responsibility. ER126-29. Indeed, Federal Defendants' purpose for the Project, was to continue operations of the mine and power plant to "[p]rovide for tribal self-determination and promote tribal economic development from the energy and mining sector for the Navajo Nation

and Hopi Tribe."[3] Thus, the Panel was also wrong that Federal Defendants "do not share [NTEC's] interest in the *outcome* of the approvals." Slip Op. at 22 (emphasis in original). Accomplishing that *outcome* was the express object of Federal Defendants' action. Thus, the Panel's hypothetical conflict was nonexistent as a matter of law and fact.

Second, the Panel cited *Manygoats v. Kleppe*, a Tenth Circuit case in which tribal members sued federal defendants under NEPA to "enjoin the performance of an agreement whereby the Navajo Nation granted to intervenor Exxon Corporation the right to explore for, and mine, uranium on tribal lands." 558 F.2d 556, 557 (10th Cir. 1977), *cited in* Slip Op. at 21. The *holding* in *Manygoats* was that, under Rule 19(b), "[i]n equity and good conscience the [NEPA] case *should and can proceed* without the presence of the Tribe as a party." 558 F.2d at 559 (emphasis added). Before reaching its holding, however, the court stated that federal defendants could not adequately represent the Navajo

[3] BIA et al., FEIS at 1-9, *available at* https://www.wrcc.osmre.gov/initiatives/fourCorners/documents/FinalEIS/Section%201%20-%20Introduction.pdf. The Panel took judicial notice of this document. Slip op. at 6 n.1.

Nation because "[t]he national interest [of NEPA] is not necessarily coincidental with the interest of the Tribe in the benefits which the Exxon agreement provides." *Id.* at 558. That statement, "unnecessary to the decision in the case," was *obiter dictum* and "therefore not precedential." *Best Life Assur. Co. v. C.I.R.*, 281 F.3d 828, 834 (9th Cir. 2002) (quoting Black's Law Dictionary 1100 (7th ed. 1999)).

More importantly, this Court *expressly rejected* such reasoning in *Daley*, 173 F.3d at 1168, and *Southwest Center*, 150 F.3d at 1154. The Court held that federal defendants can adequately represent tribes in ESA and NEPA suits against federal agencies absent a "direct"—not merely "possible"—conflict of interest. *Daley*, 173 F.3d at 1168-69; *Sw. Ctr.*, 150 F.3d at 1154. The Tenth Circuit itself subsequently agreed with *Daley* that in a NEPA suit against federal agencies, the agencies can adequately represent an absent tribe where their "interest in defending [their] determination" corresponds to the tribe's interest in upholding the decision. *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) (citing *Daley*, 173 F.3d at 1167-68). Thus, *Manygoats* in no way justifies departure from *Daley*, this Circuit's controlling precedent, and *Heckman*.

B. Under controlling public rights doctrine precedent, public suits against federal agencies under the ESA, NEPA, and the APA should not be dismissed under Rule 19.

Consistent with longstanding Supreme Court precedent and the rulings of numerous sister circuits, this Circuit has long held that Rule 19 should not operate to foreclose congressionally authorized judicial review of federal actions. The Panel's decision breaks with these precedents to render the public rights doctrine functionally meaningless—and congressionally authorized judicial review unavailable—whenever even a hypothetical risk to tribal interests is asserted.

In *Conner v. Burford*, this Court invoked the public rights doctrine to reject Rule 19 dismissal in an ESA and NEPA suit: "The appellees' litigation against the government does not purport to adjudicate the rights of current lessees; it merely seeks to enforce the public right to administrative compliance with the environmental protection standards of NEPA and the ESA." 848 F.2d 1441, 1460 (9th Cir. 1988). Dismissal, the Court warned, would "sound[] the death knell for any judicial review of executive decisionmaking." *Id.*

Conner rested on the Supreme Court's seminal ruling in *National Licorice Co. v. NLRB*, that the indispensable party doctrine, developed by courts to protect *private contractual rights*, did not preclude *public litigation* authorized by Congress: "In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." 309 U.S. 350, 363 (1940). The Court refused to allow the absence of assertedly indispensable parties to undermine the will of Congress: "Obviously employers cannot set at naught the National Labor Relations Act …" *Id.* at 364.

Consistent with *National Licorice*, federal appellate courts have been in agreement (prior to the Panel's ruling) that a sovereign entity's derivative interest in federal agency action cannot foreclose congressionally authorized judicial review of that federal action. Thus, in *Manygoats* the Tenth Circuit explained:

> Dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands. NEPA is concerned with national environmental interests. Tribal

> interests may not coincide with national interests. We find nothing in NEPA which excepts Indian lands from national [congressional] environmental policy.

558 F.2d at 559, *followed in Makah*, 910 F.2d at 559 n.6.

Similarly, in a challenge by a tribe to a Federal Energy Regulatory Commission decision under the Clean Water Act, the D.C. Circuit rejected a Rule 19 argument raised by the State of Oregon:

> With regard to sovereign immunity generally, Oregon's position is incompatible with the precepts of federalism and this Court's prior precedent. Hoopa's petition does not involve a state's certification decision or a state's application of state law, but rather *a federal agency's order*, a matter explicitly within the purview of this Court when petitioned by an aggrieved party.

Hoopa Valley Tribe v. FERC, 913 F.3d 1099, 1103 (D.C. Cir. 2019) (emphasis in original).

A majority of Sixth Circuit judges in *School District of Pontiac v. Secretary of U.S. Department of Education* expressed similar concerns in rejecting a Rule 19 argument raised by states in a case challenging application of the No Child Left Behind Act of 2001. The lead opinion on the issue observed that dismissing such challenges to federal agency action because of a nonparty state's sovereign immunity "would have the undesirable effect of foreclosing a vast category of challenges to

federal laws," including "pending and future challenges regarding environmental, transportation, and other Spending–Clause suits, if the relevant States choose not to participate." 584 F.3d 253, 267-68 (6th Cir. 2009) (*en banc*) (opinion of Cole, J.). "This cannot be the intended purpose or effect of Rule 19." *Id.*; *see id.* at 278 (opinion of Sutton, J.) (agreeing with lead opinion's Rule 19 analysis).

Other circuits have similarly refused to let absent parties derail public-rights litigation under Rule 19. *Thomas v. United States*, 189 F.3d 662, 667, 669 (7th Cir. 1999) (refusing to dismiss suit against federal agencies for violating federal law under Rule 19 despite derivative impacts to an absent tribe, explaining that "the balance of power that Congress struck in this context is the compass we must follow"); *see also Jeffries v. Ga. Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982); *Kirkland v. N.Y. Dep't of Correctional Servs.*, 520 F.2d 420, 424 (2d Cir. 1975).

Here, in conflict with those rulings, under the equitable balancing required by Rule 19(b), the Panel ignored what, under *Conner*, *National Licorice*, and their progeny, should have been controlling: *Congress's directive* that judicial review of federal action be available to aggrieved

citizens under the ESA, NEPA, and the APA. 16 U.S.C. § 1540(g)(1)(A); 5 U.S.C. § 702; *Makah*, 910 F.2d at 559 n.6 (alternative holding that dismissal under Rule 19 was unwarranted where "Congress explicitly made … regulations subject to judicial review"). The Supreme Court has forcefully defended congressional authority guaranteeing judicial review under these acts. *E.g.*, *Weyerhaeuser Co. v. FWS*, 139 S. Ct. 361, 370 (2018) ("The Administrative Procedure Act creates a basic presumption of judicial review for one suffering legal wrong because of an agency action.") (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)); *TVA v. Hill*, 437 U.S. 153, 194 (1978) (disavowing equitable authority to deny relief under ESA and explaining that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest priorities …."). It makes no sense to conclude that courts have the equitable discretion under Rule 19(b) to subordinate congressional directives of the ESA to economic development, when the Supreme Court in *Hill* denied such equitable discretion in crafting remedies.

Failing to come to grips with this line of precedents, the Panel erroneously invoked *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996),

stating that "[t]his case is therefore like *Kescoli*, where we concluded that absent tribes were necessary because the litigation could affect already-negotiated lease agreements and expected jobs and revenue." Slip Op. at 18; *id.* at 31. *Kescoli*, however, involved an "essentially private" intra-tribal dispute between the plaintiff and tribal leaders over protection of burial sites. 101 F.3d at 1311. *Kescoli* distinguished cases such as *Makah*, 910 F.2d at 559-560, where plaintiffs sought to "ensur[e] an agency's future compliance with statutory procedures," as here. *Kescoli*, 101 F.3d at 1312.

The Panel's sweeping decision vitiates the public rights doctrine by elevating hypothetical economic harm over statutory rights to judicial review. The Panel "acknowledge[d] that Plaintiff's claims relate to public rights insofar as they challenge only Federal Defendants' NEPA and ESA processes," Slip Op. at 32, and that it is "possible that, if the lawsuit continued" the district court could fashion relief without "substantially impact[ing] NTEC's rights." *Id.* Nevertheless, the panel required dismissal because it "believe[d]" that "the question at this stage must be whether the litigation *threatens* to destroy an absent party's legal entitlements." *Id.*

Thwarting judicial review of agency decisions under the ESA, NEPA, and the APA because of such hypothetical impairment of third-party rights defies the intent of Congress and the purposes of Rule 19. Such potential impacts are always present in environmental litigation against federal agencies. Thus, under the Panel's ruling public rights will never suffice to allow litigation to proceed, regardless of the public's legitimate environmental interests and Congress's mandate of judicial review of federal agency action.[4]

II. The Panel's ruling raises an issue of exceptional importance.

The Four Corners region, where coal pollution has compromised public health and pushed endangered species to the brink of extinction, ER14, 36, 40-47, has been described as a "national sacrifice area." Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation*, 13 Santa Clara J. Int'l L. 203, 243 (2015) (citation omitted). The Panel's

[4] The Panel suggested that dismissal was necessary because Congress had not abrogated tribal sovereign immunity. Slip Op. at 33. But Congress need not abrogate tribal sovereign immunity to allow judicial review of *federal actions*. As the Panel conceded, "Plaintiffs' claims here are that *Federal Defendants* violated environmental laws—not that the Navajo Nation itself did." *Id.* at 25 n.7 (emphasis in original).

sweeping ruling, however, threatens to effectively foreclose *any* judicial review of federal decisions affecting the environment on tribal lands, which will drive the most polluting industries to tribal land. *See* R. Benjamin Nelson, Note, *Tribe-Sanctioned Nuclear Waste Facilities and Their Involuntary Neighbors*, 4 Colum. J. Race & L. 257, 259 (2014) (efforts to site nuclear-waste facilities on tribal lands).

By denying judicial recourse for actions with impacts beyond tribal land, as here, ER17, 24, 38, the Panel's decision further threatens to allow tribal companies to immunize unlawful conduct affecting even *non*-tribal land. *Cf. Michigan v. Bay Mills Indian Cmty.*, 134 U.S. 2024, 2036 n.8 (2014) (raising concern that tribal sovereign immunity should not apply off tribal land "if no alternative remedies [are] available"). Shortly after the Panel's decision, NTEC purchased three of the country's largest coal mines, located on non-tribal land in Wyoming and Montana.[5] The Panel's ruling threatens to allow NTEC to operate on

[5] NTEC, Press Release, NTEC Expands Its Conscientious Energy Development Efforts by Acquiring Three Coal Mines in the Powder River Basin (Aug. 19, 2019), *available at* https://cdn.website-editor.net/337bd928b7f54e51813e75f713453762/files/uploaded/Cloud%2520Peak%2520Purchase%2520PR.pdf.

non-tribal land, unhindered by the congressionally authorized public oversight of federal agency actions related to these gargantuan strip-mines.

Finally, because NTEC's sovereignty-based Rule 19 arguments could also be advanced by states, the Panel's decision threatens to undermine congressionally authorized judicial review of federal actions throughout the country by requiring dismissal whenever a sovereign has a hypothetical derivative interest. That result would be contrary to precedents of this Circuit and other federal appellate courts, *e.g.*, *Conner*, 848 F.2d at 1460; *Hoopa Valley*, 913 F.3d at 1103; *Pontiac*, 584 F.3d at 267-68; *Thomas*, 189 F.3d at 669; *Manygoats*, 556 F.2d at 558, and would thwart the mandates of Congress and the rule of law. That consequence "cannot be the intended purpose or effect of Rule 19." *Pontiac*, 584 F.3d at 267-68. This is a question of exceptional national importance.

CONCLUSION

The Court should grant this petition for rehearing en banc.

Respectfully submitted this 12th day of September 2019.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, I certify that Appellants are unaware of any related cases.

/s/ Shiloh Hernandez
Shiloh Hernandez

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rules 35-4(a) and 40-1(a). The brief is 4002 words, excluding portions exempted under Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Shiloh Hernandez
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