No. 19-35415

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIGHTHOUSE RESOURCES, INC., et al.,

Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,

Intervenor-Plaintiff,

v.

JAY R. INSLEE, et al.

Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenor-Defendants.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:18-cv-05005-RJB
The Hon. Robert J. Bryan, United States District Court Judge

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INTRODUCTION

If a state action deprives someone of constitutional rights, federal law provides a remedy in federal court. 42 U.S.C. § 1983. Lighthouse and BNSF filed this federal lawsuit because the State Defendants' actions—regardless of whether they were legal under state law—were contrary to both the Constitution's Commerce Clause and federal railroad law. So when the Defendants characterize this case as "a land use dispute," or assert that Lighthouse's and BNSF's federal claims are "based on the same evidence" as their state court claims, they are making the wrong arguments. It does not matter whether the State Defendants complied with state law when they blocked Lighthouse's export terminal. Compliance with state law is no defense to federal Commerce Clause and preemption claims. Indeed, compliance with state law is irrelevant to such claims. On the merits, the primary question is whether the State Defendants' political, policy decision to ban a new coal export facility discriminated against or impermissibly burdened foreign and interstate commerce, including rail transportation.

But this appeal need not reach the merits. This appeal addresses the propriety of the district court's summary judgment orders preventing, and stay order indefinitely postponing, a trial on the merits. All of those orders should be reversed and remanded so a trial may promptly occur.

In addressing the stay order, the Defendants largely ignore the Washington cases that make identical issues a prerequisite for preclusion. Instead, they contend that the requirements for *Pullman* abstention are met.

But they never adequately explain how requiring compliance with the Commerce Clause raises broad, sensitive social policy questions for the State, or how this case could be resolved by allowing a state court to rule. Underscoring the weakness of their *Pullman* arguments, they fall back on a separate, inapplicable abstention doctrine unmentioned in the district court's decision.

In defending the district court's dismissal of the DNR Commissioner under the narrow exception to *Ex parte Young* articulated in *Idaho v. Coeur d'Alene Tribe*, the Defendants essentially argue for absolute immunity when a suit in any way touches state-owned aquatic lands. Such an exception, hardly narrow, breaks with precedent. *Coeur d'Alene* applies only when suits are the functional equivalent of quiet title actions that would, if successful, divest the state of all title to and jurisdiction over its lands. A suit requiring the State to follow federal law when approving a sublease—but otherwise leaving intact the State's ownership of and jurisdiction over the property—does not.

The Defendants' arguments against Lighthouse's and BNSF's rail preemption claims similarly disregard precedent. Lighthouse and BNSF have standing to bring these claims because if they prevail, the State will have to revisit its with-prejudice denial of Lighthouse's permits, relying solely on the handful of non-rail potential impacts it argued *might* occur. Beyond that, the Defendants claim as a matter of law that regulation of non-rail carriers can never trigger preemption by burdening rail transportation. But no Ninth Circuit case so holds, while decisions in the Fourth and Eleventh Circuits

expressly disagree. Because the Defendants cannot win this point as a matter of law, Lighthouse and BNSF are entitled to a trial.

ARGUMENT

I. Both the district court's stay order and its interim summary judgment orders are appealable.

A. A *Pullman* stay is a final decision into which the district court's interlocutory orders merge.

The Defendants advance no new arguments in response to binding Ninth Circuit authority holding that the district court's *Pullman* stay is "immediately appealable under 28 U.S.C. §§ 1291 and 1292(a)(1)."[1] *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003); *see Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir. 1994). Instead, they focus on their claim that the district court's interlocutory summary judgment orders do not merge into the appealable stay order.[2] As the Defendants see it, the merger doctrine applies only to a "final judgment," and the district court's stay order is not a "final judgment" because it does not definitively end the litigation.[3]

The problem with the Defendants' argument is its assumption that the stay order's appealability rests on "an exception to § 1291's finality requirement."[4] It does not, as the U.S. Supreme Court's seminal decision in

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[1] Dkt. 43, Defendants-Appellees' Joint Answering Br. at 2; *see* Dkt. 29, Appellants' Joint Opening Br. at 16-18.
[2] Joint Answering Br. at 16-17.
[3] *Id.*
[4] *Id.* at 17.

Moses H. Cone makes clear. There, the Court explained that because a *Pullman* stay order puts a litigant "effectively out of court," that order is "*final* and therefore reviewable" under section 1291—not as an "exception" to that section. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9-10 & n.8 (1983) (emphasis added) (citation omitted).

To the extent the Defendants are trying to distinguish between the term "final decision" in section 1291 and the term "final judgment" as used in various cases describing the merger doctrine, they cite no case drawing that line. And the U.S. Supreme Court, while discussing section 1291's judicial code predecessor, denied that Congress intended any such distinction: "The words 'final decision in the District Court' mean the same thing as 'final judgments and decrees,' as used in former acts regulating appellate jurisdiction." *In re Tiffany*, 252 U.S. 32, 36 (1920). So if an order is an appealable "final decision" under § 1291, it is also a "final judgment" for merger purposes.

It is true that finality and appealability are sometimes different things.[5] But a *Pullman* stay is appealable *because* it is final. *Moses H. Cone*, 460 U.S. at 9 & n.8. And since interlocutory orders merge into a final decision for purposes of appellate jurisdiction, this Court has jurisdiction over the district court's interim summary judgment decisions in this case.

[5] *See id.* at 17 (citing a decision dealing with appealability of interlocutory orders in admiralty cases).

B. Allowing a complete appeal now is the most efficient way for this case to proceed.

Addressing the district court's summary judgment orders now also makes sense as a practical matter. Absent immediate appellate review, this case would go to trial—whenever the stay is lifted—on Lighthouse's and BNSF's dormant Commerce Clause claims alone. If, on eventual appeal, this Court reverses the interim summary judgment orders, the case would be remanded for a second trial involving the same parties. Hearing the appeals now, by contrast, would ensure that all viable claims are tried together.

It is irrelevant that the district court denied Lighthouse and BNSF's motion to certify the interim summary judgment orders for appeal under Rule of Civil Procedure 54(b). Their Rule 54(b) motion and notice of appeal made clear that those orders were appealable under the merger doctrine.[6] And while certification under Rule 54(b) would have mooted the current arguments about appealability, its absence does not change the fact the interim orders merge into the final, appealable decision granting a *Pullman* stay.

[6] *See* Dist.Ct.Dkt. 327 at 2 n.1 ("This [Rule 54(b)] motion is filed strictly for protective purposes. By filing this motion, Plaintiffs do not waive their position that they have the right to directly appeal the referenced orders under the merger doctrine."); ER050-051.

II. The district court misapplied the Washington issue preclusion principles at the heart of its stay order.

A. The district court's stay undercuts section 1983's guarantee of a federal forum.

The Defendants essentially concede that the district court's issue preclusion concerns prompted its stay order.[7] But they contend that because the district court did not actually "apply" issue preclusion principles to dismiss any claims, its issue preclusion determinations are "not directly before this Court."[8] They cite no authority for the surprising notion that the district court's primary grounds for entering the stay are unreviewable.

The Defendants also brush off this Court's repeatedly expressed concern about using abstention doctrines in section 1983 cases like this one. To be clear, Lighthouse and BNSF did not argue that stays are "never appropriate" in section 1983 cases.[9] They pointed out precedent holding that section 1983 "*guarantees* 'a federal forum for claims of unconstitutional treatment at the hands of state officials' . . . ." *Knick v. Twp. of Scott*, -- U.S. --, 139 S. Ct. 2162, 2167 (2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)) (emphasis added). This Court has provided support for such a "guarantee" by warning against stays intended to prevent "conflicting results, piecemeal litigation, and some duplication of judicial effort." *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th

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[7] *See* Joint Answering Br. at 11 ("The court agreed with the Defendants that the Board's decision had preclusive effect. ER014. As a result, there were few or no issues remaining for federal trial.").
[8] *Id.* at 33-34.
[9] *Id.* at 36.

Cir. 1979). When the district court stayed this case "to allow the state courts to act," it ignored that warning and violated the "guarantee" of a federal forum.[10]

The Defendants try to sidestep section 1983's federal forum guarantee by calling this lawsuit a "land use case," which they say makes it more amenable to abstention.[11] Postponing, for the moment, the question of whether this is actually a "land use case," the Defendants' effort to build a hierarchy of section 1983 claims—some of which must be heard in federal court and some of which need not be—flouts the Supreme Court's reasoning in *Knick*. True, *Knick* did not involve abstention. It did, however, involve application of issue preclusion in a section 1983 case involving property rights. The Court held that the issue preclusion effect of requiring plaintiffs to litigate their condemnation claims in state court before filing a section 1983 Takings Clause claim rendered section 1983's federal forum guarantee "hollow." Because the district court's stay in this case has the same effect, its decision should be reversed.

B. The Defendants' effort to recast Washington issue preclusion law cannot justify the district court's stay order.

Setting aside section 1983's federal forum guarantee, the district court's issue preclusion ruling also is inconsistent with Washington state law. Courts

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[10] ER006.

[11] Joint Answering Br. at 36 (citing *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1983)).

in Washington espouse a narrow view of issue preclusion under which the issues at stake must be "identical in all respects." *Lemond v. State*, 180 P.3d 829, 833 (Wash. Ct. App. 2008) (quoting *Standlee v. Smith*, 518 P.2d 721, 722-23 (Wash. 1974)). Issue preclusion "does not apply where a substantial difference in applicable legal standards differentiates otherwise identical issues of mixed law and fact." *Cloud ex rel. Cloud v. Summers*, 991 P.2d 1169, 1173 (Wash. Ct. App. 1999).

Ignoring these cases and the standard they establish for finding "identical issues," the Defendants assert that "a plaintiff . . . that loses an administrative appeal is barred by estoppel from subsequently bringing tort or § 1983 claims based on the same facts."[12] This is wrong, and the cases the Defendants cite do not support it. Instead, those cases hold that plaintiffs are precluded from relitigating only those facts actually found in the prior administrative proceeding. *See Reninger v. State Dep't of Corrs.*, 951 P.2d 782, 791 (Wash. 1998) (finding that "same bundle of operative facts was before" the administrative body and the jury); *Shoemaker v. City of Bremerton*, 745 P.2d 858, 862-63 (Wash. 1987) (finding that the "factual issues" underlying state and federal claims were "identical"). In one case, the plaintiff had actually conceded the presence of identical issues. *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 96 P.3d 957, 962 (Wash. 2004).

[12] *Id.* at 38.

In this case, the same facts are not being litigated in the state court proceedings.[13] The Defendants have not identified *any* fact found in any state court case that is pertinent to the issues to be determined at trial—namely, whether the State Defendants' political, policy decision to ban a new coal export facility discriminated against or impermissibly burdened foreign and interstate commerce, including rail transportation. Those issues are simply not before the state courts.

The Defendants try to downplay the Washington Supreme Court's most recent issue preclusion decision, *Sprague v. Spokane Valley Fire Department*, 409 P.3d 160 (Wash. 2018), by saying that it involved "unique circumstances."[14] Of course, that could be said about any case. What matters is that the key question in *Sprague* is the same one being asked here: whether different legal claims arising out of the same general circumstances present identical issues for issue preclusion purposes. *See id*. at 183-85. The Washington Supreme Court held that they do not. *Id.* at 183.

The court in *Sprague* did not reject issue preclusion because the case "involve[d] free speech," as the Defendants suggest.[15] The court rejected issue preclusion because the prior case had involved free exercise of religion—a different legal claim. *Id*. at 184. Recognizing that the suit before it was

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[13] *See* Appellants' Joint Opening Br. at 25-27.
[14] Joint Answering Br. at 39.
[15] *Id.* The court mentions potential effects on 63,000 state employees solely as a separate, policy reason for allowing the suit to move forward. *Sprague*, 409 P.3d at 186.

"concerned with free speech, not free exercise," the court concluded that the issues were not identical for preclusion purposes. *Id*. So even to the extent Lighthouse's and BNSF's dormant Commerce Clause claims involve similar facts as Lighthouse's state court claims, the disparity between the legal elements of those claims means that the issues are not identical. Without identical issues, there can be no issue preclusion. *Dolan v. King Cty.*, 258 P.3d 20, 32 (Wash. 2011).

C. Lighthouse and BNSF's Commerce Clause arguments are not "based on" any claim of impropriety under state law.

At the outset of their issue preclusion argument, the Defendants assert, without factual citation, that Lighthouse and BNSF's "Commerce Clause arguments are based on the contention that Ecology's decision was improper under state law."[16] That is not and never has been true. The key purpose of a section 1983 action like this one is to protect constitutional rights against state officials who may be acting *legally* under state law. *See, e.g.*, *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989) (holding that a plaintiff could state a section 1983 claim even though "suspension of the [plaintiff's] permit was authorized by statute and legally permissible"). Simply put, the Defendants' actions can violate the dormant Commerce Clause even if they are entirely proper under state law. The Defendants admitted as much at an earlier stage in this case.[17]

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[16] *Id.* at 34-35.

[17] Dist.Ct.Dkt. 313 at 10.

The Defendants' attempt to illustrate their point actually underscores their error. They claim that "the facts and issues underlying" the dormant Commerce Clause claims in this case "are being adjudicated" in state court—specifically, "whether Ecology made an improper decision."[18] It should go without saying, but Ecology's decision could be "improper" for any number of reasons. A state court finding that the decision was consistent with the State Environmental Policy Act, for example, says nothing about whether the same decision discriminated against interstate or foreign commerce. The potential for such confusion is precisely why the court in *Sprague* limited application of issue preclusion to cases that involve identical causes of action and legal standards. *See* 409 P.3d at 184-85; *Cloud*, 991 P.2d at 1173.

Because the same state action may violate one legal requirement but not another, issue preclusion cannot extend to general pronouncements about whether a decision was "proper." That is where the district court's stay order went wrong.[19] Under *Sprague*, the Commerce Clause issues in this case are not identical to any of the issues being litigated in state forums. When that foundational finding is discarded as error, the basis for the district court's stay order collapses.

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[18] Joint Answering Br. at 39.

[19] ER004 ("The issues are identical—the commerce clause constitutional claims raised here involve the propriety of the grounds for [Ecology's] denial on some of the same issues the [Pollution Control Hearings Board] reviewed.").

III. Neither *Pullman* nor *Colorado River* can justify the district court's stay order.

The district court stayed this case "to allow the state courts to act," which it mistakenly believed would resolve its issue preclusion concerns.[20] Because the court erred in its issue preclusion analysis, its stay order should be reversed. But even without that error, the stay in this case does not meet the criteria for issuing a stay under the *Pullman* doctrine's "narrow exception to the district court's duty to decide cases properly before it." *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984). Nor does the district court's stay order fit the "exceedingly rare circumstances" that may warrant *Colorado River* abstention. *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir. 2017) (citation and internal quotation marks omitted).

A. Because this case is not a challenge to land use planning rules, *Pullman* abstention does not apply.

Reprising a flawed theme, the Defendants describe this case as presenting "a classic *Pullman* scenario" in which constitutional claims are "based almost entirely on alleged violations of state laws . . . ."[21] To repeat, Lighthouse's and BNSF's dormant Commerce Clause claims are *not* based on any alleged violations of state law. They are based on evidence that the State Defendants used the state permitting process as a fig leaf to accomplish their true goal—preventing the export of coal. The Defendants' actions had both

[20] ER006. Trial in one state case is currently set for February 2021. Including appeals, that likely means at least a four-year delay in this case.
[21] Joint Answering Br. at 19.

the purpose and effect of discriminating against foreign and interstate commerce. Whether those actions also violated state law is irrelevant here. Because the Defendants' *Pullman* arguments rest on the false notion that the claims in this case are "based on" state law violations, they fail at the outset.

With similar assurance, the Defendants express "no doubt that land use planning disputes such as this one raise sensitive questions of social policy," thereby satisfying this Court's first *Pullman* requirement.[22] While it is right to say that this Court has found "land use planning" to be "a sensitive area of social policy" under *Pullman*, it is not right to lump this case in with the sort of land use planning disputes where a *Pullman* stay has been upheld. *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

Denying permits for a specific project is not land use planning. Land use planning is a city ordinance that establishes a point system to allocate building permits, as in *C-Y Development*, 703 F.2d at 376. Land use planning is a community plan that limits the number of homes in a certain area, as in *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 404 (9th Cir. 1996). Land use planning is implemented by local governments and planning commissions, not state agencies. *See Pearl Inv. Co. v. City and Cty. of San Francisco*, 774 F.2d 1460, 1461 (9th Cir. 1985); *Kollsman*, 737 F.2d at 831-32; *C-Y Dev.* 703 F.2d at 376; *Sinclair Oil Corp.*, 96 F.3d at 404.

[22] *Id.* at 20.

This case involves, among other things, a Clean Water Act section 401 water quality certification. Their convenient characterizations in this Court notwithstanding, the State Defendants' decision denying Lighthouse's section 401 certification neither mentions land use nor relies on any laws governing land use.[23] The same is true of the State Defendants' letter refusing to process Lighthouse's air quality and water discharge permits, which is also at issue here.[24] Indeed, the Final EIS indicated that Lighthouse's project "would be compatible with surrounding industrial land uses and consistent with the existing zoning and comprehensive plan designations for the project area."[25] Redefining the "heart" of this case on appeal cannot save the district court's *Pullman* stay.[26] A "highly individualized" constitutional claim like this one—which, as the Defendants put it, involves "project and site specific" decisions[27]—does not "touch a sensitive area of social policy." *Privitera v. Cal. Bd. of Med. Quality Assurance*, 926 F.2d 890, 895-96 (9th Cir. 1991).

B. No legal ruling in the state law cases can moot or alter the Commerce Clause claims in this case.

The Defendants' argument on the second *Pullman*-abstention point focuses on a single scenario: "[I]f Lighthouse prevails in state court, nothing

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[23] *See* FER001-020.
[24] *See* FER021-022.
[25] Final SEPA EIS § 3.1.7 (Apr. 2017), http://millenniumbulkeiswa.gov/assets/mbtl_sepa_final-eis_volume_i_04252017_web_sm.pdf.
[26] Joint Answering Br. at 1.
[27] *Id.* at 2.

will be left for the district court to decide."[28] That is not true, and even if it were, it is not how the second part of the test works.

At a basic level, *Pullman* abstention applies when "a doubtful issue of state law *is presented*" in a federal case. *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974) (emphasis added). If the doubtful state law issue "presented" in the federal case is resolved by a state court, the federal court can avoid constitutional adjudication. *Id.* By the same token, if the federal case does not present a state law issue, *Pullman* is inapplicable. That explains why the *Pullman* abstention cases the Defendants cite involve claims for violation of state law. *See C-Y Dev. Co.*, 703 F.2d at 378 ("C-Y seeks a writ of mandamus pursuant to Cal. Civ. Proc. Code § 1094.5 . . . ."); *Kollsman*, 737 F.2d at 833 ("Count VII raises difficult state law issues . . . ."); *Pearl Inv. Co.*, 774 F.2d at 1464 (finding that the plaintiff's due process claims "are framed in terms of violations of state law"); *cf. Sinclair Oil*, 96 F.3d at 409 (abstaining while state courts considered just compensation issues in the context of an inverse condemnation claim).[29] It also explains why the proper course under *Pullman* is normally to "dismiss the state law claim and stay [federal] proceedings on the constitutional question until a state court has resolved the

[28] *Id.* at 23.

[29] *Sinclair Oil* relied on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which the U.S. Supreme Court overturned in *Knick*. *See* 139 S. Ct. at 2179. It is unlikely that *Sinclair Oil* remains good law.

issue." *Cedar Shake & Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 622 (9th Cir. 1993).

This situation does not exist here, because Lighthouse and BNSF have not asserted any state law claims. And for the reasons discussed above, their dormant Commerce Clause claims do not depend on the resolution of *any* state law issues and would not invalidate any state laws. So even if it were true that complete victory in state court would leave Lighthouse with little practical reason to pursue its constitutional claims here, that is not the kind of "ruling on the state issues" that the *Pullman* doctrine addresses.[30] *Kollsman*, 737 F.2d at 833.

C. A decision in this case would not require the district court to address any uncertain state law issues.

In addressing the third *Pullman* factor—"whether the answers to the possibly determinative questions of state law are uncertain"—the Defendants again assert that "[t]he propriety of Ecology's section 401 water quality decision as a matter of state law is directly implicated by, and underlies, Plaintiffs' Commerce Clause claims."[31] Again, they are wrong. Lighthouse and BNSF have not argued here that the State Defendants improperly exercised their authority as a matter of state law. Instead, they will show at trial how the State Defendants' actions—legal or not under state law—demonstrate an

[30] As discussed in Lighthouse and BNSF's opening brief, victory in state court is not enough to moot this case. *See* Appellants' Joint Opening Br. at 33.
[31] Joint Answering Br. at 26.

intent to discriminate against foreign and interstate commerce. The State Defendants chose, for political reasons, to ban increased exports of coal.

But even if this case did require resolution of state law issues, none of those issues are uncertain. Because several state courts have already ruled in Lighthouse's state litigation, any ambiguity that may have once existed is now gone. The district court can predict with confidence whether "Ecology may use its SEPA authority to deny a water quality certification"[32] because state courts have decided that question in another case brought by Lighthouse. *See Millennium Bulk Terminals-Longview, LLC v. Wash. Dep't of Ecology et al.*, No. 18-2-00994-08 (Nov. 19, 2019 Wash. Sup. Ct.). This part of the *Pullman* abstention test thus precludes a stay.

D. *Colorado River*, which the district court did not cite in support of its stay, does not justify abstention here.

Perhaps realizing the problems with applying *Pullman*, the Defendants try to argue that the district court's stay was also justified under a different abstention doctrine. But the Defendants did not argue for abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), in connection with the district court's stay.[33] "Generally, arguments not raised in the district court will not be considered for the first time on appeal." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014). And

[32] *Id.* at 25.

[33] *See* Dist.Ct.Dkt. 312, Defendants' Joint Response to Order Regarding Applicable Law; Dist.Ct.Dkt. 320, Defendants' Joint Reply re Order Regarding Applicable Law.

while the Defendants note in passing that "the district court did not specifically mention" *Colorado River* in its decision,[34] they fail to mention that the district court explicitly *rejected* abstention under that doctrine.[35] This Court has criticized stay orders that do not cite sufficient authority. *See Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (reversing an "extremely terse" stay order that cited insufficient authority). Upholding a stay for a reason the district court rejected would be even worse.

In any event, the *Colorado River* doctrine does not justify abstention in this case. The Defendants are correct that Ninth Circuit precedent lists eight factors that courts should consider when deciding whether *Colorado River* abstention is appropriate.[36] *See Seneca Ins.*, 862 F.3d at 841-42. It is also true that the eight factors should be applied in "a pragmatic, flexible manner." *Id.* at 842 (internal quotation marks and citation omitted). The Defendants neglect to mention, however, that this flexibility should be applied "with the balance heavily weighted in favor of the exercise of jurisdiction." *Id.*

Of the eight *Colorado River* factors, the Defendants lean most heavily on factor three: avoiding piecemeal litigation. But as this Court has explained, the mere existence of parallel state proceedings cannot justify abstention,

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[34] Joint Answering Br. at 28 n.12.
[35] Dkt. 117 at 59 ("[T]he bottom line is that . . . the Court should not abstain from jurisdiction under *Colorado River* . . . .").
[36] Joint Answering Br. at 29.

especially in the "particularly weighty" Section 1983 context. *Tovar*, 609 F.2d at 1293. That "would 'make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.'" *United States v. Morros*, 268 F.3d 695, 706 (9th Cir. 2001) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989)). Rather, "*Colorado River* stands for the proposition that when Congress has passed a law expressing a preference for unified state jurisdiction, courts should respect that preference." *Id*. The Defendants can identify no such law in this case.

The Defendants' cursory examination of the remaining factors either ignores or misconstrues those unfavorable to abstention. For example, they claim that factor five—whether state or federal law provides the rule of decision—"weighs against abstention only if the federal courts have exclusive jurisdiction over the federal claims."[37] In fact, "the 'presence of federal-law issues must always be a major consideration weighing against surrender' of jurisdiction . . . ." *Seneca Ins.*, 862 F.3d at 844 (quoting *Moses H. Cone*, 460 U.S. at 26) (emphasis omitted). The Defendants do not discuss factor eight at all, even though "the existence of a substantial doubt as to whether the state proceedings will resolve the federal action *precludes* a *Colorado River* stay or dismissal." *Id*. at 845 (emphasis added). Here, even the district court's stay order anticipated that at least some part of this case would return after the

[37] *Id.* at 31.

state litigation was completed.[38] Because the state court actions will not "complete[ly]" resolve Lighthouse's and BNSF's federal claims, "it would be a serious abuse of discretion" to abstain under *Colorado River*. *Smith v. Cent. Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1033 (9th Cir. 2005) (internal quotation marks and citation omitted).

Lastly, Lighthouse and BNSF are not forum shopping by "act[ing] within [their] rights in filing a suit in the forum of [their] choice." *Seneca Ins.*, 862 F.3d at 846. They are pursuing federal remedies for federal claims in federal court, while at the same time pursuing different claims in state court. Under these circumstances, the district court was right to reject *Colorado River* as grounds for a stay. And since the Defendants never argued for application of *Colorado River* in connection with the stay order at issue, they have waived their right to raise it here. *See In re Mortg. Elec.*, 754 F.3d at 780-81.

IV. Because the claims in this case do not amount to a quiet title action, the narrow *Coeur d'Alene* exception does not apply.

A. *Coeur d'Alene* does not apply to every suit involving state-owned submerged lands.

The Defendants acknowledge that *Ex parte Young* "typically allows claims" against state officials when a plaintiff "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective."[39] Here,

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[38] ER006 ("[I]f the Plaintiffs lose in the state courts, they would still have an opportunity to proceed with commerce clause issues in federal court . . . .").
[39] Joint Answering Br. at 45 (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

however, they contend that a "unique, narrow exception" established in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) should apply instead. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000). According to the Defendants, *Coeur d'Alene* means that *Ex parte Young* suits "cannot proceed when they involve certain decisions regarding the use and control of the beds of the State's navigable waters."[40] The cases interpreting *Coeur d'Alene* prove them wrong.

No court has ever held that *Coeur d'Alene* bars any suit involving "certain decisions regarding use and control" of state-owned submerged lands. To the contrary, this Court has only invoked the *Coeur d'Alene* exception when faced with the "exact issues" that case presented—namely, a claim that would shift *fee simple ownership* and *control* over submerged lands from the state to another party. *Lacano Inv., LLC v. Balash*, 765 F.3d 1068, 1073-74 (9th Cir. 2014). In every other circumstance, this Court has emphasized that *Coeur d'Alene* does not preclude "claims that affect state powers, or even important state sovereignty interests." *Agua Caliente*, 233 F.3d at 1048; *see In re Ellett*, 254 F.3d 1135, 1144 (9th Cir. 2001) (declining to apply *Coeur d'Alene* when "the relief merely *relates to* a more general area of core state sovereign interest") (emphasis in original); *Duke Energy Trading & Mktg., LLC v. Davis*, 267 F.3d 1042, 1054-55 (9th Cir. 2001) ("The fact that [a] lawsuit implicates the State's sovereignty interest . . . does not suffice to trigger the *Coeur d'Alene* exception

[40] *Id.*

. . . .”). “Applying the *Coeur d’Alene* exception to bar [any] action [that] affects the state’s interest in providing for the public health and welfare would allow the *Coeur d’Alene* exception to swallow the *Ex parte Young* rule.” *Cardenas v. Anzai*, 311 F.3d 929, 938 (9th Cir. 2002).

The fact that this case involves a sublease of state-owned submerged land does not raise the “exact issues” present in *Coeur d’Alene*. The *Coeur d’Alene* exception does not “extend to every situation where a state property interest is implicated.” *Arnett v. Myers*, 281 F.3d 552, 568 (6th Cir. 2002). Indeed, in *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, the Fifth Circuit held that *Coeur d’Alene* did not apply to a claim that lease provisions violated the Constitution’s Contract Clause because the plaintiff sought neither to “quiet title” nor to divest the state of its “jurisdiction or authority to regulate the land.” 269 F.2d 494, 502 (5th Cir. 2001). And in *Hamilton v. Myers*, the Sixth Circuit held that, even when a case involved submerged lands, the state was not immune from suit because the requested relief would not divest the state of its broader regulatory authority. 281 F.3d 520, 528-29 (6th Cir. 2002). As the Tenth Circuit explained, “[a]lthough a state’s ownership of public lands—in addition to its ownership of submerged lands—may well fall within the Supreme Court’s ill-defined category of ‘special sovereignty interests,’” *Coeur d’Alene* does not apply where “the plaintiffs’ requested relief [] would not change the nature of the state's ownership.” *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 632-33 (10th Cir. 1998).

In sum, *Coeur d'Alene* does not apply any time a lawsuit involves "decisions" about state-owned land. Rather, the suit must threaten a "divestiture of the state's sovereignty." *In re Ellet*, 254 F.3d at 1143. Because a ruling on whether the State Defendants' subleasing decision violates the dormant Commerce Clause would not transfer "substantially all benefits of ownership and control" to Lighthouse, the *Coeur d'Alene* exception does not apply here. *Coeur d'Alene*, 521 U.S. at 282-83.

B. A dispute over a sublease is not the functional equivalent of a quiet title action.

The Defendants also argue that *Coeur d'Alene* applies because this case is the functional equivalent of a quiet title action. In their view, "a leasehold is a possessory interest in real property," so any claims involving a sublease are essentially quiet title actions.[41] That is not what courts mean when they talk about quiet title actions.

An "action to quiet title" is "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or forever be estopped from asserting it." Black's Law Dictionary 34 (9th ed. 2009). Consistent with that definition, the federal Quiet Title Act allows parties to "adjudicate a disputed title to real property." In the U.S. Supreme Court's words, a "quiet title" action is a suit "in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property."

[41] *Id.* at 52-53 (emphasis omitted).

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 218 (2012). Similarly, in Washington State, plaintiffs do not properly assert a quiet title claim where they fail to allege any "valid subsisting interest" in the subject property and do not request relief in the form of "quieting or removing a cloud from plaintiff's title." *Byrd v. Pierce Cty.*, 425 P.3d 948, 957-58 (Wash. Ct. App. 2018) (quoting Wash. Rev. Code § 7.28.010) (emphasis omitted).[42]

Here, Lighthouse and BNSF are not asserting any "right, title, or interest" in real property. They do not challenge the State's title or argue that Lighthouse has a property right to a sublease. The requested relief in this case would do nothing to "quiet[] or remov[e] a cloud from [the State's] title." *Byrd*, 425 P.3d at 957 (quoting Wash. Rev. Code § 7.28.010). Lighthouse and BNSF seek solely to prevent the State Defendants from wielding their power to deny a sublease in a way that violates the dormant Commerce Clause and federal railroad law. As a result, this lawsuit is not the functional equivalent of a quiet title action.

[42] *Cf. Kent Sch. Dist. No. 415 v. Ladum*, 728 P.2d 164 (Wash. Ct. App. 1986) (holding that a landlord may bring an action to quiet title as against a tenant's interest in property under a leasehold); *Petsch v. Willman*, 185 P.2d 992 (Wash. 1947) (same). Unlike the landlords in *Kent and Petch*, the State is not seeking to quiet title against any tenant's interest under a leasehold. Nor is Lighthouse seeking to quiet title against the State's interest.

V. ICCTA preempts any regulation of carriers or non-carriers that unreasonably burdens rail transportation.

A. Lighthouse's and BNSF's ICCTA preemption claims are redressable.

For standing purposes, Lighthouse's and BNSF's ICCTA claims seek three forms of relief: (1) a declaratory judgment that ICCTA preempts the State Defendants' section 401 denial; (2) vacatur of that denial; and (3) an injunction barring the State Defendants from relying on alleged rail-related impacts in the future. This Court has in the past upheld the same sort of relief, even if it effectively invalidates state actions. *See, e.g., BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 771 (9th Cir. 2018) (affirming injunction preventing implementation of state law preempted by ICCTA).

The Defendants contend that this relief does not redress Lighthouse's and BNSF's injuries because the State Defendants "denied Lighthouse's request for a water quality certificate on multiple grounds, many of which have nothing to do with railroad operations . . . ."[43] They accuse Lighthouse and BNSF of making an "inapposite" argument for a "more relaxed" redressability standard based on a single case involving "procedural standing."[44] In fact, Lighthouse and BNSF's discussion of the redressability standard cited three cases, two of which did not involve "procedural

[43] Joint Answering Br. at 55.
[44] *Id.* at 56 (citing *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148 (9th Cir. 2015)).

standing."[45] Those cases establish, contrary to the Defendants' claims, that redressability requires only "that the relief sought will remove some . . . legal roadblocks, even if others may remain." *Cal. Sea Urchin*, 883 F.3d at 1182.

Other cases also support Lighthouse and BNSF's point. For example, *Renee v. Duncan*, another case that did not involve "procedural standing," held that redressability requires only a "change in legal status" and "a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered"—even if an agency "might later, in the exercise of its lawful discretion, reach the same result for a different reason." 686 F.3d 1002, 1013-14 (9th Cir. 2012) (internal quotation marks and citation omitted).[46] Similarly, in *Ibrahim v. Department of Homeland Security*, this Court held that plaintiffs need not "demonstrate that there is a guarantee that their injuries will be redressed by a favorable decision." 669 F.3d 983, 993 (9th Cir. 2012) (internal quotation marks and citation omitted). Rather, standing exists if plaintiffs can show that "a favorable decision is likely to redress their injuries." *Id.* (emphasis omitted).

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[45] Appellants' Joint Opening Br. at 41 (citing *White v. Univ. of Cal.*, 765 F.3d 1010, 1022-23 (9th Cir. 2014); *Cal. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1181-82 (9th Cir. 2018)).

[46] Amicus Massachusetts made a nearly identical argument against redressability in *Massachusetts Delivery Association v. Coakley*, 769 F.3d 11 (1st Cir. 2014). The First Circuit found standing because successfully challenging just one prong in a three-pronged test would still remove a "barrier" to relief. *See id.* at 16-17.

The same standard applies here. The State Defendants' section 401 denial decision lists nine reasons for its "with prejudice" denial.[47] (The State Defendants admitted that they would have denied without prejudice if the sole grounds for their decision had been water quality-related.[48]) Only two of those grounds—vessel transportation and cultural resources—"say nothing" about rail impacts.[49] If the section 401 denial is vacated and remanded after trial,[50] and the State Defendants are prohibited from relying on rail effects when they reconsider Lighthouse's application, it is considerably more likely that the State Defendants will grant the requested water quality certification. That is all redressability requires.

B. If a state's regulation of a non-rail carrier unreasonably burdens rail transportation, ICCTA preempts it.

When it comes to the merits of Lighthouse's and BNSF's ICCTA claims, the Defendants decline to engage the key question. Instead, they spend most of their argument knocking down straw men. "Lighthouse is not a rail carrier," they say, and "BNSF is neither a regulated nor operational part of the proposed

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[47] FER005-014.

[48] *See* Dist.Ct.Dkt. 228-18 at 3 (acknowledging that the State Defendants "did not deny the certification 'with prejudice' based on the [water quality deficiencies] set forth in Section III of the denial Order").

[49] *See* FER005-014; Appellants' Joint Opening Br. at 41-42.

[50] If the district court agrees that ICCTA preempts the State Defendants' effort to block Lighthouse's terminal on rail-related grounds, the only effective relief would be to vacate the section 401 denial and require reconsideration of Lighthouse's request. So, contrary to the Defendants' argument, "the government decision at issue would be overturned." Joint Answering Br. at 57.

project."[51] No one has ever denied those things. But the key ICCTA question in this case is whether state regulation of a non-rail carrier can be preempted by federal law. Precedent in this Court, at the STB, and in other circuits shows that it can.

ICCTA preemption does not require that a state's actions directly regulate a rail carrier, as the Defendants claim. Rather, ICCTA "preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation." *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (citation and internal quotation marks omitted). Consistent with that rule, "[w]hat matters is the degree to which the challenged regulation burdens rail transportation." *Id*. at 1097-98 The district court's summary judgment order should be reversed because it never considered this fact question.

The Defendants try to sidestep this fact-centric preemption rule by citing three Surface Transportation Board decisions for the proposition that "STB jurisdiction attaches to non-rail carriers only in situations where an acknowledged rail carrier is an operational part of the project, not merely a service provider."[52] Setting aside the inconsistency between that proposition and this Court's rule, it is not what the STB's decisions say.

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[51] *Id.* at 58.
[52] *Id.* at 60.

For example, in *SEA-3, Inc.—Petition for Declaratory Order*, the STB noted that if a locality "were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with [the railroad's] common carrier operations, those actions would be preempted . . . ." STB FD No. 35853, 2015 WL 1215490, at *6 (Mar. 16, 2015). Similarly, the STB said in *Valero Refining Co.—Petition for Declaratory Order* that local government action "must not have the effect of foreclosing or unduly restricting the rail carrier's ability to conduct its operations or otherwise unreasonably burden interstate commerce." STB FD No. 36036, 2016 WL 5904757, at *4 (Sept. 20, 2016) (citing *Ass'n of Am. R.R.*, 622 F.3d at 1097-98). The relevant fact question in both decisions was undue interference with rail operations—i.e., "the degree to which the challenged regulation burdens rail transportation"—not whether the rail carrier was "an operational part of the project."[53]

The Defendants' legal path to summary judgment is also blocked by clear rulings in the Fourth and Eleventh Circuits. The latter court explained that "[c]ertain local regulations *applied against a third-party* may be so intertwined with the provision of rail transportation services to the public so

[53] When the STB declined to preempt state regulation of a transloading facility where the petitioner had withdrawn its request to be recognized as a rail carrier, it still noted that "state and local laws and regulations are preempted when the challenged statute or regulation stands as an obstacle to authorized rail transportation." *Hi Tech Trans, LLC—Petition for Declaratory Order*, STB FD No. 34192-1, 2003 WL 21952136, at *3 & n.11 (Aug. 14, 2003) (citing *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998)).

as frustrate the objectives of federal railroad regulation." *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1337 n.9 (11th Cir. 2001) (emphasis added). The Fourth Circuit's decision in *Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), put that rule into practice.

As Lighthouse and BNSF discussed in their opening brief, *Norfolk Southern* did not involve direct regulation of a rail carrier.[54] Nor, as the Defendants now assert, did the city's ordinance "regulat[e] truck traffic at a railroad-owned and operated ethanol transloading facility."[55] In fact, the arrangements for transporting ethanol from Norfolk Southern's facility to its destination were "made between the ethanol shippers and receivers and the private trucking companies." *Id*. at 154. The city regulation at issue prohibited those non-rail carrier trucks from hauling ethanol *on city streets* without a permit.[56] *Id*. at 155 & n.4. Still, the Fourth Circuit concluded that the city's ordinance would "unreasonably burden rail carriage and thus cannot escape ICCTA preemption under the police power exception." *Id*. at 160.

These cases, especially when read in light of this Court's ICCTA preemption standard, preclude summary judgment here. No categorical rule

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[54] Appellants' Joint Opening Br. at 47.

[55] Joint Answering Br. at 64.

[56] To the extent the STB's later decisions suggest that *Norfolk Southern* "involved local regulation of transloading performed by the rail carrier or under its auspices," they misunderstand the facts in the Fourth Circuit's decision. *SEA-3*, 2015 WL 1215490, at *5; *see Valero*, 2016 WL 5904757, at *4. The *Norfolk Southern* opinion makes clear that Alexandria was not directly regulating transloading.

prohibits preemption when a state or local government regulates a non-carrier. Rather, the question in such cases is "the degree to which the challenged regulation burdens rail transportation." *Ass'n of Am. R.R.*, 622 F.3d at 1097-98 (internal quotation marks and citation omitted). That is a contested issue of fact that cannot be resolved without a trial.

C. The facts in this case warrant ICCTA preemption.

The section 401 denial in this case is unique. An ordinary section 401 certification process would have (at worst) resulted in a denial without prejudice for failure to submit water quality impact mitigation information.[57] Here, however, the State Defendants chose to invoke their SEPA substantive authority for the first time in state history.[58] That was the only way they could bring into the picture hypothetical, worst-case scenario, non-water quality impacts caused by BNSF's rail operations, resulting in an unprecedented "with prejudice" denial from Ecology.[59]

Having imported rail transportation effects into their section 401 decision, the State Defendants used ICCTA preemption as a sword to cut down Lighthouse's project. Recognizing that they cannot regulate rail operations,

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[57] *See* Dist.Ct.Dkt. 228-18 at 3. Indeed, the State Defendants originally wrote and signed a "without prejudice" section 401 denial letter. Dist.Ct.Dkt. 262-41. The key difference between that letter and the one they ultimately issued was the inclusion of rail effects.

[58] FER004-005.

[59] For example, the section 401 decision cites BNSF's main line rail capacity, locomotive air emissions, train horn sounds, and rail safety risks as reasons for denying certification with prejudice. FER004-011.

the State Defendants labeled those effects "unmitiga[ble]."[60] And given the presence of allegedly unmitigable effects, they denied section 401 certification with prejudice.[61]

But the Defendants do not want ICCTA preemption to work both ways. They acknowledge that their "with prejudice" section 401 denial turns on rail effects outside their jurisdiction to mitigate,[62] but they refuse to admit that those same effects could trigger ICCTA preemption. The State Defendants denied Lighthouse's section 401 certification to prevent increased rail traffic, and ICCTA preempts this effort to thwart and otherwise unreasonably burden BNSF's operations.[63]

Reversing the district court's summary judgment on this point would not upset any balance between federal regulation of railroads and states' ability to exercise their federally delegated water quality powers or their traditional police powers.[64]

First, a ruling in Lighthouse's and BNSF's favor would not prevent states from considering water quality impacts under section 401. States' section 401 certification authority is federally delegated statutory authority under the Clean Water Act. *See* 33 U.S.C. § 1341. Any tension between such federal

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[60] FER005-014.
[61] FER004.
[62] FER001-020.
[63] Appellants' Joint Opening Br. at 45-50.
[64] Dkt. 47, Amicus Br. of California, *et al.*, at 21-22; Joint Answering Br. at 45-50.

authority and ICCTA should be harmonized. *Ass'n of Am. R.R.*, 622 F.3d at 1097. Had a normal section 401 process unfolded here, that would not have been difficult because the decision would have focused on Lighthouse's compliance with water quality standards. *See* 33 U.S.C. § 1341(a)(1). Instead, the State Defendants used their state law power under SEPA to consider effects beyond water quality, primarily including rail-related effects on land.

Second, an ICCTA ruling in Lighthouse's and BNSF's favor would maintain the balance Congress has struck between exclusive federal regulatory control over railroads and traditional state police power. Lighthouse and BNSF seek relief that would effectively void a with prejudice section 401 denial that turns on rail transportation effects and effectively bars increased rail traffic. The State Defendants chose—using admittedly discretionary authority that other amici states also claim to possess[65]—to presuppose and prevent a bevy of effects from rail transportation. Allowing states to use such discretionary authority to bar anticipated effects from rail transportation would let them defeat ICCTA preemption. By contrast, ruling in Lighthouse and BNSF's favor would be consistent with ICCTA's goal of centralizing decisions about effects from transportation by a rail carrier at the STB.

[65] Dkt. 47, Amicus Br. of California, *et al.*, at 4 n.2

CONCLUSION

Rather than fulfill its "virtually unflagging obligation" to hear the federal claims before it, the district court forced Lighthouse and BNSF to litigate exclusively in state court. But its reasons for doing so do not hold up under scrutiny. The issues in this case are not identical to the ones being litigated elsewhere, and the narrow abstention doctrine the district court invoked does not fit the facts here. In separate but similar rulings, the district court broadened a narrow exception to *Ex parte Young* to entirely excuse one of the State Defendants from this case and refused to consider federal preemption claims based on rail-related impacts central to the State Defendants' decisions. Lighthouse and BNSF respectfully request that the Court reverse these rulings and remand this case for a trial on the merits.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,329 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Constantia 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2020, 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.

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