CASE NO. 21-16282

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAHAN TALESHPOUR, ET AL.

Plaintiffs-Appellants,

v.

APPLE, INC.

Defendant-Appellee.

MOTION BY THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE

On Appeal from the United States District Court
For The Northern District of California
District Court Case No. 5:20-cv-03122
Honorable Edward J. Davila

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Attorneys for Amicus Curiae The Product Liability Advisory Council, Inc.

Pursuant to Fed. R. App. P. 29 and Cir. R. 29-3, The Product Liability Advisory Council, Inc. ("PLAC") hereby moves for leave to file the attached amicus curiae brief in support of Defendant-Appellee Apple, Inc. PLAC endeavored to secure the consent of all parties to the filing of this brief. Defendant-Appellee provided its consent, but Plaintiffs-Appellants did not respond.

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, on behalf of its members, while presenting the broad

[1] A list of PLAC's corporate members can be found at https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

As an organization of manufacturers who typically provide express warranties of limited duration, PLAC has a significant interest in ensuring that plaintiffs are not permitted to advance theories, such as those pursued by Plaintiffs in this case, that will effectively vitiate the terms of these warranties. The attached brief makes arguments that supplement without repeating Apple's arguments, and it reflects the insights gained from representing manufacturers of numerous types of products. PLAC believes these insights will be of use to this Court in deciding this appeal.

CONCLUSION

PLAC respectfully requests that leave be granted to file the attached amicus curiae brief.

Dated: January 12, 2022

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1 and 29(a)(4)(A), Amicus Curiae, The Product Liability Advisory Council, Inc. states that it has no parent corporation and no subsidiary corporations. No publicly held company owns 10% or more of its stock.

Dated: January 12, 2022

DYKEMA GOSSETT PLLC

By: /s/ John M. Thomas
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.[2]

As an organization of manufacturers who typically provide express warranties of limited duration, PLAC has a significant interest in ensuring that

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[2] Under Fed. R. App. P. 29(a)(4)(E), PLAC affirms that no counsel for a party authored any part of this brief, and further affirms that no person other than PLAC and its counsel made a monetary contribution to its preparation or submission.

plaintiffs are not permitted to advance theories, such as those pursued by Plaintiffs in this case, that will effectively vitiate the terms of these warranties.

SUMMARY OF ARGUMENT

Plaintiffs complain of experiences indistinguishable from those of millions of owners of every complex consumer product sold in modern times: they had a problem with their products after the express warranty expired and they had to pay for the necessary repairs (or replacements). Plaintiffs fail to distinguish the defect alleged in this case from the countless other defects that inevitably occur in all complex products and that are routinely repaired at the manufacturer's expense (if they occur in the express warranty period) or at the consumer's expense (if they occur after the warranty period). And yet, they claim that Defendant Apple committed fraud by not disclosing that alleged defect to them—and to every purchaser of the MacBook computers at issue—prior to purchase.

This claim, if accepted, would vitiate virtually all limited express warranties issued by every manufacturer of complex mechanical and electronic products and effectively require all such manufacturers to provide extended warranties of indefinite duration, at no additional cost. It would require all product manufacturers to make unprecedented disclosures that are either affirmatively misleading (because such disclosures would necessarily address the potential failure of one component without regard to potential failures of hundreds or

thousands of other components) or so massive as to be utterly useless (because the disclosures address every potential failure mode of each of hundreds or thousands of components). And it would expose all product manufacturers to liability for consumer fraud for conduct that today is universally accepted as commercially reasonable—except in litigation like this.

Not surprisingly, binding decisions of this Court and the California Court of Appeal squarely preclude such claims. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017); *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1142 (9th Cir. 2012); *Daugherty v. Am. Honda Motor Co.* 144 Cal. App. 4th 824 (2006), *review denied*, 2007 Cal. LEXIS 1472 (Feb. 7, 2007). Under those decisions, a plaintiff relying on an alleged failure to disclose an alleged defect must allege the existence of an unreasonable safety hazard. No exception is recognized for defects affecting the "central function" of a product. In fact, *Daugherty* involved an alleged defect affecting the central function of the product—an engine defect that caused total engine failure.

The published decisions in *Wilson* and *Williams* represent the law of the circuit and cannot be reconsidered by a three-judge panel, because no decision of the California Supreme Court, the relevant court of last resort, undercuts the holdings in those cases. And even the Court sitting *en banc* would be required to follow the California Court of Appeal's decision in *Daugherty*, because there is no

evidence, let alone convincing evidence, that the California Supreme Court would decide differently. Law, logic, and public policy all support rejection of Plaintiffs' claims in this case.

ARGUMENT

I. *WILSON* AND *WILLIAMS* ARE BINDING PRECEDENT THAT REQUIRE AFFIRMANCE.

Panels of this Court have repeatedly held that a product manufacturer's duty to disclose defects under California law is limited to defects that create unreasonable safety concerns. *Williams*, 851 F.3d at 1025 ("To state a claim for failing to disclose a defect, a party must allege . . . the existence of an unreasonable safety hazard . . ."); *Wilson*, 668 F.3d at 1142 ("[F]or the omission to be material, the failure must [still] pose 'safety concerns.'") (cleaned up); *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663 (9th Cir. 2011) ("[W]here a plaintiff's claim is predicated on a manufacturer's failure to inform its customers of a product's likelihood of failing outside the warranty period, the risk posed by such asserted defect cannot be merely the economic cost of the product's repair but must constitute a safety concern."); *Oestreicher v. Alienware Corp.*, 322 F. App'x 489, 493 (9th Cir. 2009) ("A manufacturer's duty to consumers is limited to its warranty obligations absent either an affirmative misrepresentation or a safety issue."). Plaintiffs explicitly concede that "[i]n 2012, the Ninth Circuit concluded based on California state law that in the absence of affirmative misrepresentations, a

plaintiff must 'allege that the design defect cause[d] an unreasonab[le] safety hazard.'" (Plaintiffs' Opening Brief at 41, quoting *Wilson*, 668 F.3d at 1143).

The published decisions in *Wilson* and *Williams* represent the law of the circuit. *See, e.g., E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1261 (9th Cir. 2020). "A three-judge panel can reconsider the law of the circuit only when *the relevant court of last resort* has undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable . . . ." *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021) (cleaned up, emphasis added), quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *accord, e.g., FDIC v. McSweeney*, 976 F.2d 532, 535 (9th Cir. 1992) ("As a three-judge panel, we are bound by our prior decisions interpreting state as well as federal law in the absence of intervening controlling authority.").

Plaintiffs claim that one panel decision of this Court, *Hodsdon v. Mars*, 891 F.3d 857 (9th Cir. 2018), and one decision of the California Court of Appeal, *Rutledge v. Hewlett-Packard Co.*, 238 Cal. App. 4th 1164 (2015), establish that "*Wilson* did not remain good law for long" and therefore can be reconsidered by this Court. (Opening Brief at 43.) Plaintiffs' argument is meritless for multiple reasons.

First, of course, neither the panel in *Hodsdon* nor the California Court of Appeal are "courts of last resort." Second, even if they were, and for all of the

reasons addressed at length by Apple in its Answering Brief, the decisions in those cases are not "clearly irreconcilable" with the decisions in *Wilson* and *Williams.*[3] In fact, the panel in *Hodsdon* expressly declined to reconsider the holding in *Wilson.* Third, even if *Rutledge* provided justification for not following *Wilson* (it did not), it does not justify not following *Williams*, because *Williams* was decided *after Rutledge.* Even if the *Williams* panel clearly erred by not recognizing that *Rutledge* changed the law (it did not), this panel would still be required to follow *Williams.* "In this circuit, a three-judge panel must apply binding precedent even when it is clearly wrong because (for example) it failed to recognize an intervening change in the law." *Silva*, 993 F.3d at 717.

Wilson and *Williams* are binding precedent and must be followed in this case.

[3] The "clearly irreconcilable" requirement is "a high standard." *Gonzalez v. Barr*, 955 F.3d 762, 768 (9th Cir. 2020).

> It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent. In order for us to ignore existing Ninth Circuit precedent, the reasoning and principles of the later authority would need to be so fundamentally inconsistent with our prior cases that our prior cases cannot stand. But if we can apply our prior circuit precedent without running afoul of the intervening authority, we must do so.

Id. at 768-769 (cleaned up, citations omitted).

II. ALTERNATIVELY, *DAUGHERTY* IS BINDING AUTHORITY THAT REQUIRES AFFIRMANCE.

Even if *Wilson* and *Williams* were not binding (they are), the principal California Court of Appeal decision on which they are based (*Daugherty*) would require the same result. "[W]here jurisdiction rests on diversity of citizenship, federal courts . . . must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467, 61 S. Ct. 336, 338 (1940); *accord, e.g.*, *Franklin v. Cmty. Reg'l Med. Ctr.*, 998 F.3d 867, 874 (9th Cir. 2021); *State Farm Fire & Cas. Co. v. Abraio*, 874 F.2d 619, 621 (9th Cir. 1989). "This is especially true when the supreme court has refused to review the lower court's decision." *Id.*

Daugherty is virtually identical to this case, except that the product at issue in *Daugherty* was a motor vehicle and the allegedly defective component was an engine. Plaintiffs in *Daugherty* alleged that the "engine manufactured by Honda had a defect resulting, over time, in the slippage or disengagement of the front balancer shaft oil seal." *Id.* at 827. This resulted in "oil loss and contamination of nearby engine parts and, in severe cases, requires repair or replacement of the engine." *Id.* One plaintiff alleged that he "suffered an oil leak causing total engine failure at 57,000 miles," after the warranty had expired. *Id.* at 828-829. The

Plaintiffs alleged that Honda violated the CLRA and the UCL by concealing and failing to disclose the alleged defect. *Id.* at 833, 838.

The California Court of Appeal rejected both claims. To be actionable under the CLRA, the Court ruled, "the omission must be contrary to a representation actually made by the defendant, or an omission of a fact that the defendant was obligated to disclose." *Id.* at 835. Plaintiff alleged that Honda was obligated to disclose the alleged defect because it knew of an "unreasonable risk," but the Court rejected this claim because "the 'unreasonable risk' alleged is merely the risk of 'serious potential damages'—namely the cost of repairs in the event the defect ever causes an oil leak." *Id.* at 836. The Court held that the failure to disclose a fact that one has no affirmative duty to disclose is not likely to deceive anyone within the meaning of the UCL. *Id.* at 838.

The similarities to this case are remarkable and do not allow for a different result. In both cases, plaintiffs alleged a defect that can, over time, cause a complete failure of a major component; in *Daugherty* it was the engine while in this case it was the display. In both cases, one or more plaintiffs actually claimed to have experienced complete failure. In both cases, plaintiffs alleged that the defendant had a duty to disclose because of the cost of repairs in the event the defect occurred. In both cases, plaintiffs alleged that the defendant's failure to disclose the alleged defect violated the CLRA and the UCL.

In *Daugherty*, these claims were rejected, and they should be rejected here as well. In fact, Plaintiffs' theory that manufacturers have a duty to disclose defects that relate to a product's "central function" is plainly inconsistent with *Daugherty*; it is difficult to identify a component more central to the function of a motor vehicle than the motor.

While *Daugherty* is virtually identical to this case, *Rutledge* is not. The decision in *Rutledge* itself *assumes* that *Daugherty* was correctly decided and that the case before it was different. *See Rutledge*, 238 Cal. App. 4th at 1174-1175. And it *was* different, if only because the plaintiffs' claims in *Rutledge* were based in part on "specific misrepresentations," including misrepresentations concerning reliability. *Id.* at 1176. The court's ultimate holding in *Rutledge* was that the plaintiffs' "evidence is sufficient to create a triable issue of fact as to the nature of HP's representations, and whether that triggered a duty to disclose the defect." *Id.* Here, as Apple points out, the district court held that Apple did not make any such misleading representations, and Plaintiffs do not challenge this ruling on appeal. (Answering Brief at 13-14.)

III. PLAINTIFFS' THEORY IS CONTRARY TO LAW AND LOGIC.

Even the Court *en banc* would be required to follow *Daugherty*, because there is no evidence, let alone convincing evidence, that the California Supreme Court would decide differently, particularly as it denied review of that decision.

Besides, public policy, common sense, and applicable legal principles all support rejecting the disclosure theory advocated by Plaintiffs in this case.

A. Plaintiffs' Theory Has No Limiting Principle.

"Defects can, and do, arise with complex instrumentalities . . . ." *Thiedemann v. Mercedes-Benz USA, LLC*, 872 A.2d 783, 794 (N.J. 2005). Everyone knows this; it is the reason why virtually every manufacturer provides express warranties limited by duration and why a market for extended warranties exists. The very existence of such warranties "is a recognition of potential defects (in a statistical sense, the inevitability of defects) in the seller's product and an allocation of risk associated with such defects." *Neuser v. Carrier Corp.*, No. 06-C-645-S, 2007 U.S. Dist. LEXIS 9663, at *12 (W.D. Wis. Feb. 9, 2007)*; accord, e.g., Schiesser v. Ford Motor Co.*, No. 16-C-730, 2017 U.S. Dist. LEXIS 53180, at *8 (N.D. Ill. Apr. 6, 2017) ("The Warranty promises to repair, replace, or adjust all parts on a vehicle that are affected by factory defects for the duration of the Warranty, acknowledging the possibility of latent defects."); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig. v. Ford Motor Co.*, MDL No. 1112, 1999 U.S. Dist. LEXIS 22892, at *20 (D.N.J. May 14, 1999) (repair or replace warranty "acknowledge[s] the possibility of defects in factory-supplied materials or workmanship and promise[s] that if such a defect manifests itself under normal use during the warranty coverage period, Ford will repair, replace or adjust the

defective part at no cost to the owner of the vehicle."); *Herbstman v. Eastman Kodak Co.*, 342 A.2d 181, 187 (N.J. 1975) (express warranty "contemplated that such defects might occur and, if so, Kodak would repair them").

Although the potential for defects is generally known, and disclosed by the express warranty itself, Plaintiffs' theory in cases such as this is that manufacturers have a duty to disclose to all purchasers the *specific* defects *that happened to occur to them*. In this case, for example, Plaintiffs' complaint alleges that Apple should have disclosed the potential for failure of the cables that connect the lighting mechanism of the display screen to the display controller board, an alleged defect that they describe in detail complete with pictures purporting to demonstrate that the problem is that the cables are too short. But if Plaintiffs' theory has merit, there is no basis to limit Apple's disclosure duty to the particular defect that these Plaintiffs happened to experience; the duty would necessarily extend to any potential hardware defect that might or might not occur to purchasers and that could adversely affect the display, that could cause the keyboard or mouse to malfunction, or prevent connection to the Internet, or interfere with the speakers or the microphone, or interrupt the power supply or prevent charging, or corrupt the hard drive, etc.—the very defects, in other words, that the express warranty was designed to cover. And, of course, any such duty would not be limited to manufacturers of computers; it would necessarily extend to all manufacturers,

including manufacturers of cars, motorcycles, chain saws, telephones, boats, ovens, televisions, etc., and the manufacturers of their components. *All* manufactures of *all* products would be required to disclose to *all* potential purchasers *all* known defects (or at least defects that relate to "critical functions").

Limiting the duty to "known" defects is no limitation at all. Manufacturers necessarily know of all of the defects that are repaired under warranty. For any defect repaired under warranty by virtually any manufacturer, plaintiffs could provide the same type of detailed description and pictures that Plaintiffs rely on in this case. Further, as the Court of Appeal recognized in *Daugherty:*

> "[V]irtually all product failures discovered in automobiles after expiration of the warranty can be attributed to a 'latent defect' that existed at the time of sale or during the term of the warranty. All parts will wear out sooner or later and thus have a limited effective life. Manufacturers always have knowledge regarding the effective life of particular parts and the likelihood of their failing within a particular period of time. . . . [M]anufacturers . . . can always be said to 'know' that many parts will fail after the warranty period has expired. A rule that would make failure of a part actionable based on such 'knowledge' would render meaningless time/mileage limitations in warranty coverage."

Daugherty, 144 Cal. App. 4th at 830, *quoting Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 250 (2d Cir. 1986). In other words, "[f]ailure of a product to last forever would become a 'defect,' a manufacturer would no longer be able to issue limited warranties, and product defect litigation would become as widespread

as manufacturing itself." *Wilson*, 668 F.3d at 1141 (cleaned up), *quoting Daugherty*, 144 Cal. App. 4th at 829.

B. Non-Safety Defects Are Generally Not "Material."

The holding in *Daugherty* is consistent with the general rule requiring disclosure only of "material" facts. Indeed, "materiality" was the express basis for this Court's holding in *Wilson:* "for the omission to be material, the failure must [still] pose 'safety concerns.'" *Wilson*, 668 F.3d at 1142. For multiple reasons, this must be the general rule.

"A fact is material if a *reasonable* consumer would attach importance to its existence or nonexistence in determining his choice of action." *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (emphasis added). All prospective buyers know that they might experience problems with any product they are buying; that, again, is why manufacturers provide warranties and why consumers are willing to pay extra for extended warranties. Thus, the potential for defects to occur cannot be material; consumers routinely buy products knowing of that potential. Further, "[m]ateriality is assessed, not in retrospect, but from the perspective of the prospective buyer." *Coba v. Ford Motor Co.*, No. 12-1622 (KM) (MAH), 2017 U.S. Dist. LEXIS 123546, at *23 (D.N.J. Aug. 4, 2017). Thus, the issue is not whether a reasonable consumer would view the actual occurrence of a display problem to be important. Rather, the issue is whether, for some reason, a

prospective purchaser who would otherwise view the potential for all sorts of defects to occur as unimportant (because that is a potential inherent in all products), would nevertheless view the *potential* for *this one specific display problem* to be important. The answer must be "no." No reasonable consumer would consider this information to be important when it is divorced from all of the other risks and benefits of the product at issue—and its alternatives.

For example, Plaintiffs in this case could not have purchased *any* computer that did not have some risk of some display problems. Plaintiffs might have been able to purchase another computer with a reduced risk of display problems caused by a short cable connecting the display screen to the controller board, but they could not have purchased another computer without some risk of display problems caused by other issues. Thus, no reasonable consumer would find the defect alleged here to be important without first evaluating the risk of display problems associated with alternative products. *See, e.g., Anderson v. Ford Motor Co.*, No. 17-03244-CV-S-BP, 2020 U.S. Dist. LEXIS 66549, at *8 (W.D. Mo. Feb. 14, 2020) ("[T]he Court concludes that the [product's] failure rate would be material to a reasonable consumer's purchasing decision only where the failure rate is (1) extremely high in the abstract or (2) significantly higher than comparable vehicles."); *Munch v. Sears Roebuck & Co.*, No. 06 C 7023, 2007 U.S. Dist. LEXIS 62897, at *11 (N.D. Ill. Aug. 27, 2007) ("A product's rate of failure would

be material to a reasonable person only if it exceeded a standard rate of failure in the industry for comparable machines produced by comparable manufacturers.").

But even that is a simplistic view. In the real world, some people use their MacBook entirely on their desk, while others drag it in the car, on airplanes, and more. A thin and sleek computer might be critically important to the latter, but not important at all to the former. Others might prefer a Dell laptop, which is less expensive but lacking many of the features of an Apple product. One manufacturer might try to keep the price down by purchasing some less expensive components, while another might decide to devote more expense to a particular or unique feature of their design. While reasonable consumers will always consider a wide variety of factors specific to their individual needs, no reasonable consumer would consider only the risk of display problems and only the benefit of a thin and sleek design. Even a reasonable consumer especially concerned about reliability would consider *all* of the potential risks associated with the MacBook, not just the risk of display problems caused by short cables, and how those risks compare to alternative computers. They would also consider the benefits of the MacBook and how those compare to the alternatives.

In the real world, the disclosure or disclosures demanded by Plaintiffs would either be affirmatively misleading or useless. This can be illustrated by contemplating the "but for" worlds in which the disclosure or disclosures

demanded by Plaintiffs are made. On one hand, if Plaintiffs are envisioning a "but for" world in which Apple and Apple alone disclosed this one potential display problem, the disclosure would be affirmatively misleading because it would suggest that display problems are somehow unique to Apple and can be avoided simply by purchasing another computer. A consumer who rejected the MacBook because of this disclosure, with no information about potential problems in other computers, could well end up purchasing a computer that offers less of what made the MacBook desirable in the first place *and* poses a greater risk of display failure or other types of failures. On the other hand, if Plaintiffs are envisioning a "but for" world in which all computer manufacturers disclose all of the problems they repair under warranty and that might or might not occur during the warranty period or after the warranty expires, consumers would be bombarded with massive amounts of data for every computer they considered buying, rendering any one individual data point—such as the possibility of a display problem caused by a short cable—largely meaningless in the context of everything else that *might* go wrong with any computer.

Not surprisingly, no manufacturer of any product routinely makes the type of disclosure Plaintiffs demand in this case. And yet, the theory advanced by Plaintiffs in this case, if accepted, necessarily leads to the conclusion that virtually every manufacturer of consumer products of any complexity is committing

consumer fraud with every product sold. The only sensible conclusion is the one that multiple panels of this Court have reached in reliance on *Daugherty* and in published and unpublished decisions alike: to be material, as a general rule, the defect must create an unreasonable risk to safety.

CONCLUSION

The order of the district court should be affirmed in all respects.

Dated: January 12, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 21-16282

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This brief contains 4000 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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