Nos. 21-35815 & 21-35856

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN TINGLEY,

Plaintiff-Appellant,

v.

ROBERT W. FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON, ET AL.,

Defendants-Appellees,

EQUAL RIGHTS WASHINGTON,

Intervenor-Defendant-Appellee,

On Appeal from the United States District Court
for the Western District of Washington
No. 3:21-CV-05359-RJB
Hon. Robert J. Bryan

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF REHEARING EN BANC

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Dated: October 14, 2022

/s/ Paul M. Sherman
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STATEMENT OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: property rights, economic liberty, educational choice, and freedom of speech. As part of its mission to defend freedom of speech, the Institute has challenged laws across the country that regulate a wide array of occupational speech, including teletherapy, parenting advice, dietary advice, and veterinary advice. Amicus believes that the decision below, if allowed to stand, represents a serious threat to the constitutional protection afforded to these and countless other types of occupational speech.

SUMMARY OF ARGUMENT

This case concerns speech that a great many people believe is backwards, bigoted, ignorant, and even immoral. Amicus does not file this brief to dispute those assessments. But the First Amendment protects even outrageous speech by people who arouse public contempt. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977). This Court should not allow the debate over the merits of Plaintiff's speech to distract from the central constitutional issue in this case: whether talk therapy is speech, the regulation of which triggers heightened judicial scrutiny, or mere conduct, the

[1] No party counsel authored any portion of this brief, and no party, party counsel, or person other than Amicus or its counsel paid for this brief's preparation or submission. All parties have consented to the filing of this brief.

regulation of which triggers far more deferential review. How this Court answers that question will have repercussions far beyond the contentious debate at the center of this case; it will affect everyone who speaks for a living, from tour guides to dietitians to political consultants and beyond.

Answering that question should also have been straightforward. Under the U.S. Supreme Court's ruling in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), in which the Court rejected the so-called professional speech doctrine, the Court reaffirmed that speech by state-licensed professionals is entitled to the same protection as that by any other speaker. Thus, just as in any other First Amendment case, the panel below should have applied the Supreme Court's established test determining whether Washington's law, as applied to plaintiff's talk therapy, regulated "speech" within the meaning of the First Amendment. And under that test—set forth most clearly in the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)—Washington's law operates as a content-based restriction on speech because it is triggered solely by speech that communicates particular messages on a particular topic.

But the panel did not conduct this required analysis. Instead, the panel held that it was bound by this Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), in which an earlier panel of this Court held that a similar prohibition on

conversion therapy for minors regulated only conduct, not speech. This was error. The U.S. Supreme Court abrogated *Pickup* in *NIFLA*. And this Circuit recognized that fact in *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), which reversed a trial court for the same misplaced reliance on the now discredited *Pickup* decision. The panel's attempt to distinguish *NIFLA* and *Pacific Coast Horseshoeing*, asserting that those cases involved speech while this case supposedly involves only conduct, is wrong. Indeed, it is precisely the erroneous view of speech versus conduct that the Supreme Court rejected in *NIFLA*.

The panel's ruling creates an untenable situation in which this Circuit applies the Supreme Court's speech-conduct test faithfully in some occupational contexts but not in others, with no principled basis for distinguishing between the two. As a result, the harm to First Amendment rights may extend far beyond therapists and counselors offering controversial and potentially harmful advice. Indeed, it could ultimately harm the very children whom Washington has set out to protect. It is no stretch to imagine that some state may wish to pass legislation that, for example, prohibits mental health counselors from providing *affirming* treatment to gay or transgender youth. And, indeed, Arkansas recently enacted a law that prohibits licensed medical providers from referring youth to other medical providers for gender-affirming treatment. *See Brandt v. Rutledge*, 47 F.4th 661 (8th

Cir. 2022) (petition for rehearing en banc filed). To hold that the speech here is unprotected is necessarily to hold that the speech there is unprotected, leaving speakers and their listeners at the mercy of their state legislatures. This Court should grant rehearing en banc to ensure that does not happen.

ARGUMENT

I. The panel's decision touches on an important constitutional question.

The subject matter of this case is deeply controversial, but the legal question at the heart of the petition for rehearing—how to tell whether a regulation of a licensed occupation regulates "speech" or "conduct"—is a vitally important one that will recur again and again in many different contexts. As America has moved to a more information-based economy, ever-greater numbers of people earn their living by speaking. And, as Amicus's own direct experience illustrates, there will be inevitable conflicts between those speakers' First Amendment rights and the asserted power of state licensing authorities.

Consider the case of retired engineer Wayne Nutt. *Nutt v. Ritter*, No. 7:21-cv-00106-M (E.D.N.C. filed June 9, 2021), available at https://ij.org/wp-content/uploads/2021/06/NC-Engineering-Complaint.pdf. For most of his career, Nutt lawfully practiced engineering in North Carolina, without a license, under the state's "industrial exemption." But when Nutt testified as an expert witness in a lawsuit, the state's engineering board accused him of the unlicensed "practice" of

engineering. And North Carolina is not the only state to apply its engineering statute to public advocacy; the state of Oregon did the same when it accused engineer Mats Järlström of the unlicensed practice of engineering after Järlström emailed the state's board with concerns about the state's timing formula for traffic lights. *See Järlström v. Aldridge*, No. 3:17-cv-00652-SB, 2017 WL 6388957 (D. Or. Dec. 14, 2017).

The Kentucky Board of Examiners of Psychology took a similar tack when it sent a cease-and-desist letter to syndicated newspaper columnist John Rosemond after he published an advice column in a Kentucky newspaper in which he offered advice to parents struggling with their teenage son. *See Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015). As here, the government argued that advice tailored to an individual's personal parenting situation was the unlicensed "practice of psychology," that could be regulated without considering the First Amendment.

State surveying boards in North Carolina and Mississippi have taken similar action against companies that produce maps or take aerial photographs of property. *See Mississippi Startup Files First Amendment Countersuit Against State Licensing Board*, https://ij.org/press-release/mississippi-startup-files-first-amendment-countersuit-against-state-licensing-board/ (last visited Oct. 13, 2022); *North Carolina Drones*, https://ij.org/case/north-carolina-drones/ (last visited Oct. 13, 2022). In both cases, the state has argued that creating these images is the

unlicensed "practice of surveying," even though the maps and photos do not establish official property lines or have any other independent legal effect.

Other examples abound. In North Carolina, the state's dietetics board went through diet blogger Steve Cooksey's website with a red pen, specifying on a line-by-line basis which portions of his low-carb diet advice were the illegal, unlicensed practice of dietetics. *Cooksey v. Futrell*, 721 F.3d 226, 229–30 (4th Cir. 2013). Further south, the state of Florida conducted a sting operation against diet coach Heather Del Castillo after receiving a complaint that she had been offering dietary advice to willing clients. *See Del Castillo v. Philip*, No. 3:17-cv-722-MCR-HTC (N.D. Fla. filed July 17, 2019), available at https://ij.org/wp-content/uploads /2017/10/FL-Diet-Speech-Opinion.pdf. And even advice about animals isn't safe—in Texas, the state has argued that retired veterinarian Ron Hines may not offer any individualized advice about any animal, even to pet owners outside the United States, unless he has first physically examined the animal. *Hines v. Quillivan*, 982 F.3d 266 (5th Cir. 2020).

In each of these cases, the government argued—or is still arguing—that the plaintiff's speech is actually the "conduct" of practicing a profession, and thus receives no First Amendment protection. But if that were true, then there would be no limits to what could be cast out from the scope of the First Amendment. That is because all speech can be characterized, in some sense, as conduct. University

professors engage in the conduct of "instructing." Political consultants engage in the conduct of "strategizing." Stand-up comedians engage in the conduct of "inducing amusement." As the law of this Circuit now stands, sometimes the government will be able to get away with this labeling game—at least when the "conduct" being regulated consists of talk therapy. Other times, it won't. *See Pac. Coast Horseshoeing*, 961 F.3d at 1069. And future panels will be left to guess which path they should take. En banc hearing is therefore warranted to decide on a consistent rule governing this and any other occupational-speech cases.

II. The panel's ruling may harm the very people the government is trying to protect.

Even if one ignored the broad repercussions that the panel's ruling may have for other occupations, there is no reason to believe that ruling would be used only to help vulnerable groups, as Washington claims to be doing. Indeed, the holding that talk therapy is conduct, rather than speech, is just as likely to be wielded against such groups.

Consider Arkansas's recent enactment of Act 626, which prohibits physicians and other healthcare providers from providing or referring any person under the age of 18 for "gender transition procedures." Ark. Code § 20-9-1504. When advocates for transgender minors challenged that law's referral prohibition as a violation of the First Amendment, the government defended the law on precisely the grounds that the government urges here, arguing "that Act 626 is not

a regulation of speech but rather a regulation of professional conduct." *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 893 (E.D. Ark. 2021).

Citing *NIFLA*, the trial court rejected that argument and held that the law was a content-based restriction on speech subject to strict scrutiny. Finding that the government was unlikely to satisfy that standard, the trial court thus preliminarily enjoined the law, allowing the plaintiffs to receive referrals for medical care during their lawsuit. But had the trial court instead followed the lead of the panel here, it would have reviewed Arkansas's law with only rational-basis review, which it may well have survived.

If this Court does not rehear this case en banc and similarly repudiate the panel's misapplication of the Supreme Court's speech-conduct test, it will be inviting other states within the Ninth Circuit to enact laws like Arkansas's, not just on issues of gender identity, but on any number of other controversial issues. *See, e.g.*, *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (invalidating a Florida law that prohibited doctors from asking their patients about gun ownership). In a Circuit that spans nine politically diverse states and that is home to tens of millions of people, there is no telling what harm might follow.

But there is no reason to go down that road. As explained in part III of this brief, the panel's First Amendment ruling cannot be squared with binding

precedent, which requires that restrictions on talk therapy be treated as what they are: content-based restrictions on speech.

III. Supreme Court precedent establishes that talk therapy is speech, and content-based restrictions on talk therapy must be reviewed with strict scrutiny.

The panel correctly recognized that the central First Amendment question here is whether the Supreme Court's ruling in *NIFLA* abrogated this Circuit's earlier ruling in *Pickup*. It did, a fact this Circuit later recognized in *Pacific Coast Horseshoeing*. The panel's attempt to distinguish those cases by claiming they involved speech while both this case and *Pickup* involve conduct fails because *Pickup* itself did not undertake the speech-conduct analysis that both the Supreme Court and this Circuit have held is required. *See Pac. Coast Horseshoeing*, 961 F.3d at 1069 (applying the speech-conduct test set forth in *Humanitarian Law Project*, 561 U.S. at 28). Instead, *Pickup* engaged in exactly the sort of "labeling game" that *Humanitarian Law Project* foreclosed. *See Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc). But applying "ordinary First Amendment principles"—as *NIFLA* requires, 138 S. Ct. at 2375—shows that Washington's prohibition on plaintiff's talk therapy is a content-based restriction on speech that must be reviewed with strict scrutiny.

A. *NIFLA* abrogated *Pickup*.

Because talk therapy involves a therapist speaking with their client and "is not tied to a [separate] procedure," and because the government here has singled out talk therapy on a particular topic for disfavored treatment, Washington's law would ordinarily be considered a content-based restriction on speech that must be reviewed with strict scrutiny. *NIFLA*, 138 S. Ct. at 2373. The wrinkle, of course, is that this Court held precisely the opposite in *Pickup*. But *Pickup* is no longer good law. This is evident not only from the Supreme Court's ruling in *NIFLA*, but also from this Circuit's later decision in *Pacific Coast Horseshoeing*.

First, *NIFLA*. There, the Supreme Court held unconstitutional a compelled-speech requirement that applied to so-called crisis pregnancy centers. This Circuit had upheld the law, relying on *Pickup* to conclude that the law regulated only "professional speech," and was thus not subject to strict scrutiny.

The U.S. Supreme Court made short work of that argument, identifying *Pickup* by name and rejecting the "professional speech" doctrine it adopted. Here, Amicus will simply let the Supreme Court speak for itself:

- "Although the [challenged law] is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates 'professional speech.'"

- "Some Courts of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules. See, *e.g.*, . . . *Pickup v. Brown,* 740 F.3d 1208, 1227–1229 (9th Cir. 2014)";

- “But this Court has not recognized ‘professional speech’ as a separate category of speech.”

- “This Court’s precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.” (cleaned up)

- “This Court’s precedents do not recognize such a tradition for a category called ‘professional speech.’”

- “In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.”

NIFLA, 138 S. Ct. at 2371–75.

Under this Circuit’s case law, these statements are more than enough to show that *NIFLA* abrogated *Pickup*. As this Court has recognized, all that is necessary to meet this standard is that the Supreme Court’s ruling in *NIFLA* be “clearly irreconcilable” with *Pickup*. *Mille v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). That standard does not require that the Supreme Court identify circuit precedent by name and explicitly reject its holding—though the Supreme Court *has* done so here, which should eliminate all doubt.

If there had been any remaining doubt, though, this Court’s decision in *Pacific Coast Horseshoeing* resolved it. There, as here, the plaintiff was prohibited from speaking with clients (in that case, students) based on the subject-matter of his speech. There, as here, the trial court relied on *Pickup* to hold that the law regulated only conduct and not speech. And there, as this Court should do again

here, this Circuit recognized that *Pickup* had been "abrogated" by *NIFLA* and then went on to apply ordinary principles of First Amendment law. 961 F.3d at 1069 (applying *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) to conclude that the challenged law was a content-based regulation of speech).[2]

To be fair, the panel accepted that *NIFLA* had abrogated *Pickup* at least insofar as that decision adopted the so-called "professional speech doctrine." *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022). But it held that it was nonetheless bound by a different holding of *Pickup*—namely, that talk therapy conducted with the intent of changing someone's sexual orientation was "conduct," rather than speech. *Id.* at 1077.

This holding, however, is irreconcilable with *Pacific Coast Horseshoeing*, which squarely held that speech-conduct questions, even in the context of occupational-licensing laws, are governed by the Supreme Court's decision in

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[2] Other federal appellate courts have similarly recognized that *NIFLA* abrogated earlier decisions adopting the professional speech doctrine. *See Vizaline, LLC v. Tracy*, 949 F.3d 927, 933 (5th Cir. 2020) (holding that *NIFLA* abrogated *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015), in which the Fifth Circuit had adopted the professional speech doctrine); *Greater Phila. Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 149 n.242 (3d Cir. 2020) (recognizing that *NIFLA* abrogated *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014)); *see also Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020) ("[B]ecause *NIFLA* directly criticized *Pickup* and *King*—cases with very close facts to this one—we do not think there is much question that, even if some type of professional speech might conceivably fall outside the First Amendment, the speech at issue here does not.").

Humanitarian Law Project. *Pac. Coast Horseshoeing*, 961 F.3d at 1069 (noting that the correct standard is "that a law which 'may be described as direct at conduct' nevertheless implicates speech where 'the conduct triggering coverage under the statute consists of communicating a message" (quoting *Humanitarian Law Project*, 561 U.S. at 28)). The *Pickup* panel, though, said that *Humanitarian Law Project* had nothing to do with cases like this because that case concerned only "the regulation of (1) political speech (2) by ordinary citizens." *Pickup*, 840 F.3d at 1230.

That holding cannot be squared with *NIFLA*, which affirmed that, even in the context of professional-client relationships, "ordinary First Amendment principles" apply. 138 S. Ct. at 2375. And one of those principles is that the test for distinguishing speech from conduct is that set forth in *Humanitarian Law Project*. But as the law stands in this Circuit, although *Humanitarian Law Project* governs most challenges to restrictions on speech, for regulations on talk therapy (or at least some kinds of talk therapy) it does not. En banc review is therefore warranted to decide on a consistent approach to applying this binding Supreme Court precedent.[3]

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[3] And deciding between the two panel opinions should be easy, if only because *Pickup*'s description of *Humanitarian Law Project* is incorrect. The *Pickup* panel distinguished *Humanitarian Law Project* because it concerned only "political speech." 840 F.3d at 1230. But *Humanitarian Law Project* directly holds the

B. Applying ordinary First Amendment principles to Appellant's claim, Washington's law is a content-based restriction on speech subject to strict scrutiny.

Granting rehearing en banc would also allow this Court to bring its precedents into line with binding Supreme Court precedent, which makes clear that advice and counseling delivered through the spoken word is speech, not "conduct."

As noted above, the controlling case is *Holder v. Humanitarian Law Project*, in which the U.S. Supreme Court considered the constitutionality of a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorists. 561 U.S. 1, 6–11 (2010). The plaintiffs in that case included two U.S. citizens and six domestic organizations that wished, among other things, to provide "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* at 9, 14–15. They wanted, in other words, to give individualized advice solely through the spoken word.

They were prevented from doing so, however, because speech in the form of advice was illegal. Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources." *Id.* at 12. That term was

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opposite. 561 U.S. at 25 ("Plaintiffs claim that Congress has banned their 'pure political speech.' It has not." (citation omitted)). In other words, the *Humanitarian Law Project* opinion directly rejected the very holding that *Pickup* attributes to it.

defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance," defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* at 12–13. The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 24–39.

The government defended the law by arguing that the material-support prohibition was aimed at conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore only incidentally burdened the plaintiffs' expression. *Id.* at 26–27. But the U.S. Supreme Court emphatically and *unanimously* rejected that argument, holding that the material-support prohibition was a content-based regulation of speech subject to heightened scrutiny.[4] *Id.*

Most importantly, and in sharp conflict with the ruling below, the Supreme Court did not base its ruling on some metaphysical distinction between "speech" and "conduct." Instead, the Court took a commonsense approach to determining whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs were

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[4] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 26–28; *id.* at 45 (Breyer, J., dissenting).

allowed to communicate some things to designated terrorist groups but not other things:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

The Court also rejected the notion that the material-support prohibition could escape strict scrutiny because it "*generally* function[ed] as a regulation of conduct." *Id.* As the Court observed, even when a law "may be described as directed at conduct," strict scrutiny is still appropriate when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28.

This analysis applies to the First Amendment claim in this case. Plaintiff wishes to talk with his minor clients, and "whether [he] may do so . . . depends on what [he] say[s]." *Id.* at 27. If Plaintiff communicates "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity," his speech is permitted. Wash. Rev. Code § 18.130.020(4)(b). If, on the other hand, Plaintiff communicates advice on ways to "change behaviors

or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," his speech is prohibited. *Id.* § 18.130.020(4)(a). Further, just as in *Humanitarian Law Project*, although Washington's law may generally function as a ban on conduct, the "conduct" triggering application of the statute to Plaintiff consists entirely of speech.

Other pre-*NIFLA* decisions by the U.S. Supreme Court further support this conclusion. Most notably, *Reed v. Town of Gilbert* shows that the government's laudable motive for enacting the law—protecting the health of gay or transgender minors—does not insulate the law from ordinary First Amendment scrutiny. That is because "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained." *Reed*, 576 U.S. 155, 165 (2015) (cleaned up). "In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 166.

In short, Washington's restriction on talk therapy is a content-based restriction on speech and must be analyzed as such. That conclusion does not necessarily mean that the government will lose; Appellees may be able to show that conversion therapy is sufficiently harmful—and Washington's law sufficiently narrow—that the law survives strict scrutiny. But the government must be held to

that burden. If it is not, countless others who speak for a living will be wrongly deprived of their First Amendment rights.

CONCLUSION

The panel's ruling that individualized counseling is professional conduct and not constitutionally protected speech was error. This Court should reverse that ruling and apply the constitutionally required strict scrutiny, or remand this case to the district court for it to do so in the first instance.

Dated: October 14, 2022

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FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS
9TH CIR. CASE NUMBERS 21-35815 & 21-35856

I am the attorney or self-represented party.

This brief contains 4,132 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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Signature /s/ Paul M. Sherman **Date** October 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Paul M. Sherman
Paul M. Sherman
INSTITUTE FOR JUSTICE