No. 23-870

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTIAN LOPEZ,

Petitioner,

MERRICK B. GARLAND,
United States Attorney General

Respondent.

On Petition for Review of a Decision of the
Board of Immigration Appeals (No. A205-882-422)

BRIEF FOR THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that amicus curiae the American Immigration Lawyers Association has no corporate parent, and no publicly held corporation holds 10% of any stock it might issue.

Dated: November 20, 2024

s/ David J. Zimmer
David J. Zimmer

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INTEREST OF *AMICI CURIAE*[1]

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. As part of its mission, AILA provides trainings, information, and practice advisories to practitioners providing direct services to noncitizens, and to counsel representing noncitizens accused of criminal offenses in federal and state courts.

[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amicus* or their counsel contributed money that was intended to fund the preparation or submission of this brief. All parties have consented to filing of this brief.

INTRODUCTION

As the Petition explains, this Court should grant rehearing en banc because Mr. Lopez should not have been removed based on an interpretation of the phrase "single scheme" that this Court long rejected as conflicting with the statute's text. For sixty years, this Court held that "single scheme" does not mean "single *act*." *Szonyi v. Barr*, 942 F.3d 874, 876-77 (9th Cir. 2019) (Collins, J., dissenting from denial of rehearing en banc). This Court's about-face in *Szonyi* turned not on any error in this Court's longstanding reading of the statute, but instead on deference to the agency's second-best reading. *Szonyi*'s decision to elevate the agency's interpretation over this Court's indisputably conflicts with *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). Rehearing en banc is thus warranted to correctly interpret the statute, free from *Szonyi*'s deference-based interpretation of the phrase "single scheme."

Amicus AILA submits this brief to highlight an additional, related reason that rehearing en banc is warranted: To clarify when, in light of *Loper Bright*, a three-judge panel has the authority to reconsider prior circuit precedent that relied on *Chevron*. That question is of fundamental importance because there are countless circuit precedents that deferred to agencies. A subset of those precedents include cases that, like *Szonyi*, engaged in little reasoning beyond describing the statute as ambiguous and the agency's decision as reasonable. The question of

whether and to what extent a three-judge panel is bound by *Chevron*-reliant precedent is a pressing and exceedingly important one that this Circuit should address en banc. While much *Chevron*-reliant precedent can likely be reconciled with *Loper Bright*, there are some cases (like *Szonyi*) that cannot. Articulating the proper test for when a three-judge panel can reconsider such *Chevron*-reliant cases is precisely the kind of task that calls for en banc review.

This case provides an ideal vehicle to address that question because the panel answered it in two conflicting ways. Addressing the meaning of theft-based moral-turpitude offenses, the panel held that it was *not* bound by *Chevron*-reliant precedent (*Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009)) deferring to an agency decision narrowly construing moral-turpitude theft offenses to exclude temporary takings. Addressing the meaning of "single scheme," however, the panel held that it *was* bound by *Chevron*-reliant precedent (*Szonyi*) deferring to an agency decision interpreting "single scheme" to mean "single act." The panel did not justify those disparate approaches based on the role *Chevron* played in those precedents. Instead, the panel's only explanation for treating *Chevron*-reliant cases differently is that the agency had changed positions on the first issue since *Castillo-Cruz* was decided, but had not changed positions as to the second issue since *Szonyi* was decided.

The upshot of that approach is that *Chevron*-reliant circuit precedent is categorically binding unless the government rejects that precedent. That is both fundamentally unfair and clearly wrong. Given *Loper Bright*'s holding that agency interpretations of statutes are effectively irrelevant, determining whether this Court is bound by its *Chevron*-reliant precedent should not depend on whether the agency has since changed position. Put simply, the government should not be able to wave its hand and wipe out precedent with which it now disagrees while insisting that everyone else remains bound by *Chevron*-reliant precedent no matter how inconsistent it may be with the statutory text.

Given the inequity and logical flaws in the panel's treatment of *Chevron*-reliant precedent, this Court should grant rehearing en banc and hold that panels should apply this Court's longstanding rule from *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), under which a panel is not bound by *Chevron*-reliant precedent when its reasoning is "clearly irreconcilable" with *Loper Bright*.

ARGUMENT

As the Petition explains, rehearing en banc is warranted for multiple reasons. AILA submits this brief to highlight one particular reason for en banc review: To clarify when a three-judge panel of this Court is bound by pre-*Loper Bright* circuit precedent that relies on *Chevron*. The panel reached flawed and inconsistent answers to that exceptionally important question.

I. The Panel's Rule of Decision as to Which Circuit Precedent is Binding Is Flawed and Fundamentally Unfair to Non-Government Parties

A. *Miller v. Gammie* establishes the framework through which panels assess the continued vitality of circuit precedent.

Twenty years ago, in *Miller v. Gammie*, this Court established the now well-settled standard for deciding when a three-judge panel may disregard precedent due to intervening legal authority. This Court, sitting en banc, held that where intervening authority is "clearly irreconcilable" with a circuit precedent, "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." 335 F.3d at 900. Importantly, the "issues decided by the higher court need not be identical in order to be controlling." *Id.* Rather, the higher authority "must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*; *see also Tapia Coria v. Garland*, 114 F.4th 994, 1008-09 (9th Cir. 2024) (precedent no longer binding because intervening Supreme Court decision "did not directly address" the legal issue but "direct[ed] a completely different approach" to interpreting the relevant statute).

For more than two decades, *Miller v. Gammie* has guided three-judge panels in deciding if circuit precedent remains good law. It remains the correct lens

through which to determine which *Chevron*-reliant precedents remain good law after *Loper Bright*.

B. The panel inconsistently and erroneously applied *Miller v. Gammie.*

This case requires this Court to address two questions of statutory interpretation: (1) whether a temporary taking of another's property involves moral turpitude, and (2) whether Mr. Lopez's crimes constituted a "single scheme of criminal misconduct." *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (a noncitizen "who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct … is deportable."). As to both issues, this Court had on-point precedent deferring to the BIA. For the first question, this Court had repeatedly deferred to the BIA's holding that "a taking with intent to deprive the owner of his property only temporarily" is not morally turpitudinous. *See Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc); *Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1294 (9th Cir. 2018); *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1088 (9th Cir. 2017); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159 (9th Cir. 2009). Under that precedent, Mr. Lopez would prevail because Reno's municipal code, pursuant to which Mr. Lopez was convicted for petty theft, covered temporary takings. *See* Reno Municipal Code § 8.10.040.

For the second question, this Court had initially interpreted the statute to interpret the "single scheme" phrase broadly—*i.e.*, in a manner favorable to noncitizens like Mr. Lopez. That broad interpretation did not rest on agency deference and was the law of this Court for sixty years. *See Wood v. Hoy*, 266 F.2d 825 (9th Cir. 1959); *see also Gonzalez-Sandoval v. INS*, 910 F.2d 614 (9th Cir. 1990) (reaffirming *Wood*); *Leon-Hernandez v. INS*, 926 F.2d 902 (9th Cir. 1991) (same). Subsequently, though, the BIA adopted a narrower approach to the "single scheme" phrase, and this Court deferred to that government-friendly view with little reasoning in *Szonyi*. There can be little dispute that, under *Loper Bright*, *Szonyi*'s approach to statutory interpretation was wrong and this Court's deference-free approach to statutory interpretation in cases dating back to *Wood* was correct.

Under *Miller v. Gammie*, the panel should have considered, for each issue, whether *Loper Bright* "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." 335 F.3d at 900. That inquiry should look, among other things, to the role that *Chevron* played in the relevant precedent. If deference was invoked as simply one of multiple bases for upholding the agency's decision, then *Loper Bright* likely would not sufficiently undercut the prior decision to deprive it of its precedential force.

By contrast, the reasoning of a limited set of *Chevron*-reliant precedent has clearly been undercut by *Loper Bright*. For instance, some precedent expressly

noted that an agency's interpretation was not the best reading of the statute, but nevertheless deferred to the agency. And other cases failed to engage with any of the traditional tools of statutory interpretation, which indicates that *Chevron* deference was not merely a framework through which to interpret the statute but rather was the exclusive basis of the decision. In such cases, *Loper Bright* likely *did* displace that precedent. That inquiry is especially important in the immigration context: Noncitizens should not be ordered removed based on *Chevron*-reliant precedent that was clearly wrongly decided in light of *Loper Bright*.

The panel's decision in this case, however, did not faithfully apply *Miller v. Gammie*, but instead invented a novel approach specific to *Chevron*-reliant precedent—one that requires categorically adhering to precedent the government likes, regardless whether it is reconcilable with *Loper Bright*, and revisiting precedent the government has rejected. Specifically, the panel held that it was *not* bound by this Court's decision deferring to the agency's less government-friendly view that temporary takings are non-turpitudinous, but that it *was* bound by this Court's decision deferring to the agency's government-friendly view that "single scheme" means "single act."

The panel's justification for this split approach was that, on the moral-turpitude question, the BIA had revisited its interpretation of morally turpitudinous theft offenses after this Court had deferred to BIA's prior approach to temporary

takings. Specifically, in *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016), the BIA rejected its prior interpretation and held that temporary takings are, in fact, morally turpitudinous. *Lopez v. Garland*, 116 F.4th 1032, 1041 (9th Cir. 2024). The panel concluded that, because this Court had never considered whether it should defer to *Diaz-Lizarraga*'s government-friendly view, the panel was not bound by its prior precedent (including its en banc decision in *Almanza-Arenas*) deferring to the Board's less government-friendly view. 116 F. 4th at 1041. On the single-scheme issue, however, the agency had not changed position from the one to which this Court deferred in *Szonyi*. The panel held, with little reasoning, that "*Szonyi* remains precedential authority which binds us" because it was not clearly irreconcilable with intervening higher authority. 116 F. 4th at 1045

The net result is that, under the panel's decision, the question whether a three-judge panel is bound by *Chevron*-reliant precedent is entirely dependent on the agency's whims. If the agency has maintained the position to which this Court previously deferred, a panel is bound by the *Chevron*-reliant decision, no matter how irreconcilable that precedent is with *Loper Bright*. By contrast, if the agency does not like the position to which this Court deferred, the agency can simply

change positions, which frees this Court from its prior decision and allows this Court to adopt its own, independent interpretation of the statute.[2]

That approach has no basis in *Miller v. Gammie*. While the panel purported to invoke *Miller v. Gammie* in describing *Szonyi* as not clearly irreconcilable with intervening higher authority, the panel gave no explanation as to *why* it thought so. As described above, *Szonyi* jettisoned six decades of consistent precedent from this Court that interpreted the phrase "single scheme" without deferring to the agency. And it did so based solely on a cursory analysis that described the statute as ambiguous and the agency's interpretation as reasonable. It is hard to imagine reasoning more inconsistent with *Loper Bright*.

Moreover, by giving the government the power to determine the precedential weight of *Chevron*-reliant holdings, the panel's approach conflicts with *Loper Bright* itself. *Loper Bright* held that "courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action," 144 S. Ct. at 2261 (emphasis omitted), and that "agencies have no special competence in resolving statutory ambiguities. Courts do," *id.* at 2266. But under the panel's approach, agencies have practically full control as to whether *Chevron*-reliant precedent remains good

[2] That said, the panel's analysis of the scope of theft-related moral-turpitude offenses did not engage in the independent analysis *Loper Bright* requires but instead improperly applied a *Chevron*-like deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

law. If the agency likes an interpretation to which this Court deferred, it can effectively lock all three-judge panels of this Court into that interpretation, no matter how cursory this Court's analysis or how egregiously the interpretation conflicts with the statute itself. If the agency does not like an interpretation to which this Court deferred, however, the agency can simply change position, which magically wipes this Court's precedent off the books. Giving agencies that control sharply conflicts with *Loper Bright*'s attempt to shift statutory interpretation away from agencies and to the courts.

Indeed, the panel's approach effectively resurrects *National Cable & Telecommunications Association v. Brand X Internet Services*, which *Loper Bright* rejected. 545 U.S. 967 (2005). Under *Brand X*, the fact that the government had changed its mind about the meaning of the statute *was* relevant because *Chevron* "force[d] courts" to "mechanically afford *binding* deference to agency interpretations, including those that have been inconsistent over time" and "even when a pre-existing judicial precedent [held] that [an ambiguous] statute mean[t] something else." *Loper Bright*, 144 S. Ct. at 2265. But *Loper Bright* razed that regime. The only relevant question is whether this Court has interpreted the statute, and whether that interpretation is still good law under *Miller v. Gammie*. Aside from their power to persuade under *Skidmore* or some specific statutory

delegation of authority not present here, the agency's positions are no longer relevant to the courts' task and duty to interpret statutes.

Additionally, the panel's approach is fundamentally unfair to non-Executive Branch parties who do not control government agencies and thus cannot erase circuit precedent. *See Loper Bright*, 144 S. Ct. at 2288 (Gorsuch J., concurring) ("[O]rdinary people can do none of those things. They are the ones who suffer the worst kind of regulatory whiplash *Chevron* invites."). Put simply, on the panel's view, the government can wipe away any *Chevron*-reliant precedent it wants (no matter how consistent with *Loper Bright*) while a regulated party is bound by all *Chevron*-reliant precedent (no matter how inconsistent with *Loper Bright*). Stacking the deck for the government in this way is both deeply unfair and inconsistent with *Miller v. Gammie*, which instructs panels to focus on whether the reasoning of this Court's precedent is consistent with intervening authority.

Finally, the panel's suggestion that *Chevron*-based precedent remains binding even as to the limited set of cases that are irreconcilable with *Loper Bright* is itself erroneous, conflicts with *Miller v. Gammie*, and will waste the Court's resources. As *Loper Bright* recognized, noncitizens should not face removal from this country—including potential separation from family and persecution upon their removal—because of agency action that conflicts with the statute's best meaning. 144 S. Ct. at 2289 (Gorsuch J., concurring) (Individuals "are entitled to

make their arguments about the law[] … on equal footing with the government."). Yet under the panel's approach, noncitizens can and often will be removed based on flawed interpretations simply because this Court previously deferred to the BIA's incorrect statutory interpretation. Moreover, under the panel's approach, the only way to avoid this injustice is for this Court to go en banc to correct every prior decision that improperly deferred to an incorrect agency interpretation. The "pragmatic approach[]" to evolving law that this Court adopted in *Miller v. Gammie* was intended to avoid precisely that injustice and waste of judicial resources. 335 F.3d at 899-900.

C. *Loper Bright* does not justify a departure from *Miller v. Gammie*.

As the panel noted, *Loper Bright* stated that it did "not call into question" the "holdings" of *Chevron*-reliant cases that "specific agency actions are lawful." 144 S. Ct. at 2273. Those cases are "still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology." *Id.* And under the doctrine of statutory stare decisis, "[m]ere reliance on *Chevron* cannot constitute a 'special justification' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.'" *Id.* For multiple reasons, nothing about this part of *Loper Bright* displaces *Miller v. Gammie* in the context of *Chevron*-reliant precedent.

First, given its reference to "statutory *stare decisis*," it is unclear whether this part of *Loper Bright* even applies to the courts of appeals as opposed to just the Supreme Court. *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 318 (2005) ("Whatever the merits of statutory stare decisis in the Supreme Court, the inferior courts have no sound basis for following the Supreme Court's practice."). In any case, the way that *stare decisis* applies at the three-judge panel level *is* through the *Miller v. Gammie* framework. "The most important stare decisis principle in the courts of appeals is that one panel cannot overrule another," *id.* at 328, unless that precedent is "clearly irreconcilable" with intervening higher authority, 335 F.3d at 900. Indeed, panels do not apply the *stare decisis* factors to prior circuit precedent at all—they typically remain bound by circuit precedent no matter how that panel might apply the type of *stare decisis* analysis that the Supreme Court applies when considering whether to adhere to its own precedent. Instead, the only time in which a three-judge panel can reject a prior panel decision is when it decides that the prior decision is clearly irreconcilable with intervening higher authority. Thus, the *Lopez* panel should have adhered to "statutory *stare decisis*" principles by applying *Miller v. Gammie*.

Second, *Loper Bright* actually suggests that some *Chevron*–reliant precedent *can* be reconsidered. The Court noted that "[m]ere reliance on *Chevron*" is not

enough to call into question a holding in a prior case. 144 S. Ct. at 2273. That leaves open the possibility that reliance on *Chevron*, in addition to other factors, should prompt reconsideration. *Miller v. Gammie* does not establish that reliance on *Chevron alone* is enough to warrant jettisoning prior precedent. So applying *Miller v. Gammie* in no way conflicts with the principle that "[m]ere reliance on *Chevron*" is not enough to invalidate precedent. In addition, nothing in *Loper Bright* suggests that this Court must go en banc to correct every single case in which this Court deferred to an agency decision that adopted a flawed interpretation of a statute.

Third, and at the very least, nothing in *Loper Bright* supports the panel's view that the government, and only the government, can avoid precedent it does not like. In particular, the panel gets no help from *Loper Bright*'s statement that it does not "call into question" the "holdings" of *Chevron*-reliant cases that "specific agency actions are lawful," 144 S. Ct. at 2273. To be sure, this Court had not, before this case, explicitly considered whether the agency, in *Diaz-Lizarraga*, lawfully interpreted moral turpitude to encompass temporary takings. But this Court *had* held that the agency had lawfully interpreted moral turpitude to *exclude* temporary takings. If that Circuit precedent is binding—*i.e.*, the holding that the agency had lawfully interpreted moral turpitude to exclude temporary takings—then it cannot, post-*Loper Bright*, *also* be lawful for the agency to interpret moral

turpitude to *include* temporary takings. In other words, in a post-*Loper Bright* world in which a statute has one meaning, the agency cannot have lawfully interpreted the statute in two conflicting ways.

* * *

In sum, this Court should grant rehearing en banc and hold that whether a given *Chevron*-reliant precedent remains binding depends on a case-by-case application of *Miller v. Gammie*. Where, for instance, the prior precedent either strongly suggested that the best reading of the statute cuts against the agency or provided effectively no reasoning before summarily deferring to the agency under *Chevron*, that precedent is no longer binding because its "theory or reasoning" are blatantly inconsistent with *Loper Bright*. *Miller*, 335 F.3d at 900. In such cases, the court so clearly failed to "exercise independent judgment in determining the meaning of statutory provisions" that adhering to that precedent after *Loper Bright* is untenable. 144 S. Ct. at 2262. On the other hand, where prior precedent applied the *Chevron* framework but provided robust reasoning and analysis supporting the agency's view, there would be little basis to presume that the court would have reached a different conclusion without *Chevron* deference, and the decision would remain binding. This approach harmonizes *Loper Bright* with *Miller v. Gammie*, avoids flagrant injustice, and preserves judicial resources.

II. The Question Whether and When Three-Judge Panels Are Bound By *Chevron*-Reliant Precedent Warrants Rehearing En Banc.

A. The question is exceptionally important.

There can be no serious dispute that the question of how this Court treats *Chevron*-reliant precedent in light of *Loper Bright* is exceptionally important, especially in the context of immigration law. For decades, this Court deferred to the BIA's interpretation of the INA. In many of those cases, this Court sought to interpret the statute in addition to invoking *Chevron* deference. *E.g.*, *Diaz-Rodriguez v. Garland*, 55 F.4th 697 (9th Cir. 2022) (en banc), *vacated*, 144 S. Ct. 2705 (2024). But in some cases, this Court (like other courts of appeals) did little more than describe the statute as ambiguous and the agency's decision as reasonable—often over the course of a few short sentences or paragraphs that essentially summarized the agency's decision. *E.g.*, *Moscoso-Castellanos v. Lynch*, 803 F.3d 1079, 1083 (9th Cir. 2015), *abrogated by Pereira v. Sessions*, 585 U.S. 198 (2018); *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397 (9th Cir. 1987). Cases applying such "reflexive deference," *Pereira*, 585 U.S. at 221 (Kennedy, J., concurring), are plainly irreconcilable with *Loper Bright*. The question whether they nevertheless remain binding on three-judge panels—forcing those panels to uphold removal orders even though no federal court has seriously evaluated the statutory interpretation on which those orders rest—is of exceptional importance to noncitizens in particular and to regulated parties more generally.

Rehearing is particularly warranted given that the panel decided this exceptionally important question without briefing from the parties on this issue. As the petition explains, the briefing in this case was completed before *Loper Bright*. After *Loper Bright*, the government filed an unopposed motion for supplemental briefing—briefing that presumably would have laid out the various arguments as to *Loper Bright*'s impact on *Chevron*-reliant precedent like *Szonyi*. *See* ECF 37. Yet the panel did not allow supplemental briefing. *See* ECF 38. A question as important as this one should be resolved en banc and with the benefit of briefing from the parties.

B. The question is appropriate for the en banc Court.

In some sense, the question of when a three-judge panel is bound by a prior three-judge-panel decision is an odd one for the en banc Court. When this Court grants a petition for rehearing en banc, the panel decision is vacated and the en banc Court is not bound by panel precedent. At that point, whether the three-judge panel was bound by another three-judge panel decision might be considered irrelevant.

In *Miller v. Gammie*, however, this Court correctly recognized that, because the question of when a three-judge panel is bound by prior precedent is so important to the functioning of this Circuit, it is still an appropriate issue for the en banc Court to address. 335 F.3d at 899-900. The majority opinion reached the

issue of which circuit precedent binds three-judge panels thereby establishing an important rule for how this Circuit operates. *Id.* Two concurrences addressed whether that holding was "dicta" and both rejected the conclusion that it was non-binding dicta. *Id.* at 901 (Kozinski, J., concurring); *id.* at 902-03 (Tashima, J., concurring). *Miller v. Gammie*'s approach makes sense and supports granting rehearing. If the en banc Court did not have the power to bind three-judge panels on this issue, then this Court would be unable to ensure uniform deference principles across the Circuit.

CONCLUSION

This Court should grant the petition for rehearing en banc to address how three-judge panels review *Chevron*-reliant panel precedent after *Loper Bright*.

Dated: November 20, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 29(b)(4) and Circuit Rule 29-2(c)(2) because it contains 4,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: November 20, 2024

s/ David J. Zimmer
David J. Zimmer

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 20, 2024. I certify that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

Dated: November 20, 2024

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