CASE NO. 24-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AZADEH KHATIBI, M.D., *et al*.,

Plaintiffs-Appellants,

v.

RANDY W. HAWKINS, in his official capacity as President of the Medical Board of California, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California, 2:23-cv-06195-MRA-E (Hon. Mónica Ramírez Almadani)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because it concerns whether the government can control a private lecturer's speech by regulating protected academic expression.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The National Association of Criminal Defense Lawyers hosts a variety of lectures and seminars that qualify for Continuing Legal Education ("CLE") credits. Practicing attorneys in the state of California, much like practicing doctors, are statutorily obligated to earn a certain number of continuing education credits every few years. In one of the Association's upcoming events, its lecturers plan to discuss

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

the intricacies of defending drug crimes.[2] The Association's lectures during this seminar will no doubt be meticulously crafted (as they always are) by its presenters, down to the most minute detail. But unfortunately, if this seminar were to be hosted in the Central District of California, it would not be protected by the First Amendment under the reasoning of the court below.

Under the reasoning of the district court's decision in this case, the Association's CLE lectures do not belong to the Association's presenters—their speech belongs to the California government. The district court interpreted the "government speech" doctrine to encompass any speech that the state chooses to regulate under its authority to oversee professional licensure. Under the district court's reasoning, California could mandate that CLE instructors express *pro*-prosecution viewpoints, even when the subject of their lesson is criminal defense. If presenters want their lectures to qualify for continuing education credits, they must let the government, at its discretion, tell them what they must say.

Under the district court's reasoning, there is no limit to what a state could force into the mouths of professional development instructors. A state could mandate that a critic of originalism include arguments in favor of originalism; or that CLE lecturers discussing the Second Amendment must endorse the majority opinion in

[2] *NACDL's 17th Annual Seminar: Defending Modern Drug Cases,* NAT'L ASS'N OF CRIM. DEF. LAWS. (last visited Aug. 25, 2024), https://tinyurl.com/yc6em9xm.

Heller (or must endorse the dissent in *Heller*); or that lecturers must teach (or even endorse) the unitary executive theory in all courses discussing the power of the President; or that lecturers must endorse a strong nondelegation doctrine in any lecture on administrative law.

These issues are familiar to lawyers as controversial topics that deserve free and unrestricted debate. But the implications of the district court's opinion are no less scary in the context of continuing medical education. Under California's new continuing medical education ("CME") requirements, all state-accredited courses or lectures must include a discussion about the impact of implicit bias. Cal. Bus & Prof. Code § 2190.1(d)(1). Private lecturers (medical doctors and academics) must frame their discussion of implicit bias in line with the state's favored viewpoint. These lecturers must address implicit bias even if they think doing so is counterproductive or irrelevant to the subjects they are teaching.

Appellants (a collection of medical doctors and course instructors) sued the Californian Medical board over this requirement. They argued that the new implicit bias mandate violates their First Amendment rights against compelled speech. But the district court disagreed and dismissed their case. Instead, the court held that appellants' lectures were government speech and thus afforded no First Amendment protection.

This decision is wrong for all the reasons appellants explain in their principal brief. *Amicus* writes separately to urge this Court to resolve a conflict between speech doctrines and to stress the importance of academic freedom in the context of post-doctoral, continued education.

First, the government speech doctrine does not supersede the compelled speech doctrine. To determine whether the speech at issue is government speech rather than private speech, the court below focused on the amount of control the government exerts over a privately created message. But hinging the test for government speech on government control would incentivize a government to over-regulate private speech to evade First Amendment scrutiny. Courts should instead focus on determining whether the government has adopted private speech as its own or has empowered a consenting private person to speak on its behalf. Under a proper government speech analysis, the implicit bias mandate at issue in this case is not government speech.

Second, the government's attempt to regulate CME instruction violates basic tenets of academic freedom. The First Amendment freedom of speech protects academic expression, even in state-controlled universities. CME instructors should be afforded no less protection when teaching in a private capacity, independent from the state.

For these reasons, the district court's decision to dismiss appellants' case should be set aside.

ARGUMENT

I. COURTS SHOULD NOT READ THE GOVERNMENT SPEECH DOCTRINE AS EMPOWERING THE GOVERNMENT TO COMPEL PRIVATE EXPRESSION.

The government speech doctrine recognizes that the government itself is an entity that is free to express its own viewpoints. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001). But sometimes disputes arise as to whether speech is really that of the government or a private party. In answering this question, one factor that courts consider is "the extent to which the government has actively shaped or controlled the expression" of a speaker. *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022). The more control the government exercises in shaping a message, the more likely that courts will consider that message to be government speech.

But this is not the only factor in the analysis, and it must have limits. If the government could transform any private speech into government speech merely by excessively regulating it, then the government could bypass important First Amendment protections by overregulating private expression. This approach would pose a great danger to the speech rights of every American. The better approach is to analyze *Shurtleff*'s "control" prong in conjunction with other important factors. Control alone should not be understood as the sole factor in determining government

speech. Rather, speech should only be understood as the government's when the government *adopts* private speech as its own or *jointly* speaks with a consenting private entity.

To be sure, control is an important factor in determining what constitutes government speech. Government speech is the "purposeful communication of a governmentally determined message by a person exercising a *power* to speak for a government." *Shurtleff*, 596 U.S. at 268 (Alito, J., concurring) (emphasis added). Control over the government's message is key because "governments are not natural persons" and "can only communicate through human agents who have been given the power to speak" for them. *Id*. If those government agents could claim a First Amendment right to shape the government's message for themselves, the government would not be able to effectively voice its own positions. *See Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

In cases where the government speaker is an agent of the government itself (for example, an employee or contractor), determining governmental control is simple. If the agent charged with speaking for the government is acting within the scope of their official duties when communicating a message, they "are not speaking as citizens for First Amendment purposes." *Id*. at 421. This is true because the employee owes their ability to speak for the government to their employment.

However, determining the level of control the government exercises over a non-agent's message is more difficult. When a private person delivers what is claimed to be a government message, the control that the government exerts over that message may be less evident. And further complicating this analysis, a private speaker is rarely claiming to speak for the government. It is usually the government that claims control over the speaker's message, so that it may evade First Amendment scrutiny.

But the government may, nonetheless, speak through private actors. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995). And to determine whether the government is speaking through a private person, one factor is the amount of control the government exercised in shaping the message of the speaker. *Shurtleff*, 596 U.S. at 252. If a private speaker is simply a conduit for the government's message, then no First Amendment inquiry is necessary because there was no private speech for the Constitution to protect.

However, this rule should not be extended beyond private persons *voluntarily* working alongside the government to craft a public message. Otherwise, the government speech doctrine would incentivize the government to tighten its control over private speech. As the government increasingly regulates private expression, it would become more likely to successfully assert ownership over that speech, effectively circumventing the First Amendment. That is a problem because when the

government compels private parties to speak (even on the government's behalf), it runs afoul of another First Amendment principle that protects private expression: the compelled speech doctrine.

The compelled speech doctrine protects private citizens from being forced to speak or carry a governmentally prescribed message. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018). The government speech doctrine and compelled speech doctrine may appear to clash when the government attempts to force private speakers to help create and convey the government's preferred message. But Supreme Court precedent offers an effective way to harmonize them. *Shurtleff*'s "control" prong should be understood within the context of the Supreme Court's other government speech precedents. *See Matal v. Tam*, 582 U.S. 218, 235 (2017) (instructing that courts should not depart from the context of government speech cases when analyzing government speech claims). Lower courts applying *Shurtleff*'s control test should first determine whether either of the following hold true: Did the private person *voluntarily* assume a power to speak for the state, or did the government (through an agent of the state) adopt that person's private speech as its own? *See Shurtleff*, 596 U.S. at 270–71 (Alito, J., concurring). These are the "two ways in which a government can speak using private assistance." *Id.* at 270. In the first instance, the government's control over private speech is cabined to only those persons voluntarily working alongside the government. In the second instance, the

government has not compelled private speech at all; the government is simply parroting a privately crafted message as its own. And in both cases, the level of control the government exerts over consenting, *private* expression is equivalent to the control the government exerts over its own agents' messages. In either scenario, the final message is delivered by a government agent or someone authorized to speak on the government's behalf. *See id*. at 268 ("[F]or 'speech' [to have been] spoken by the government, the relevant act of communication must be government action.").[3]

The Court's "control" analysis under *Shurtleff* should be understood as limited to these two contexts—the government adopting private speech as its own or jointly speaking with a consenting private entity. This understanding of *Shurtleff* harmonizes the government speech doctrine with the compelled speech doctrine and ensures that no private person is forced to speak, create, or carry an unwanted

[3] Justice Alito's reasoning in *Shurtleff* best mirrors the Court's reasoning in *Matal v. Tam*. In *Matal*, there were four characteristics that the Court seized on in determining that submitted trademarks were not sufficiently controlled by the government to constitute government speech: (1) the trademarks were not "dream[ed] up" by the government, (2) the government did not edit the trademarks' substance, (3) the government's rules were otherwise viewpoint-neutral, and (4) acceptance of the speech at issue was mandatory. 582 U.S. at 235–36. All these consideration concern whether the trademark office (1) created the speech contained within the trademarks or (2) was effectively adopting submitted trademarks as its own speech. The Court concluded that it did neither.

government message.[4] And this analysis also ensures that the government has ample control over its agents' and other cooperative actors' speech—because those persons are truly speaking on the government's behalf.

Understanding the *Shurtleff* control test in this manner harmonizes it with every Supreme Court ruling on government speech. *See e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (finding that the government does not violate the First Amendment by accepting and displaying a privately donated statue in a public park, because doing so effectively transforms the statue into government expression); *Matal*, 582 U.S. at 235 (finding that registered trademarks did not constitute government speech because the marks were "dream[ed] up" by private parties and the government did not take ownership of them); *id*. at 237 (describing the Court's decision in *Johanns v. Livestock Marketing Ass'n,* 544 U.S. 550 (2005), as turning on the government agent in charge of controlling and editing the submitted private speech for the agency's own purposes). In line with these precedents, the government speech doctrine must be confined to truly *governmental* expression. The Supreme Court has instructed lower courts to do no less. *See Matal*, 582 U.S. at 235.

[4] *See e.g.*, *Anderson Fed'n of Teachers v. Rokita*, 666 F. Supp. 3d 789, 801 (S.D. Ind. 2023) ("Government speech is not, however, 'exempt from First Amendment attack if it uses a means that restricts private expression in a way that "abridges" the freedom of speech, as is the case with compelled speech.'").

For these reasons, lower courts should focus their analysis under the "control" prong of the government speech doctrine to determining whether the government has sufficiently claimed private speech as its own or empowered a consenting private party to speak for the government.

II. CME INSTRUCTORS' SPEECH IS NOT GOVERNMENT SPEECH.

The Supreme Court "conduct[s] a holistic inquiry" to determine whether expression is government speech. *Shurtleff*, 596 U.S. at 252. In conducting that inquiry, courts must consider three main factors: (1) "the history of the expression at issue"; (2) "the public's likely perception as to who (the government or a private person) is speaking"; and (3) "the extent to which the government has actively shaped or controlled the expression." *Id*. When weighing these factors, lower courts "must exercise great caution before extending [the Supreme Court's] government-speech precedents," because the failure to do so renders the doctrine "susceptible to dangerous misuse." *Matal*, 582 U.S. at 235.

The district court failed to heed *Matal*'s warning against extending the government speech doctrine beyond the Supreme Court's precedents. Instead, the district court held that California exercised transformative control over the speech of non-consenting private speakers, namely CME instructors. Even more troubling, the court observed that this control was exercised even though the speech at issue was fully developed by private speakers at the government's command. *Khatibi v.*

Hawkins, No. 2:23-cv-06195-MRA-E, 2024 U.S. Dist. LEXIS 81485, at *18–19 (C.D. Cal. May 2, 2024). These conclusions were wrong, and the district court should be reversed.

California law requires that "all [CME] courses . . . contain curriculum that includes the understanding of implicit bias." Cal. Bus & Prof. Code § 2190.1(d)(1). To satisfy this requirement, all CME course instructors must develop, as a part of their lesson, (1) "[e]xamples of how implicit bias affects perceptions and treatment decisions of physicians and surgeons, leading to disparities in outcomes," or (2) "[s]trategies to address how unintended bias in decisionmaking may contribute to health care disparities by shaping behavior and producing differences in medical treatment along lines of [a protected class]." *Id.* § 2190.1(e). Instructors who fail to develop examples or strategies to address implicit bias will have their offending courses disaccredited upon audit.

The implicit bias mandate forces private speakers (CME instructors) to craft a message that aligns with the government's views on a politically sensitive issue. The law is not a simple disclosure rule; it does not simply mandate that CME instructors recite a rote government message. The law requires much more. To comply with the law, CME instructors must develop a message that the state wants propagated within medical academia. CME instructors must utilize their professional expertise and develop arguments and explanations about how implicit bias affects

health care discrepancies in their field. It does not matter that some CME instructors may disagree with the arguments they have to develop and teach; even if instructors believe that implicit bias does not affect healthcare outcomes in their field, they are still required to argue that it does.

The government cannot mandate speech creation in this way and then claim the protection of the government speech doctrine. CME instructors are not state actors empowered to speak for the government. CME instructors are not state employees and do not possess any official state duties. Nor is the government adopting CME instructors' speech as its own. In fact, the law does the opposite. The law mandates that CME instructors *privately* develop arguments that the government prefers and speak those arguments as a part of instructors' *private* lessons. At no point in this process is the speech at issue recited by a government agent or someone empowered to speak on the government's behalf. The lack of government control over CME instructors' speech renders the implicit bias mandate just that, a mandate that private speech be created in line with the government's preferred viewpoint. Such a law compels the creation of speech in violation of the First Amendment.

The district court resisted this conclusion on two grounds. First, the district court concluded that CME instructors are voluntarily assisting the government in the creation of CME courses. This conclusion was wrong. The California government has the power to subject the practice of medicine to licensure. The government has

exercised that power here, putting in place regulations on what instruction post-doctoral education medical practitioners must receive to be compliant. But instead of providing those courses itself, the government relies on independent private instructors to provide that education.

It is misleading to say that the CME instructors in this case voluntarily complied with the implicit bias requirements to obtain a government benefit. The CME instructors in this case do not work for the state of California; they do not receive any monetary benefit for their courses from either the board or the state. CME instructors comply with continued education laws because they must in order for their classes to be accredited. The only "benefit" that CME instructors receive for complying with the implicit bias regulations is continued accreditation. But accreditation is not enough to transform private speech into government speech. The government does not transform a private speaker's message into the government's by conferring that speech certain privileges. *See Iancu v. Brunetti*, 588 U.S. 388, 404 (2019) (explaining that despite the government being "loosely associated with the [trade]mark because it registers the mark and confers certain benefits upon the owner" the "trademark statute cannot easily be described as a regulation of 'government speech'")

Rather, "the ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is

surreptitiously engaged in the 'regulation of private speech.'" *Shurtleff*, 596 U.S. at 263. The government here is neither working alongside private speakers to craft speech nor mandating what must be taught in its government schools. Rather, the government here is using its power of licensure to dictate the viewpoint that private instructors must teach regarding a divisive and unrelated political issue. In this way, the government is using its power of licensure to exercise undue influence over what viewpoint CME instructors must teach in their private capacity as academics; the state is not disseminating its own message through consenting private actors.

Second, the district court concluded that the government exercised editorial control over CME instructors via government audits, which in its estimation was sufficient to transform instructors' private speech into the government's own. *Khatibi*, 2024 U.S. Dist. LEXIS 81485, at *22–23. True, the government audits CME courses to ensure compliance. But when auditing courses, the government is not taking ownership over its contents. Rather, the government is ensuring that private speakers have put forward a message that aligns with the government's favored viewpoint, or otherwise complies with government regulation. Put simply, the government uses audits only to enforce its speech development requirements. The government does not use audits to adopt that speech for itself; that private speech is still created and disseminated by CME instructors.

In fact, the state's auditing scheme is much like the trademark approval scheme at issue in *Matal v. Tam*. In *Matal*, the Supreme Court concluded that trademarking words or symbols generated by private registrants did not amount to government speech because the Patent and Trademark Office did not exercise sufficient control over the nature and content of those marks to convey a governmental message. 582 U.S. at 218. Crucially, the Court found that the speech at issue in *Matal* was "wholly created" by registrants without any government input other than checks to ensure compliance with mostly viewpoint-neutral standards (other than the offending, viewpoint-based law struck down in that case). *Id*. at 235–36. And once found compliant, trademarks were automatically registered; the government was not choosing what speech it was purportedly adopting. *Id*.

The trademark office's review system in *Matal* is strikingly similar to the system employed by the state here. State auditors review CME courses for compliance with a series of otherwise viewpoint-neutral requirements. Auditors do not participate in shaping the private lesson plans they review; those plans are wholly the product of private speakers. After review, lesson plans are automatically accepted. *See Khatibi*, 2024 U.S. Dist. LEXIS 81485, at *22. What's more, unless reviewed, lesson plans are presumed compliant. *Id.* Consistent with the Supreme Court's view of the review and approval scheme at issue *Matal*, the state's practice

of auditing CME courses does not transform the private speech of CME instructors into the government's speech.

The district court misapplied *Shurtleff*'s government speech test. The court incorrectly concluded that the government exercised transformative control over the private speech of CME instructors. It did not. The district court expanded the government speech doctrine beyond its reasonable scope to include CME instruction, and that constitutes reversable error. In doing so, the court denied the appellants the right to have their First Amendment claim heard. This Court should overrule that decision and allow appellants their day in court.

III. THE IMPLICIT BIAS MANDATE IS A GRAVE ATTACK ON ACADEMIC FREEDOM.

As the Supreme Court has long recognized, "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). To impose "any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Id*.

These warnings are no less relevant in the context of post-doctoral medical education. On the contrary, courts afford continuing medical education "the highest degree of constitutional protection." *See Wash. Legal Found. v. Friedman,* 13 F.

Supp. 2d 51, 62 (D.D.C. 1998) ("It is beyond dispute that when considered outside the context of manufacturer promotion of their drug products, *CME seminars*, peer-reviewed medical journal articles and commercially-available medical textbooks merit the highest degree of constitutional protection.") (emphasis added); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."). Medical practitioners, professionals, and professors create and disseminate novel theories on the cutting edge of medical science. Medical instructors meticulously design their lessons to make novel medical theories accessible to medical practitioners (or to other medical professions practicing or teaching in a different field). The free exchange of ideas is vital to the scientific process and the continued growth of medical academia. Through this process, the best positions rise and fall based on their merit.

The California government wants to disrupt this process. The state has chosen a particular viewpoint regarding implicit bias that it wants to propagate throughout medical academia. To do this, the state has leveraged its tremendous regulatory power over medical practitioners. Pursuant to its ability to regulate professional licensure, the state has required the teaching of its preferred viewpoint in every CME qualifying class. This mandate violates basic principles of academic freedom and should be scrutinized accordingly.

But the district court below held otherwise. It concluded, in part, that private medical practitioners were no different than public school teachers. *Khatibi*, 2024 U.S. Dist. LEXIS 81485, at *18–19. If the government can regulate what can be taught in a primary and secondary school, the court reasoned that it can also regulate post-doctoral medical education with the same level of control. *See id*. This comparison is inapt and an afront to the highest form of academic freedom.

Not long after the proliferation of public universities in the late nineteenth and early twentieth centuries, leading academics and scholars publicly opined about the importance of academic freedom and open scholarship in American universities. In a 1908 report on American higher education, the Carnegie Foundation for the Advancement of Teaching remarked that "the American people and their political leaders, 'must be educated to the idea of intellectual freedom as the atmosphere in which truth grows.'" KEITH E. WHITTINGTON, YOU CAN'T TEACH THAT! THE BATTLE OVER UNIVERSITY CLASSROOMS 31 (2024). "[S]o long as people 'are willing to permit the politicians to play with their highest institution of learning, there is little hope of genuine progress.'" *Id*. Their concerns were recognized by the Supreme Court some decades later. "Our Nation is deeply committed to safeguarding academic freedom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). That freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id*.

The Ninth Circuit has also long recognized the importance of academic freedom in the public university setting. *See Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *see also C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 988 (9th Cir. 2011) (discussing the importance of academic freedom in public high schools). Even where the core duties of public professors include teaching and lecturing, the Ninth Circuit has consistently dismissed arguments that professors' speech constitutes unprotected government speech. *See Demers*, 746 F.3d at 411 (concluding that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court"). Instead, lower courts in the Ninth Circuit review public educators' First Amendment claims under the test articulated in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968). *See id*. And those First Amendment protections are even stronger in the context of private instruction. *See Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 528–29 (3d Cir. 2004) (finding that private religious instruction is fully protected by the First Amendment).

The government's implicit bias mandate violates basic notions of academic freedom. CME instructors are the equivalent of university professors when teaching CME courses. Even more, CME instructors are not public employees. CME instructors are the First Amendment equivalents of private university professors teaching private lessons. And even if CME instructors were hired by the state,

Garcetti's rationale for limiting their speech would not "apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher *and* professor." *Demers*, 746 F.3d at 412. In either case, the government cannot mandate that a person contributing to the highest levels of academia must create and teach state-approved lessons. If the government wants to disseminate that message, "[t]he [s]tate can express that view through its own speech." *See Sorrell*, 564 U.S. at 578 (explaining that Vermont is free to establish its own program to educate consumers about the availability of generic alternatives to brand-name medications without offending the First Amendment).

This Court should note the gravity of the government's claim that it can regulate private, post-doctoral academic instruction. It is a threat to academic freedom when a state attempts to dictate what viewpoint private academics must teach regarding an unrelated, politically charged subject. The government's attempt to do so here violates CME instructors' basic First Amendment rights. And the district court's conclusions otherwise constitute reversable error.

CONCLUSION

For the foregoing reasons, as well as those presented by plaintiffs-appellants, this Court should reverse the district court's ruling.

Respectfully submitted,

Dated: August 30, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 4,816 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. 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 it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ Thomas A. Berry

August 30, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Thomas A. Berry

August 30, 2024