

No. 19-71930

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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A COMMUNITY VOICE; CALIFORNIA COMMUNITIES AGAINST TOXICS;  
HEALTHY HOMES COLLABORATIVE; NEW JERSEY CITIZEN ACTION;  
NEW YORK CITY COALITION TO END LEAD POISONING; SIERRA CLUB;  
UNITED PARENTS AGAINST LEAD NATIONAL; and WE ACT FOR  
ENVIRONMENTAL JUSTICE,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and  
ANDREW R. WHEELER, as Administrator of the United States Environmental  
Protection Agency,

*Respondents.*

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On Petition for Review of a Final Rule  
of the U.S. Environmental Protection Agency

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BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY  
AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS AND REMAND

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Dated: January 22, 2020

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Date: January 22, 2020

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## INTEREST OF AMICUS CURIAE

Policy Integrity is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Our legal and economic experts have produced extensive scholarship on the best practices for regulatory impact analysis and the proper valuation of regulatory costs and benefits. Most notably, our director, Richard L. Revesz, has published more than eighty articles and books on environmental and administrative law, including works on the legal and economic principles that inform rational regulatory decisions. *See, e.g.,* Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* (2008).<sup>3</sup>

In furtherance of its mission to promote rational decisionmaking, Policy Integrity has filed many *amicus curiae* briefs assessing agencies' economic analyses of regulatory actions. *See, e.g.,* Brief of the Institute for Policy Integrity as *Amicus Curiae*, *California v. Azar*, No. 19-15974 (9th Cir. filed July 5, 2019), ECF. No. 63 (arguing that agency had improperly failed to address the substantial costs of the rule); Brief of the Institute for Policy Integrity as *Amicus Curiae*, *Nat. Res. Def.*

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<sup>3</sup> A full list of publications can be found in Revesz's online faculty profile, available at <https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20228>.

*Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (arguing that agency's claim that a delay rule would cause no harm was unreasonable); Brief of the Institute for Policy Integrity as Amicus Curiae, *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017) (arguing that agency's failure to consider forgone benefits was arbitrary). In those cases that have been decided, courts have agreed with these arguments. *Nat. Res. Def. Council*, 894 F.3d at 104, 115–16 (holding that the record established that the rule harmed petitioners); *California v. BLM*, 277 F. Supp. 3d at 1123 (holding failure to consider forgone benefits arbitrary).

In this case, Petitioners argue that EPA's decision to finalize the dust-lead hazard standards at 10 µg/ft<sup>2</sup> on floors and 100 µg/ft<sup>2</sup> on windowsills (the "10/100 Standards") was arbitrary and capricious. Pet'rs' Opening Br. ("Pet'rs' Br.") at 44. In particular, Petitioners criticize the agency's economic claims and assessments of the feasibility of lower Dust-Lead Hazard Standards. *See id.* at 47-52. Policy Integrity's expertise in economics, cost-benefit analysis, and administrative law give it a unique perspective from which to evaluate petitioners' claims that the challenged rule is arbitrary and capricious.

## **SUMMARY OF ARGUMENT**

In the Final Rule, EPA recognizes that "no safe level of lead in blood has been identified," EPA, Review of the Dust-Lead Hazard Standards and the Definition of



Lead-Based Paint (“Final Rule”), 84 Fed. Reg. 32,632, 32,638 (July 9, 2019) (Pet’rs’ Excerpts of Record (“ER”) at 7), and that “no non-zero lead levels . . . can be shown to eliminate health risk entirely,” *id.* at 32,635 (ER at 4). EPA nonetheless asserts that it has authority to set the Dust-Lead Hazard Standards higher than zero based on a consideration of “achievability,” reliability, and “resources for addressing” the hazards. *Id.* at 32,638-39 (ER at 7-8).

Petitioners have argued that considering factors such as achievability and cost when setting the Dust-Lead Hazard Standards violates the Toxic Substances Control Act, *see* Pet’rs’ Br. at 1, 29-31, and that the chosen level is arbitrary and capricious in any event because those factors do not support the agency’s choice, *see id.* at 48-51. This brief critiques EPA’s economic analysis in support of the arbitrary and capricious claim.

As EPA’s own analysis shows, EPA’s decision to set the Dust-Lead Hazard Standards at 10  $\mu\text{g}/\text{ft}^2$  for floors and 100  $\mu\text{g}/\text{ft}^2$  for window sills leaves significant benefits on the table. *See* EPA, Economic Analysis of the Final Rule to Revise the TSCA Dust-Lead Hazard Standards (“Final Rule EA”) at 6-1 to 6-12, 8-2 to 8-7 (June 2019) (ER at 1157-1168, 1204-1209). Numerous studies have shown that preventing lead poisoning is vastly more effective than confronting the costs of lead poisoning after it has occurred. Lead poisoning causes harms that are irreversible and severe, which when quantified, can easily outweigh the costs of preventing the

poisoning in the first place. Thus, it is unsurprising that EPA's own analysis shows that setting the Dust-Lead Hazard Standards at a level below the 10/100 Standards would be more net beneficial.

In the face of this analysis, EPA's justifications for forgoing more net beneficial options do not pass muster. EPA asserts that laboratories might face equipment and accreditation costs under stricter standards and might stop providing dust-lead testing as a result, 84 Fed. Reg. at 32,640 (ER at 9). But that assertion is based on a fundamentally confused understanding of supply and demand. Assuming EPA is right that laboratories might face equipment and accreditation costs, laboratories would likely pass through any additional expenses to consumers. But because the government requires dust-lead testing, demand is inelastic and should respond only weakly to any increase in prices. Thus, laboratories will have no reason to discontinue testing. Rather, they would have a reason to stay in the market. Additionally, even if some laboratories do discontinue testing, EPA fails to consider whether other laboratories already have the capacity to meet the demand for testing.

EPA's justification for adopting a standard that will self-evidently hurt children is unsupported, and the rule should be remanded.

## ARGUMENT

### **EPA Has Not Provided a Reasoned Explanation for the Dust-Lead Hazard Standards**

EPA asserts that “achievability,” reliability, and its analysis about “resources for addressing” the hazards justify the decision to set the Dust-Lead Hazard Standards at the 10/100 level. 84 Fed. Reg. at 32,638-39 (ER at 7-8). But in conducting its analysis of the achievability and costs of the standard, the agency ignored longstanding executive guidance instructing agencies to select the approach that maximizes net benefits, *see* Executive Order 12,866 §1(a), 58 Fed. Reg. 51,735 (Sept. 30, 1993), and failed to provide a reasoned explanation for the chosen standard as required under the Administration Procedure Act, *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* (“*State Farm*”), 463 U.S. 29, 43 (1983).

#### **A. EPA’s Own Analysis Shows that Setting the Dust-Lead Hazard Standards at Lower Levels Would be More Net Beneficial**

In its Economic Analysis for the Final Rule, EPA evaluated five different pairs of dust-lead hazard standards, which each included a floor hazard standard and a window sill hazard standard. *See* Final Rule EA at 4-2 (ER at 1093). EPA ultimately finalized a standard that set a 10  $\mu\text{g}/\text{ft}^2$  hazard standard for floors and a 100  $\mu\text{g}/\text{ft}^2$  standard for window sills. 84 Fed. Reg. at 32,632 (ER at 1). But EPA’s own analysis shows that a stricter standard would have higher net benefits. Specifically, the 5  $\mu\text{g}/\text{ft}^2$  hazard standard for floors and 40  $\mu\text{g}/\text{ft}^2$  standard for window sills (the “5/40

Standards”) shows net benefits that are significantly higher than the net benefits for the 10/100 Standards. *See* Final Rule EA at 6-1 to 6-12, 8-2 to 8-7 (ER at 1157-1168, 1204-1209). As EPA explained, “[f]or the estimates using the 3 percent discount rate, net benefits are strictly increasing with the stringency of the dust-lead standards.” *Id.* at 6-1 (ER at 1157) (describing pattern as shown under one model).

EPA analyzed the net benefits of the five regulatory options using several different models, but under all models using a 3% discount rate and under some models using a 7% discount rate, the net benefits were highest for the 5/40 Standards, the most stringent regulatory option evaluated. *See id.* at 6-1 to 6-12, 8-2 to 8-7 (ER at 1157-1168, 1204-1209). In one analysis, EPA projected that the 10/100 Standards will have annual costs of \$31.9 million and annual benefits ranging from \$268.3 to \$533 million, with net benefits estimated between \$236.4 and \$501.1 million. *See id.* at 6-2 (ER at 1158). That same analysis projected that the 5/40 Standards would cost \$67.3 million annually, but provide annual benefits of \$346.6 to \$744 million and thus provide annual net benefits of \$279.3 to \$676.7 million. *See id.* Accordingly, while the costs increased when the stringency of the regulatory option increased, the net benefits increased even more—by up to 35%—demonstrating the efficacy of the more stringent Dust-Lead Hazard Standards.<sup>4</sup>

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<sup>4</sup> The fact that EPA found that more lenient standards showed higher net benefits under a few modeling scenarios using a 7% discount rate does not change this analysis. *See* Final Rule EA at 6-1 to 6-12, 8-2 to 8-7 (ER at 1157-1168, 1204-

These results are unsurprising given the severe, irreversible, and incurable harms that lead exposure causes. Those harms impose high costs on society, which persist for decades. Accordingly, interventions to prevent lead exposure are required to avoid adverse health impacts, making such policies net-beneficial to society.

For example, the behavioral problems associated with childhood lead exposure can include “conduct disorders, increased risks of juvenile delinquency and antisocial behaviors, higher total arrest rates, and arrest rates for violent crimes in early adulthood.” EPA, *Biomonitoring: Lead, America’s Children and the*

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1209). The 7% discount rate provides a less accurate estimate of the regulatory options’ net benefits, because it is based on an analysis of the private sector rate of return on capital. Office of Mgmt. & Budget, *Circular A-4* at 33 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>. Where a regulation will cause harm over the span of a human life, as this one will, *see* Final Rule EA at ES-18 (ER at 999), a discount rate based on the rate of return for capital in the private markets is not appropriate. Instead, a lower discount rate is more reliable. *See Circular A-4* at 33; *see also* EPA, *Guidelines for Preparing Economic Analyses* at 6-8, 6-18, 6-19 (Dec. 2010) (explaining that the lower consumption rate of interest reflects the rate at which individuals are willing to trade present for future consumption), <https://www.epa.gov/sites/production/files/2017-09/documents/ee-0568-06.pdf>. Moreover, even if the private rate of return were relevant, the 7% estimate is outdated and does not reflect current economic conditions. *See Council of Econ. Advisers, Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate* at 1 (Jan. 2017) (explaining that the discount rate guidance should be updated to reflect “a general reduction in interest rates along with a reduction in the forecast of long-run interest rates”), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/201701\\_cea\\_discounting\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/201701_cea_discounting_issue_brief.pdf).

*Environment 2* (3d ed. Aug. 2017) (internal citations omitted)<sup>5</sup>; see also Jessica Wolpaw Reyes, *Lead Exposure and Behavior: Effects on Antisocial and Risky Behavior Among Children and Adolescents*, 53 *Econ. Inquiry* 1580, 1599 (2015) (study suggesting “a substantial effect of early childhood blood lead on criminal behavior as a teenager”).<sup>6</sup>

These harms are extremely costly. One study estimates that attention deficit disorder cases linked to lead exposure cost society \$267 million annually. Elise Gould, *Childhood Lead Poisoning: Conservative Estimates of the Social and Economic Benefits of Lead Hazard Control*, 117 *Envtl. Health Persp.* 1162, 1165 (2009).<sup>7</sup> The same study projected the direct costs of lead-linked crime at more than \$1.8 billion, including direct victim costs, costs related to incarceration and legal proceedings, and “lost earnings to both criminal and victim,” and the indirect costs at \$11.6 billion, including psychological and physical harms needing treatment. *Id.* at 1165. Another study on the costs of environmental diseases in children estimated that lead poisoning leads to \$5.9 million in annual medical costs as well as an additional \$50.9 billion “in lost economic productivity resulting from reduced

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<sup>5</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0035>.

<sup>6</sup> See <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0412>.

<sup>7</sup> Available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0311> (attachment 13).

cognitive potential from preventable childhood lead exposure.” See Leonardo Trasande & Yinghua Liu, *Reducing the Staggering Costs of Environmental Disease in Children, Estimated at \$76.6 Billion in 2008*, 30 Health Aff. 863, 865 (2011).<sup>8</sup> Lead exposure causes myriad harms which impose substantial direct and indirect costs on society.

Because of the adverse impacts of lead exposure at all levels, experts recognize that prevention rather than treatment after the fact is necessary to protect public health. The Centers for Disease Control and Prevention’s Advisory Committee for Childhood Lead Poisoning Prevention advises governments to prioritize prevention instead of “responding after the exposure has taken place.” Ctrs. for Disease Control and Prevention, *CDC Response to Advisory Committee on Childhood Lead Poisoning Prevention Recommendations in “Low Level Lead Exposure Harms Children: A Renewed Call of Primary Prevention”* 2 (June 7, 2012) (ER at 526) (summarizing the position of the advisory committee).

Emphasizing prevention over treatment is rational because of the incurable and long-lasting nature of lead poisoning. The American Academy of Pediatrics has explained that “[n]o effective treatments ameliorate the permanent developmental effects of lead toxicity.” American Academy of Pediatrics, *Prevention of Childhood*

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<sup>8</sup> See <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0311> (attachment 12).

*Lead Toxicity*, 138 *Pediatrics* 1, 1 (2016) (ER at 230). And studies have found that the adverse impacts from lead exposure “are persistent.” *See* Decl. of David C. Bellinger (ER at 145).

Even attempting to reduce the poisoning itself can be exceedingly difficult. “Chronically lead-poisoned children may continue to have elevated blood lead levels for months or years after exposure has been reduced, due to body stores that usually decline very slowly.” Scott Clark et al., *Effects of HUD-Supported Lead Hazard Control Interventions in Housing on Children’s Blood Lead*, 111 *Envtl. Research* 301, 302 (2011).<sup>9</sup> And blood lead levels decline less in children who have been exposed to lead more than once, than in children who were not previously poisoned, demonstrating that, even putting aside the harms that lead poisoning causes, attempts to reduce lead in the blood become less effective as exposures continue. *Id.* at 309; *see also* American Academy of Pediatrics, *supra*, at 2 (ER at 231) (explaining that studies show that treating lead poisoning after the fact has not been efficacious).

Studies show that because lead exposure causes severe damage with limited opportunities for mitigation, intervention activities that maximize primary prevention can be highly net beneficial. One study evaluating the efficacy of lead hazard controls estimates that “for every dollar spent on controlling lead hazards, \$17-\$221 would be returned in health benefits, increased IQ, higher lifetime

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<sup>9</sup> *See* <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0089>.



earnings, tax revenue, reduced spending on special education, and reduced criminal activity.” Gould, *supra*, at 1166. For these reasons, the American Academy of Pediatrics has explained that prevention “is the most reliable and cost-effective measure to protect children from toxicity.” American Academy of Pediatrics, *supra*, at 1 (ER at 230).

EPA acknowledges that lead exposure can lead to “irreversible and life-long health effects” in children, Final Rule EA at ES-18 (ER at 999), and its own analysis showed that a more stringent option provided higher net benefits than the 10/100 Standards. *See id.* at 6-1 to 6-12, 8-2 to 8-7 (ER at 1157-1168, 1204-1209). In fact, EPA’s analysis only focused on a subset of the harms, monetizing only the benefits to children from avoided IQ losses. *See id.* at 5-43 (ER at 1155). If EPA had monetized more of the avoided harms, the analysis would have likely shown that stricter standards were even more net beneficial.

As EPA acknowledges, “the earnings increase from a gain in IQ is an incomplete measure of the value of neurodevelopmental impacts of lead in children.” *Id.* at 5-44 (ER at 1156). Additional adverse health effects in children include “increased risk of attention-related behavioral problems, greater incidence of problem behaviors, decreased cognitive performance, reduced post-natal growth, delayed puberty and decreased kidney function.” *Id.* at ES-19 (ER at 1000). In adults, lead exposure leads to “increased risks to the nervous system, cardiovascular, renal,

hematological, reproductive effects.” *Id.* But EPA did not monetize these damages. As a result, EPA’s own analysis—which shows that a stricter standard than the one chosen would be more net beneficial—“underestimates the quantified benefits of the regulatory options.” *Id.*

In sum, because lead exposure causes lifelong and often irreversible adverse health impacts, early intervention is crucial to preventing extensive future harms. And as EPA’s own analysis shows, aggressive lead control activities can provide substantial net benefits.

#### **B. EPA Fails to Provide a Reasoned Explanation for Forgoing Benefits**

EPA’s own analysis shows that the 10/100 Dust-Lead Hazard Standards are not the most net beneficial, and EPA must therefore provide a rational explanation for forgoing benefits. Under the Administrative Procedure Act, EPA is required to “examine the relevant data” and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” when issuing any new regulation. *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). Courts will reverse where an examination of the agency’s explanation makes clear that the agency failed to consider “an important aspect of the problem.” *Id.* One important factor in an agency decision is the harm that the decision causes to society. *See, e.g., Air Alliance Houston v. EPA*, 906 F.3d 1049, 1067 (D.C. Cir. 2018) (holding that the agency had not adequately explained its decision to delay a

rule that would have prevented significant harm in chemical disasters); *Gresham v. Azar*, 363 F. Supp. 3d 165, 175 (D.D.C. 2019), *appeal filed* (D.C. Cir. 19-5094) (faulting the agency for failing to estimate the impact of the rule on Medicaid coverage).

Here, by selecting an option that has lower net benefits, EPA has chosen to forgo benefits of lead poisoning prevention. EPA explains its decision not to select lower Dust-Lead Hazard Standards by arguing that laboratories might stop providing dust-lead testing services and thus reduce the availability of dust-lead testing leaving children at risk. *See* 84 Fed. Reg. at 32,640-41 (ER 9-10). But that explanation rests on two wholly unsupported and speculative assumptions and is inadequate.

First, even if lower Dust-Lead Hazard Standards would require laboratories to “acquire new instrumentation and revise their accreditation with an on-site inspection,” as EPA supposes, *id.* at 32,641 (ER at 10), that does not mean that laboratories will discontinue providing dust wipe analysis services. In fact, the conclusion that laboratories will discontinue services gets basic economic principles wrong. Assuming EPA is correct that laboratories may need to make capital investments and seek revised accreditation, the costs of taking those steps would be passed through to consumers at least in part. But because government requirements to perform dust-lead testing make demand inelastic, demand will respond only slightly to price changes. *See* N. Gregory Mankiw, *Principles of Economics* 90 (4th

ed. 2007). In other words, because of inelastic demand, the laboratories can pass on costs to consumers almost completely and so will not be burdened by the regulation at all. *See* E. Glen Weyl & Michal Fasbinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121 J. Pol. Econ. 528, 530 (2013). And with a stable and ongoing demand, laboratories would have every incentive to continue providing testing, not to discontinue testing. In fact, in EPA's interviews with 14 accredited laboratories, none explicitly stated that they would discontinue dust-lead testing. (*See* ER at 1291-1317 (portion of ER containing summaries of EPA's discussions with industry stakeholders)).

Second, even if some laboratories stopped providing dust-lead testing services, EPA provided no support for the second assumption it makes that children could be put "at risk of prolonged lead exposure" as a result of laboratory closures. 84 Fed. Reg. at 32,640 (ER at 9). Again, EPA gets the economic analysis wrong. Children are at risk of prolonged lead exposure due to EPA's failure to set the Dust-Lead Hazard Standards at the appropriate level, not the other way around. If EPA set the standard at the appropriate level, children would only potentially be harmed by a reduction in laboratories if testing is unavailable in the market. If laboratories with the technology to test for lower dust-lead concentrations have the capacity to provide additional services to make up for laboratories that discontinue dust-lead testing, these providers can fill the gap created by other laboratories that exit the

market. Because EPA does not provide additional evidence that testing will become unavailable, its conclusion that children may be harmed is unreasonable.

As Petitioners further explain, *see* Pet'rs' Br. at 52, EPA's other attacks on the achievability of lower dust-lead hazard standards are supported by equally thin rationales. For example, EPA cites a study suggesting that "dust-lead may reaccumulate after [Lead Hazard Control] activities" and prevent lower window sill hazard standards from being maintained over time. 84 Fed. Reg. at 32,639 (ER at 8). But the study cited by EPA evaluated only partial controls, making its conclusions inapplicable for estimating the long-term benefits of more effective lead abatement measures. *See* Jonathan Wilson et al., *Evaluation of HUD-Funded Lead Hazard Control Treatments at 6 Years Post-Intervention*, 102 *Envtl. Research* 237, 239, 240 (2006).<sup>10</sup>

While "an agency's predictive judgments . . . are entitled to particularly deferential review," that deference is only given "so long as [the predictions] are reasonable." *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) (Kavanaugh, J.) (internal quotation marks omitted). Here, EPA's claims are not supported by either reasonably available evidence or economic logic, and thus they deserve no deference.

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<sup>10</sup> *See* <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0119>.

## CONCLUSION

EPA's selection of the 10/100 Standards for the Dust-Lead Hazard Standards should be remanded as arbitrary and capricious.

Dated: January 22, 2020

Respectfully submitted,  
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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3508 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Date: January 22, 2020

*/s/ Bethany A. Davis Noll*

Bethany A. Davis Noll

## CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 22, 2020

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