No. 17-35640

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and RASIER, LLC,

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, *et al.*,

Defendants-Appellees

Appellants' Response To Petition For Rehearing Or Rehearing En Banc

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INTRODUCTION

The City of Seattle enacted an unprecedented collective-bargaining ordinance authorizing independent contractors to collude and fix prices. In a thorough and well-reasoned opinion, a unanimous panel correctly ruled that state-action immunity does not shield the ordinance from federal antitrust law. Both federal agencies responsible for enforcing antitrust law urged the panel to reach that decision. Brief of FTC & DOJ, Doc. 36.

Nothing about the panel's decision warrants the extraordinary step of panel rehearing or en banc review. That is true for each of the elements required for immunity. For the first element (clear articulation), the panel merely applied Supreme Court and Ninth Circuit precedent to specific Washington statutes—hardly the sort of question worth the resources of the full Court.

For the second element (active supervision), the panel followed the Supreme Court's binding holding in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). The City's claim that the panel created a circuit split on this element is meritless, as all of the cases the City cites as conflicting are readily distinguishable. Even if they were not, the City ignores Sixth Circuit cases that squarely agree with the panel, so any circuit split will remain unresolved regardless of the panel opinion. En banc review therefore would not serve national uniformity.

BACKGROUND

Many for-hire drivers in Seattle operate as independent contractors. And many of these drivers use a smartphone-based ride-referral service like Uber or Lyft. These drivers enter into contracts in which they agree to pay a service fee in exchange for use of the referral service.[1] Panel Opinion ("Op.") 8.

The City's ordinance authorizes for-hire drivers who are independent contractors to unionize and then collectively fix the prices they pay to companies like Uber and Lyft (the ordinance calls Uber and Lyft "driver coordinators"). Op. 9. The City does not dispute on appeal that this union of independent contractors is a per se illegal price-fixing cartel under the Sherman Act. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 986 (9th Cir. 2000). And federal law preempts municipal ordinances that purport to authorize private parties to engage in per se antitrust violations. *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

The City sought to evade the antitrust laws by invoking what the Supreme Court calls the "disfavored" doctrine of state-action immunity. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). Here, the distinction between states and municipalities is crucial. States themselves are immune from federal

[1] Drivers using the Uber referral service in Washington contract with Uber's subsidiary, appellant Rasier, LLC (together with Uber Technologies, Inc., "Uber"). Rasier is permitted to operate as a transportation network company in the City of Seattle.

antitrust law; but because municipalities "are not themselves sovereign," state-action immunity "does not apply to them directly." *Id.* Thus, a municipality may authorize private parties to violate the antitrust laws with immunity only by meeting two stringent requirements. The anticompetitive activity must be (1) "clearly articulated and affirmatively expressed as state policy," and (2) "actively supervised by the State." *Id.* Both elements aim to ensure that "particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

Courts protect both federalism and national antitrust policy by closely scrutinizing claims of municipal immunity. *Id.* at 632–33. For the former, less-than-searching review may inadvertently extend immunity to actions the states did not intend to authorize. *Id.* at 636. For the latter, "too loosely" doling out antitrust immunity to municipalities would "permit[] purely parochial interests to disrupt the Nation's free-market goals." *Phoebe Putney*, 568 U.S. at 226.

The panel correctly applied these principles. *First*, it correctly ruled that the Washington Legislature has not clearly articulated a policy to allow anticompetitive municipal regulation of "compensation contracts between for-hire drivers and driver coordinators" like Uber and Lyft. Op. 24. *Second*, it correctly ruled that the ordinance fails the active-supervision requirement under *Town of Hallie*, 471 U.S. at 46 n.10, because no state official supervises the private price-fixing activity. Op. 32.

ARGUMENT

The City lacks any legitimate basis for panel rehearing or en banc review. The petition retreads the same arguments the City presented to the panel, seeks en banc review of the panel's application of well-settled law to specific state statutes, and incorrectly claims that the decision creates a circuit split.

I. Rehearing Is Not Warranted On The Clear-Articulation Requirement

a. The City does not even contend that there is a circuit split on the clear-articulation requirement. It simply objects to the panel's application of established antitrust law to particular Washington statutes. This issue boils down to a case-specific parsing of Washington law in light of federal precedent. That is not the sort of issue appropriate for panel rehearing or en banc review. *See* Fed. R. App. P. 35.

b. Moreover, the panel's decision was undoubtedly correct. The City must demonstrate a clearly articulated state policy to displace competition in the "particular field" at issue. *Southern Motor Carriers, Inc. v. United States*, 471 U.S. 48, 64 (1985). As this Court has repeatedly explained in an unbroken line of cases, a city must prove "not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anticompetitive." *Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir. 1984); *accord Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 942 (9th Cir. 1996); *Preferred Communications, Inc. v. City of Los*

Angeles, 754 F.2d 1396, 1412 (9th Cir. 1985); *Golden State Transit Corp. v. City of Los Angeles*, 726 F.2d 1430, 1433 (9th Cir. 1984); *Tom Hudson & Assoc., Inc. v. City of Chula Vista*, 746 F.2d 1370, 1373 (9th Cir. 1984). Thus, the legislature must authorize not just some anticompetitive regulation of certain entities or activities, but the "challenged restraint" itself. *Phoebe Putney*, 568 U.S. at 225.

Under this standard, the Supreme Court and this Court have repeatedly rejected immunity when a state policy contemplated anticompetitive regulation of certain entities and activities, but not the "kind of actions" embodied in the "challenged restraint," even when the state policy deals with a closely related activity. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595–96 (1976) (immunity for utility's distribution of *electricity* did not extend to the utility's distribution of *light bulbs*); *Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988) (immunity for monopoly provider of air-ambulance *dispatching* did not extend to dispatcher's anticompetitive conduct in providing air-ambulance *services*); *Springs Ambulance*, 745 F.2d at 1273 (immunity for anticompetitive pricing on *public* ambulance services did not extend to *private* ambulance services).[2]

[2] Seattle says these cases are all irrelevant because here the legislature "explicitly" authorized anticompetitive regulation of "all aspects of the for-hire transportation services market." Pet. 14 n.4. This argument assumes the answer to the question, putting the cart before the horse. The very issue on appeal is whether the legislature authorized anticompetitive regulation of the contracts between drivers and referral services, or whether it authorized anticompetitive regulation only of transportation services to the public.

The panel correctly applied this standard. The relevant Washington statute authorizes cities to "regulate for hire transportation services without liability under federal antitrust laws." RCW 46.72.001. While this does authorize some anticompetitive regulation, it does not speak to the "particular field" the City seeks to regulate. *S. Motor Carriers*, 471 U.S. at 48. It authorizes anticompetitive regulation only of "transportation services"—meaning, as the title of Chapter 46.72 puts it: "Transportation of passengers in for hire vehicles." It does not authorize all regulation of "transportation service *providers*" or activities "*affecting* the provision of transportation services."

The statute's general enabling provision similarly authorizes municipal regulation only of "for hire vehicles operating within their respective jurisdictions." RCW 46.72.160. The power to regulate "vehicles" does not authorize regulation of those who operate such vehicles in their relationships with referral services. Nor do any of the six enumerated powers in RCW 46.72.160(1)–(6) say anything about regulating contracts for referral services, but clearly deal with transporting passengers, as the panel explained. Op. 26.

In sum, these statutes are simply a garden-variety public safety authorization to protect consumers by ensuring the safety, reliability, and affordability of public transportation services, including anticompetitive regulations such as setting rates for transportation. The notion that this ubiquitous, familiar authorization to regulate

"transportation services" to the public somehow affirmatively contemplated and authorized municipalities to engage in regulation of the labor/independent-contractor relationship between drivers and referral services is obviously wrong, and the panel properly rejected it. The relationship between drivers and referral services is an entirely different activity than providing transportation service to the public.

Similarly, regulating the relationship between drivers and referral services presents entirely different public policy issues than the consumer protection actually authorized by the statute. Authorizing the latter hardly authorizes or contemplates the former. There is no basis to conclude that authorization to protect consumers by regulating fares somehow authorizes regulation of labor issues. Yet the City seeks to impose its own labor law—complete with a collective-bargaining program—on what it sees as a labor relationship between drivers and referral companies. The legislature knows how to regulate labor relations when it wants to. There is an entire title of the code dedicated to it. Title 49 RCW ("Labor Regulations"). Had the legislature wanted to authorize municipalities to impose their own brand of labor law on drivers and referral companies, it would have done so.

c. Attempting to avoid all of this, the City resorts to misstating the panel's holding. The City insists the panel demanded that the "Legislature specify the *precise* form of regulation cities might choose to enact." Pet. 3, 13, 14. The panel did no such thing. It in fact said nothing about the *form* of the regulation, but instead

focused on the *type of activity* that the regulation targeted. The panel concluded that the legislature authorized anticompetitive regulation of a specific activity—transportation service—while Seattle sought to regulate a different activity—the upstream contractual relationships between drivers and referral services. Op. 24.

Indeed, the panel's analysis is directly supported by Seattle's own cases. In *Southern Motor Carriers*, 471 U.S. at 64, the Court first said that the legislature need not provide a "specific, detailed" authorization for anticompetitive conduct. But the very next sentence clarifies that the legislature must "clearly intend[] to displace competition" in the "particular field" at issue. *Id.* Here, the legislature did not authorize anticompetitive regulation in the "particular field" at issue, even if it did so in the related field of transportation services to the public. Likewise, in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370–71 (1991), the legislature authorized anticompetitive municipal regulation of "structures," and the Court merely held that billboards are "structures." The Court did not hold, as the City would have it, that an express authorization covering structures implicitly extended to streets or other matters affecting "structures." And here, Washington's express policy covering transportation services to the public does not implicitly extend to all aspects of the transportation services industry.

The City also attacks the panel's conclusion that the Washington statute is "silent on the issue of compensation contracts between for-hire drivers and driver

coordinators." Op. 24. But it does so only by (1) rewriting the statute's plain language, and (2) erroneously arguing that the statute's silence on compensation contracts is irrelevant, because a residual clause could be read to implicitly authorize the City's public policy decision to impose collective bargaining. As noted, the City's claim (Pet. 16) that the statute authorizes regulating "*all* aspects of the local for-hire transportation services industry" is at war with the statute's text, which authorizes only regulation of "transportation service" (RCW 46.72.001), and "[t]ransportation of passengers in for hire vehicles" (Ch. 46.72 RCW), not labor issues or contractual relationships between drivers and third-party referral services.[3]

Nor does the residual clause help the City. It permits "[a]ny other requirements adopted to ensure safe and reliable for hire vehicle transportation service." RCW 46.72.160(6). This clause, like the first five in 46.72.160, is limited to for-hire *vehicles*, and it merely authorizes safety regulation of transportation services to the public. The City believes the residual clause authorizes anticompetitive regulation of any activity whatsoever, so long as a municipality can articulate some way it is

[3] In an argument so inapposite that it did not even raise it to the district court, the City points to a definition of "transportation" in a different title of the code that applies to taxicab companies, not for-hire vehicles. Pet. 16 n.5 (citing RCW 81.04.010(15)). Not surprisingly, the City has never contended that companies like Uber and Lyft are taxicab companies or that taxicab regulations apply to them. And the cited definition cuts against the City, as it refers to the transportation services of "receiving, carriage, and delivery of persons," not the separate, upstream relationship between drivers and ride-referral services.

connected to "safe and reliable for hire vehicle transportation service." Pet. 14. Even assuming (incorrectly) that the clause could somehow be plausibly interpreted to authorize the City to regulate any third-party transactions that arguably affect safety or reliability, such as auto-repair services, the dispositive point is that *the City* exercised *its* purportedly boundless *discretion* to impose the "challenged restraint." The *legislature* never contemplated or authorized that "restraint" or the "kind of [anticompetitive] action" Seattle is taking. *Springs Ambulance*, 745 F.2d at 1273.

In other words, even if the ordinance could survive deferential administrative review akin to *Chevron* step two, as a permissible "gap filling" regulation to deal with an issue the legislature did not "foresee," that would plainly not satisfy the clear-articulation requirement. As this Court and the Supreme Court have repeatedly explained, the test is whether the legislature has affirmatively contemplated the "kinds of actions alleged to be anticompetitive," which is analogous to *Chevron* step one. *Phoebe Putney*, 568 U.S. at 225; *Springs Ambulance*, 745 F.2d at 1273.

Accordingly, the fact that Appellants have not challenged the ordinance's validity as an ultra vires act under state law is irrelevant. Pet. 16. Whether it could survive deferential review under state law is an entirely different question from whether the legislature *clearly* authorized the "kind of action" the City engaged in. That is why, as the City correctly recognizes, federal courts resolving state-action immunity should "not … resolve such questions of state law authority." *Id.*

II. Rehearing Is Not Warranted On The State-Supervision Requirement

For the state-supervision requirement, the City at least claims that the panel's opinion conflicts with a decision of this Court (*Tom Hudson*) and creates a circuit split. But this turns out to be false, as all of the City's cases are readily distinguishable. And even assuming (incorrectly) that the City's reading of cases from the First, Second, and Eighth Circuits is correct, they would squarely conflict with two cases from the Sixth Circuit. This Court cannot resolve that conflict. As for *Tom Hudson*, it is distinguishable, did not address the relevant issue, and was superseded by *Town of Hallie*. Rehearing is therefore not "necessary"—or even able—"to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). Regardless, the panel correctly held that a state official must supervise private parties engaged in anticompetitive activity to receive state-action immunity.

a. The panel's holding follows directly from *Town of Hallie*. The issue was whether a state official must supervise municipal officials when the relevant actor is a municipality, not a private party. 471 U.S. at 46. The Court at length analyzed the differences between sovereign states, municipalities, and private parties. *Id.* at 37–38, 46–47. The Court's holding referred to each of these three groups, as follows:

> We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.… Where state or municipal regulation by a *private party* is involved, however, *active state supervision must be shown*, even where a clearly articulated state policy exists.

Id. at 46 & n.10 (emphasis added). In other words, a state official must supervise when a city delegates authority to private parties to fix prices.

Here, the City has delegated that price-fixing authority to private "unions." *Town of Hallie* therefore requires active state supervision of those private parties. The panel correctly so held. Op. 35–36.

The City bases its petition on an untenable reading of *Town of Hallie*. It claims that the Court used "state" as "shorthand for the State and its subordinate bodies." Pet. 7–8. This state-means-city argument cannot be reconciled with the issue presented, the reasoning, or the holding of *Hallie*. The distinction between sovereign states, non-sovereign municipalities, and private parties was front and center in *Town of Hallie*. 471 U.S. at 46–47. The Court based its opinion on crucial distinctions among those entities. *Id.* 37–38, 46–47. As the Court explained, states are exempt from federal antitrust law because they are sovereign. *Id.* at 38. "Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Id.* After drawing this careful distinction and discussing it at length throughout the opinion, the Court did not suddenly revert to casual shorthand when it required "state supervision" of private parties acting under a municipal ordinance. *Id.* at 46 n.10.

But it is worse than that. The City's reading requires "state" to take two different meanings in the same sentence. As quoted above, the word "state" appears

three times in the last sentence of footnote ten. *Id.* In the City's confused view, "state" first refers just to states, it then becomes shorthand for states and municipalities, and it finally reverts back to just states. That is incoherent.

At bottom, the City's theory of "active municipal supervision" of private parties conflicts irreconcilably with *Hallie* and with every other state-action decision in which the Court has drawn careful distinctions between municipalities and sovereign states. In every one, the Court has referred to "state supervision," and has never mentioned or contemplated "municipal supervision." *Community Comms. Co. v. City of Boulder*, 455 U.S. 40, 51 n.14 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411–12 (1978).

b. The City claims that the panel decision conflicts with "[e]very other Circuit to have considered the issue," thus creating a circuit split. Pet. 8. That is false, both because the City's cases are distinguishable and because the law in the Sixth Circuit is squarely aligned with the panel's ruling. The Sixth Circuit has held and reaffirmed that state officials must supervise private parties acting under municipal ordinances. It first did so in *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 774 F.2d 162, 163 (6th Cir. 1985) (order). It reaffirmed this holding in *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 536 (6th Cir. 2002). As the court explained, "the requirement of active state supervision cannot be

satisfied by municipal oversight." *Id.* In *Riverview*, it said, "[w]e expressly held that state, rather than municipal, supervision is required." *Id.*

Seeking to downplay these Sixth Circuit cases, the City claims that *Michigan Paytel* somehow undercut the holding of *Riverview*. Pet. 9 n.2. But that is obviously incorrect. After reaffirming the holding of *Riverview*, *Michigan Paytel* discussed the different principle that state supervision is not required when the municipality alone, rather than a private party, is "the effective decision maker." 287 F.3d at 538. This principle applies in circumstances not at issue here, such as when a private party serves as "a municipal agent," or when a city is setting rates or creating a monopoly. *Id.* It does not apply when a city has "delegated decision making authority to" a private party, as Seattle has done by authorizing drivers' unions to fix prices through collective bargaining. *Id.*

The City's four cited cases do not support its position either, as they are readily distinguishable on the same basis. Pet. 8–9. Those cases did not involve authorizing anticompetitive activity by a private party, but instead involved anticompetitive conduct by a municipality alone, much like the "effective decisionmaker" scenario discussed in *Michigan Paytel*. In each case, a city established a monopoly for a public service, and the plaintiff challenged the city's creation of the monopoly or some consequence of that conduct. For example, in *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983), Kansas City created

a "publicly controlled, single-operator ambulance system." *Id.* at 1010. The court held that state supervision was not required because the relevant actor was the city—it created the monopoly—and state supervision is required only when a city delegates authority to "private persons to make anticompetitive decisions." *Id.* at 1014. This holding lends no support to Seattle, which has indeed authorized private parties to engage in such activity during collective bargaining. Moreover, contrary to the City's claims, the court said nothing at all about municipal supervision of private parties, it merely said that "state supervision of *Kansas City's* conduct is unnecessary." *Id.* (emphasis added).

While each of the City's other three cases uses its own slightly different analysis, the upshot is the same. No state supervision is required when the municipality itself is the relevant anticompetitive actor—as it is when it creates a monopoly. *See Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 127 (2d Cir. 2003) (monopoly on electric inspections); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1079 (1st Cir. 1993) (monopoly on garbage collection); *Tom Hudson*, 746 F.2d at 1374 (monopoly on ambulance service). And although these latter three cases do state that municipalities may supervise private parties, the challenged restraint in each case was ultimately the city's own act of creating the monopoly.

Even if these cases were not clearly distinguishable, they still do not support en banc review. *Tom Hudson* and *Gold Cross Ambulance* were decided before and superseded by *Hallie*, and *Tri-State Rubbish* failed to address *Hallie*. 998 F.2d at 1079. Also, the issue of *whether* a municipality could supervise private parties was not even raised in *Tom Hudson*. *See* Op. 35 n.17. As for *Electrical Inspectors*, that opinion simply assumed, without any explanation, that "active supervision by the Village" could suffice. 320 F.3d at 127. It assumed this because the parties never contested it and indeed invited it. The plaintiff argued that to obtain immunity a private monopolist must "prove that the local municipality actively supervises its monopoly." Br. of Appellant, No. 01-9483 at *25 (2d Cir. Feb. 22, 2002). And if, as explained above, the city's creation of the monopoly was the relevant anticompetitive conduct, then it makes sense that the plaintiff simply assumed the municipality would supervise the entity on whom that monopoly was conferred.

c. The City and its amici argue that the panel's holding "will have profoundly negative effects" on municipalities, preventing them from "designating a particular company to serve as garbage collector," taxi service, or ambulance service, and forcing cities "to provide such services themselves." Pet. 11. That is not true. All the City's examples involve conduct by a city alone, such as setting rates for taxi services, creating a monopoly in garbage services, or contracting with an exclusive service provider. Consistent with the panel's holding and with all of the City's cases,

otherwise anticompetitive conduct by the municipality acting alone does not require supervision by the state.[4]

Nor would it impose "heavy burdens on state governments" (Pet. 12) to require state and municipal officials to coordinate when supervising rate-setting by private drivers. In fact, Washington has a ready-made solution. The legislature has provided for joint regulation of for-hire drivers by municipalities and the *state* department of licensing. The director of licensing has authority over general vehicle regulation (RCW 46.01.011), and has joint regulatory authority with municipalities over transportation of passengers in for-hire vehicles (RCW 46.72.170).

The City nevertheless claims that state officials "will be ill-equipped to determine whether private party conduct serves the *local* governments' regulatory goals." Pet. 12. This claim reveals a pervasive flaw in the City's federalism-based arguments. State-action immunity is designed to ensure that anticompetitive conduct serves the goals of the *state*, not the city. *Phoebe Putney*, 568 U.S. at 225. That is why the Supreme Court demands that "the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Id.*

[4] And, of course, the City knows that municipalities are in no way "required to exclude private parties from any role in developing regulatory policies." Pet. 12. Private parties have a protected First Amendment right to participate in the legislative process. *Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961). What cities cannot do is authorize private parties to fix prices with no supervision by the state.

Since the state's regulatory goals are the ones that matter, a Washington official is *better* equipped than a city official to supervise the terms of a collective-bargaining agreement (assuming *arguendo* that the State had actually authorized such activity).

Finally, the City claims "it would be implausible to rule that a city may regulate … taxi rates but only if a state agency also supervises the private taxi operators." Pet. 9. That misses the fundamental point about *authorizing private* parties to engage in anticompetitive activity, as the City has done. *See* Op. 36. The problem here is not that the City *alone* is regulating rates or creating monopolies, but that it is delegating authority to private parties to engage in price fixing.[5] It makes perfect sense to require state supervision when municipalities authorize price-fixing by private parties. "Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interest of the State." *Town of Hallie*, 471 U.S. at 47. That concern is not present when the anticompetitive conduct is that of the municipality itself. *Id.*

CONCLUSION

For these reasons, the Court should deny the petition.

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[5] The City incorrectly equates municipalities with "state administrative agencies." Pet. 10. State agencies are direct agents of the state; cities are independently controlled entities. That fundamental difference is why state agencies enjoy sovereign immunity, but "immunity does not extend to suits prosecuted against a municipal corporation." *Alden v. Maine*, 527 U.S. 706, 756 (1999).

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CERTIFICATE OF SERVICE

I certify that on August 3, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Ninth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

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