# No. 19-3574

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

ROSLYN LA LIBERTE,

*Plaintiff-Appellant*,

v.

JOY REID,

*Defendant-Appellee*.

On Appeal from the United States District Court
for the Eastern District of New York
Case No. 1:18-cv-05398-DLI, Hon. Dora L. Irizarry

## DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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## INTRODUCTION AND RULE 35(B)(1) STATEMENT

The panel opinion ("Op.," attached hereto as Exhibit A) presents the following issues that warrant panel rehearing and rehearing en banc:

*First*, the panel "h[e]ld (for the first time) that California's anti-SLAPP statute," Cal. Civ. Proc. Code § 425.16, "is inapplicable in federal court because it conflicts with Federal Rules of Civil Procedure 12 and 56." Op. at 2. In so holding, it created the first true split among circuits as to the application of a specific state anti-SLAPP law—California's—by a federal court sitting in diversity.[1] The panel's holding on this issue of exceptional importance directly conflicts with authoritative decisions of the Ninth Circuit harmonizing California's anti-SLAPP statute with the Rules.[2] *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999) ("*Newsham*"); *see also Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018) ("*Planned Parenthood*").

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[1] In a recent unpublished decision, the Ninth Circuit split from the Fifth Circuit on the application of provisions of the Texas Citizens Participation Act— Texas's anti-SLAPP law—in federal court. *Compare Clifford v. Trump*, No. 18-56351, 2020 WL 4384081, *1 (July 31, 2020) *with Klocke v. Watson*, 936 F.3d 240, 244-47 (5th Cir. 2019).

[2] Subsequent references to the "Rules" are to the Federal Rules of Civil Procedure.

The panel opinion's all-or-nothing rejection of California's anti-SLAPP statute—including, specifically, its provision for an award of attorney's fees to prevailing defendants, *see* Op. at 18—also conflicts with this Court's decision in *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014), and precedent of the Supreme Court and this Court holding that state law fee-shifting provisions apply in federal court. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 n.31 (1975) ("*Alyeska Pipeline*"); *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993). If unaddressed, the panel opinion will result in the inequitable administration of California law and encourage forum shopping, thereby undermining the "twin aims" of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) ("*Erie*"). *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

*Second*, whether Plaintiff-Appellant is a "limited purpose" public figure for commentary arising from her advocacy on a controversial public issue does not turn, as the panel held, on whether she received "regular and continuing" media coverage, Op. at 5. Media access is not a requirement of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Nor is it a consideration under the test applied by California courts, which governs here. *See Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1577 (Cal. App. 2005) ("*Ampex*"). By treating "regular and continuing" media attention as dispositive, the panel opinion impermissibly collapses the distinction between public figures for all purposes and those, like

Plaintiff-Appellant, who voluntarily inject themselves into "particular public controversies in order to influence" their outcome. *Gertz,* 418 U.S. at 345.

*Third*, the panel opinion concluded that the district court "erred by characterizing" one of the two social media posts at issue "as nonactionable opinion" because it "could be interpreted as accusing" Plaintiff-Appellant of engaging in "archetypal racist conduct[.]" Op. at 5, 28. But the Instagram post in question—in which Defendant-Appellee, in the context of an active public debate over "sanctuary" state laws, commented on the juxtaposition of a viral photograph of Plaintiff-Appellant, an opponent of such laws, with a 1957 photograph of a woman protesting school desegregation—is *precisely* the type of expression of opinion the First Amendment protects.

The only "conduct" it references—"screaming at a child, with their face twisted in rage," JA087—is a figurative description of the unaltered photographs included in the post. It is well-settled that a statement that interprets disclosed facts—or, in this case, disclosed photos—is non-actionable. *See, e.g.*, *Standing Committee v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995) (statement accusing judge of anti-Semitism based on his sanctioning of Jewish lawyers was protected opinion because it conveyed the speaker's "personal belief that the [judge] is anti-Semitic"). And the panel's conclusion that the post may nevertheless be actionable because it implies that Plaintiff-Appellant's vocal opposition to California's

"sanctuary" state law was motivated by "racial animus," Op. at 29, conflicts with numerous decisions recognizing such statements to be protected opinion. *See, e.g.*, *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (holding that use of the term "racist" is non-actionable); *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (holding mayor's query whether her political opponent was a Nazi war criminal to be non-actionable); *see also McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 159 (D.D.C. 2014) ("[T]o the Court's knowledge no decision has found statements claiming that a person is anti-gay or homophobic to be actionable defamation.").

## BACKGROUND AND PROCEDURAL HISTORY

Plaintiff-Appellant sued Defendant-Appellee for defamation in connection with two social media posts. JA037. Defendant-Appellee moved the court (i) to dismiss for failure to state a claim under Rule 12(b)(6); (ii) to strike under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16(b)(1); and (iii) for an award of attorney's fees under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16(c)(1). JA264; JA277-78. The district court addressed Defendant-Appellee's motions to strike and dismiss together; applying the same federal "plausibility" standard to both, JA268, it dismissed the action, JA272-77, and awarded Defendant-Appellee attorney's fees pursuant to California's anti-SLAPP fee-shifting provision, JA278.

On July 15, 2020, the panel vacated the district court's judgment. It held California's anti-SLAPP statute "inapplicable in federal court[,]" and vacated the district court's dismissal of Plaintiff-Appellant's defamation claim under Rule 12(b)(6) on the grounds that, as to one of the two social media posts at issue, the district court "erroneously deemed [Plaintiff-Appellant] to be a limited purpose public figure" and "as to the other, the court mischaracterized it as nonactionable opinion." Op. at 2.

## REASONS FOR GRANTING REHEARING

### I. The applicability of California's anti-SLAPP statute in federal court is a question of exceptional importance.

A. The panel opinion directly conflicts with Ninth Circuit precedent.

California's anti-SLAPP statute was enacted to combat "a disturbing increase in lawsuits brought primarily to chill" free speech and petition. Cal Civ. Proc. Code § 425.16(a). Under the statute, if a defendant moves to strike a claim shown to be based on an act in furtherance of protected expression, the plaintiff must show a "reasonable probability" of prevailing on that claim for it to survive dismissal. Cal. Civ. Proc. Code § 425.16(b)(1) (the "motion-to-strike provision"). The statute also mandates an award of attorney's fees to a prevailing defendant. Cal. Civ. Proc. Code § 425.16(c)(1) (the "fee-shifting provision").

Federal courts sitting in diversity "apply state substantive law and federal procedural law[,]" *Hanna*, 380 U.S. at 465, using a two-step analysis to determine whether a state law applies. First, courts ask whether a Rule "answers the question in dispute." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) ("*Shady Grove*"). If so, the Rule governs, so long as it does not violate the Rules Enabling Act; if not, the court must then determine whether the state law is substantive within the meaning of *Erie*. *Id*.

The panel held, for the first time, that "California's anti-SLAPP statute is inapplicable in federal court because it increases a plaintiff's burden to overcome pretrial dismissal, and thus conflicts with [Rules] 12 and 56." Op. at 4. This holding directly conflicts with Ninth Circuit precedent. *See Newsham*, 190 F.3d at 972-73; *see also Metabolife International, Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001) (holding that the statute's "discovery-limiting" provisions collide with Rule 56, but reaffirming that the motion-to-strike and fee-shifting provisions are applicable in federal court).

In 2018, the Ninth Circuit clarified its application of the motion-to-strike provision in diversity cases, holding:

> If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under [Rule] 8 and 12 standards; if it is a factual challenge, then the motion must be treated as though it

> were a motion for summary judgment and discovery must be permitted.

*Planned Parenthood*, 890 F.3d at 833 (citation omitted).

Thus, if a "special motion to strike [is] based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under Rule 12(b)(6) except that the attorney's fee provision of [California's anti-SLAPP law] applies." *Id*. (citation omitted). This approach "eliminates" conflicts between California's anti-SLAPP statute and Rules 12 and 56. *Id*.

The panel opinion's split with the Ninth Circuit undermines *Erie*'s "twin aims": "discouragement of forum shopping and the avoidance of the inequitable administration of the laws." *Hanna*, 380 U.S. at 468. By holding California's anti-SLAPP provisions inapplicable in federal court, the panel opinion gives "a litigant interested in bringing meritless SLAPP claims" a "significant incentive to shop for a federal forum." *Newsham*, 190 F.3d at 973; *see also Godin v. Schencks*, 629 F.3d 79, 81, 91 (1st Cir. 2010). Further, the panel opinion encourages forum shopping *among* federal courts, incentivizing SLAPP plaintiffs to attempt to bypass courts in the Ninth Circuit for courts in this Circuit.

B. The panel opinion conflicts with *Adelson* and other precedent holding that state fee-shifting provisions are applicable in federal court.

The panel's holding that California's anti-SLAPP fee-shifting provision cannot be invoked in federal court also conflicts with *Adelson*, 774 F.3d at 809,

and decisions of the Supreme Court and this Court that make clear that state fee-shifting provisions are applicable in diversity cases.

Relying on footnotes in two other courts of appeals' decisions interpreting different anti-SLAPP statutes, the panel concluded that the fee-shifting provision of California's anti-SLAPP statute cannot apply in light of its conclusion that the statute's motion-to-strike provision conflicts with the Rules. Op. at 18 (citing *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1337, n.5 (D.C. Cir. 2015); *Klocke*, 936 F.3d at 247 n.6). In *Adelson*, however, this Court, eschewed an all-or-nothing approach to determining whether provisions of Nevada's anti-SLAPP law apply in federal court. 774 F.3d at 808–09.

Evaluating each of the three "specific state anti-SLAPP provisions applied by the district court" separately, this Court in *Adelson* found application of two provisions—the civil-immunity and fee-shifting provisions—"unproblematic." *Id.* (citing *Cotton,* 4 F.3d at 180). As the Court explained, each "(1) would apply in state court had suit been filed there; (2) is substantive within the meaning of *Erie,* since it is consequential enough that enforcement in federal proceedings will serve to discourage forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule." *Adelson,* 774 F.3d at 809 (citation omitted).

Though the panel opinion emphasizes that California's anti-SLAPP statute mandates an award of attorney's fees to "a prevailing defendant *on a special*

*motion to strike*," Cal. Civ. Pro. Code § 425.16(c)(1) (emphasis added), that is not, under this Court's approach in *Adelson*, dispositive. The fee-shifting provision of the Nevada anti-SLAPP statute considered in *Adelson* mandates a fee award if "the court grants a special motion to dismiss filed pursuant to [Nev. R. Stat. §] 41.660"; like California's statute, it does not expressly "make attorney's fees available to parties who obtain dismissal by other means, such as under [Rule] 12(b)(6)." Op. at 18 (quoting *Abbas*, 783 F.3d at 1337, n.5.)

Other federal courts of appeals have also held that state anti-SLAPP fee-shifting provisions are applicable in diversity cases. *See Planned Parenthood*, 890 F.3d at 833; *Godin*, 629 F.3d at 81, 91. And, outside the anti-SLAPP context, both the Supreme Court and this Court have recognized that federal courts sitting in diversity should apply state fee-shifting provisions. *See Alyeska Pipeline,* 421 U.S. at 260 n.31; *Cotton*, 4 F.3d at 180 ("Attorney's fees mandated by state statute are available when a federal court sits in diversity.").

California's anti-SLAPP fee-shifting provision does not conflict with any Rule and provides a substantive entitlement that California has a powerful policy interest in seeing consistently enforced. *See* Cal. Civ. Proc. Code § 425.16(a). It should not be unavailable to SLAPP defendants in diversity cases in this Circuit. *See Shady Grove*, 559 U.S. at 418–19 (Stevens, J., concurring) (explaining that

federal rules "must be interpreted with some degree of 'sensitivity to important state interests . . .'") (citations omitted)).

## II. Whether Plaintiff-Appellant is a "limited purpose" public figure does not turn on whether she commands "regular and continuing" media attention.

In vacating the district court's dismissal under Rule 12(b)(6), the panel held that the district court had "erroneously deemed" Plaintiff-Appellant a limited purpose public figure required to plead actual malice. Op. at 2. Dispositive to the panel was its conclusion that Plaintiff-Appellant "lacked the regular and continuing media access that is a hallmark of public-figure status." *Id*. at 5. But whether Plaintiff-Appellant is a limited purpose public figure does not "turn on" media access. *Id*. at 25. Media access is not required by *Gertz*. Nor is it a factor in the test applied by California courts. Rehearing is necessary to clarify the correct legal standard, application of which makes clear—even on the limited factual record at present—that Plaintiff-Appellant is a limited purpose public figure.[3]

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[3] Because the district court granted Defendant-Appellee's motion to dismiss under Rule 12(b)(6), the record before it was limited to the pleadings and judicially noticeable matters. The district court has yet to consider all evidence that may be proffered by the parties and to resolve "disputed factual questions bearing on the public figure determination." *Khawar v. Globe Intern., Inc.*, 19 Cal.4th 254, 264 (Cal. 1998). Thus, though Defendant-Appellee should not be required to show that Plaintiff-Appellant had "regular and continuing media access" for the actual malice standard to apply, nothing in the panel opinion forecloses Defendant-Appellee from making such a showing.

In *Gertz*, the Court provided a twofold rationale for extending the actual malice rule to "public figures." First, it observed that they "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Second, and "more significantly," the Court explained that public figures have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 253 (Cal. 1984) ("*Reader's Digest*") (citing *Gertz*, 418 U.S. at 345).

In doing so, the *Gertz* Court was not "setting forth criteria for deciding who is and who is not a public figure, it was explaining why they are treated differently for purposes of constitutional protection. [*Gertz*] therefore does not imply that only people with access to the media are public figures." Sack on Defamation, Fourth Edition, Vol. 1 § 5.3.3. And, indeed, though this Court considers "regular and continuing access to the media" a factor for determining whether a plaintiff is a limited purpose public figure, it has not treated that factor as dispositive. *See Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 618 (2d Cir. 1988) (holding that plaintiffs "may properly be characterized as limited purpose public figures" notwithstanding their lack of continuing access to the media).

Under California law, which governs here, courts apply a three-part test to determine whether a plaintiff is a limited purpose public figure:

> First, there must be a public controversy, which means the issue was debated publicly and had foreseeable and substantial ramifications for nonparticipants. Second, the plaintiff must have undertaken some voluntary act through which [she] sought to influence resolution of the public issue. . . . And finally, the alleged defamation must be germane to the plaintiff's participation in the controversy.

*Ampex*, 128 Cal.App.4th at 1577; *see also Reader's Digest*, 37 Cal.3d at 254-55 ("[S]uch a determination is often a close question which can only be resolved by considering the totality of the circumstances which comprise each individual controversy.").

Plaintiff-Appellant satisfies this standard. An activist "passionate" about "this country's immigration policies," Plaintiff-Appellant took a "particular interest" in California Senate Bill 54 (SB 54), "a controversial 2017 law that limits cooperation between local law enforcement and federal immigration authorities." Op. at 5. "Sanctuary" laws like SB 54—and their supporters and opponents—have garnered widespread media and public attention in California and nationwide. JA100-102; JA146-50. It was into this existing controversy that Plaintiff-Appellant, a vocal opponent of "sanctuary" laws, injected herself by, *inter alia*, testifying at city council meetings in at least eight different California cities to

voice her opposition to SB 54. JA102-105. Far from being dragged involuntarily into the "sanctuary" state controversy, Plaintiff-Appellant actively "sought to influence [its] resolution[.]" *Ampex*, 128 Cal.App.4th at 1577; *compare Khawar*, 19 Cal.4th at 267 (plaintiff who happened to be standing "in close proximity" to Robert Kennedy when he was assassinated did not engage in conduct calculated to "influence the public with respect to any issue"). By espousing her political views across California, Plaintiff-Appellant "invite[d] attention and comment," *Gertz*, 418 U.S. at 345, and thus became a limited purpose public figure for matters "germane" to her participation in that debate. *Ampex*, 128 Cal.App.4th at 1577.

The panel opinion holds, however, that a limited purpose public figure must not only "invite attention and comment," *Gertz*, 418 U.S. at 345, but also *receive* the kind of "regular and continuing" media attention generally reserved for *all purpose* public figures. *See* Op. at 24. To be clear, Plaintiff-Appellant did receive attention for her anti-immigration advocacy *before* the two allegedly defamatory posts at issue. A photograph of her was featured in *The Washington Post* in connection with a story about anti-immigration activists, JA101; JA119-144. And another photograph of Plaintiff-Appellant—in what appears to be a heated confrontation with a young man at a June 25, 2018 city council meeting in Simi Valley, California, JA105-106 (the "June 25 Photo")—published in the *Ventura County Star*, had gone viral on social media, drawing widespread attention,

including from prominent, national media figures, JA113-114. That Plaintiff-Appellant did not "regular[ly] and continu[ally]" command more extensive media coverage prior to that is not dispositive. Indeed, to so hold would eliminate the distinction between limited purpose and all-purpose public figures drawn in *Gertz*.

The public figure inquiry does not turn on how successful a plaintiff is in drawing media attention to herself or her views on a particular issue. It turns on whether she "undert[ook] some voluntary act through which [she] sought to influence resolution of the public issue," *Ampex*, 128 Cal.App.4th at 1577, thereby exposing herself to an increased risk that an "erroneous statement"—"inevitable in a free debate"—would be made about her, *New York Times Co. v. Sullivan,* 376 U.S. 254, 270-72 (1964). The panel's holding to the contrary contravenes *Gertz* and governing California law.

## III. The panel's holding that the July 1 Post is not protected opinion necessitates rehearing.

This case arose in the context of a heated debate among Americans regarding whether and to what extent state and local law enforcement should cooperate with federal immigration authorities. *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 601 (Cal. 1976) (in the context of a heated debate, "language which generally might be considered as statements of fact may well assume the character of statements of opinion"); *cf. Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 894

(9th Cir. 1988) (statements that anti-pornography activist, *inter alia*, "hates men, hates sex, and hates herself" were "expression of opinion in an important public debate" about pornography).

It was in this context that Defendant-Appellee posted on Instagram the already-viral June 25 Photo of Plaintiff-Appellant side-by-side with an infamous 1957 photograph of a woman in Little Rock, Arkansas protesting school desegregation. Defendant-Appellee commented on the juxtaposed photos that "history sometimes repeats" and "I can't believe that person screaming at a child, with their face twisted in rage, is real" but "every one of them were." JA87 (the "July 1 Post"). The panel's holding that the July 1 Post is not protected opinion because it implies that Plaintiff-Appellant engaged in "archetypal racist conduct" merits rehearing. Op. at 28.

The only "conduct" referenced in the July 1 Post—"screaming at a child"—reflects Defendant-Appellee's non-actionable interpretation of the juxtaposed photos displayed immediately below.[4] And, because the photos are included, the

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[4] The words "screaming," "child," and "twisted in rage" do not make the post actionable. To the contrary, "rhetorical hyperbole" and "loose, figurative" language are hallmarks of protected opinion. *See National Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974).

reader is free to interpret them differently. *See McCaskill*, 36 F. Supp. 3d at 159 ("Because different constituencies can hold different—and completely plausible—views of [Plaintiff-Appellant's] actions, statements characterizing those actions constitute protected opinion."); *see also Clifford*, 2020 WL 4384081 at *7 ("Because the tweet juxtaposing the two images was displayed immediately below Mr. Trump's tweet, the reader was provided with the information underlying the allegedly defamatory statement and was free to draw his or her own conclusions.").

Nor does the panel's conclusion that "[a] reader could interpret the juxtaposition of the [July 25 Photo] with the 1957 Little Rock image to mean that [Plaintiff-Appellant] likewise screamed at a child *out of racial animus*" make the July 1 Post actionable. Op. at 28–29 (emphasis added). It is well within the sphere of protected opinion to imply that impassioned opposition to California's "sanctuary" state law was motivated by "racial animus." *Cf. Stevens*, 855 F.2d at 402; *Koch*, 817 F.2d at 509; *McCaskill*, 36 F. Supp. 3d at 158–59 (holding statement that supporters of state constitutional amendment prohibiting same-sex marriage were "anti-gay" non-actionable); *Raible v. Newsweek*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) ("We hold that to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel.").

Viewed through the eyes of an objectively reasonable reader, the July 1 Post reflects Defendant-Appellee's opinion about the similarities between the July 25 Photo and the 1957 Little Rock image. To the extent it reflects Defendant-Appellee's "personal belief" that opponents of "sanctuary" state laws, including Plaintiff-Appellant, are motivated by racial animus, that is quintessential protected opinion, *Standing Committee*, 55 F.3d at 1438–39, incapable of "being proven true or false," *Turner v. Wells*, 879 F.3d 1254, 1264 (11th Cir. 2018) (holding that accusations of "homophobic taunting" are non-actionable).

*Overhill Farms, Inc. v. Lopez*, 190 Cal.App.4th 1248, 1265 (Cal. App. 2010), cited in the panel opinion, does not hold otherwise. In that case, the California Court of Appeal held that accusations of pre-textual "employment terminations which were both racist" and ageist, *id.* at 1251-52, were actionable because they accused the plaintiff company of wrongful—indeed, *illegal*—conduct. *Id*. at 1263 (citation omitted) ("[A] claim of racially motivated employment termination is a provably false fact."). Nothing in that decision suggests that merely attributing otherwise lawful conduct to "racial animus" is actionable. And, were that the law, expressing an opinion that *any* "conduct" or political viewpoint is motivated by "racism" or is "racist" would remove that opinion from constitutional protection.

Public debate over divisive political issues—like the debate over "sanctuary" state laws—are often characterized by "supercharged rhetoric"; they are nevertheless essential to the search for "truth." *Stevens*, 855 F.2d at 399. Because the panel's opinion, if unaddressed, will chill a staggering amount of vital contemporary public discourse about race, rehearing is necessary.

## CONCLUSION

For the foregoing reasons, panel rehearing and rehearing en banc should be granted.

Respectfully submitted,

*/s/ Katie Townsend*

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Dated: August 7, 2020
Washington, D.C.

## CERTIFICATE OF COMPLIANCE

I, Katie Townsend, do hereby certify that the foregoing Petition for Panel Rehearing or Rehearing En Banc:

1) Complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,899 words, as calculated by the word-processing system used to prepare the brief; and
2) 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 using Microsoft Office Word in 14-point, Times New Roman font.

*/s/ Katie Townsend*
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*Counsel for Defendant-Appellee*

Dated: August 7, 2020
Washington, D.C.

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system with a resulting electronic notice to all counsel of record on August 7, 2020.

Dated: August 7, 2020

*/s/ Katie Townsend*
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