Case No. 21-16027

United States Court of Appeals for the Ninth Circuit

JESSE HERNANDEZ; ROBERT ROBERT; RICHARD MURPHY; SARAB SARABI; GLENDA HUNTER; CAIN AGUILAR; DENNIS GUYOT; ALBERT KEY; COBB TRAN HA; JEFF NICHOLS; GEORGE GREIM; WESLEY MILLER; SUSAN DILLEY; CONNIE DOBBS; SEAN ESQUIVEL; RAMONA GIST; MARTHA GOMEZ; JASON HOBBS; BRANDON MEFFORD; ANGEL PEREZ; CLYDE WHITFIELD

Plaintiffs–Appellees,

and

MONTEREY COUNTY WEEKLY; FIRST AMENDMENT COALITION; PATRICIA RAMIREZ; JENNIFER RAMIREZ; YVETTE PAJAS; XAVIER PAJAS; JANEL PAJAS,

Intervenors–Appellees,

v.

COUNTY OF MONTEREY; MONTEREY COUNTY SHERIFF'S OFFICE; CALIFORNIA FORENSIC MEDICAL GROUP,

Defendants–Appellants.

From the U.S. District Court, Northern District of California,
Case No. 5:13-cv-02354-BLF,
Hon. Beth Labson Freeman

PLAINTIFFS–APPELLEES' OPPOSITION TO DEFENDANTS–APPELLANTS' MOTION FOR STAY

ROSEN BIEN GALVAN & GRUNFELD LLP
Michael W. Bien
mbien@rbgg.com
Ernest Galvan
Van Swearingen
Cara E. Trapani
Caroline E. Jackson
101 Mission Street, Sixth Floor
San Francisco, CA 94105-1738
Telephone: (415) 433-6830

NATIONAL PRISON PROJECT of the AMERICAN CIVIL LIBERTIES UNION
Corene Kendrick
ckendrick@aclu.org
Kyle Virgien
39 Drumm Street
San Francisco, CA 94111-5805
Telephone: (202) 393-4930

Attorneys for Appellees

TABLE OF CONTENTS

Page

INTRODUCTION 1

LEGAL STANDARD 2

ARGUMENT 3

I. WELLPATH HAS NOT SHOWN IT IS LIKELY TO SUCCEED ON THE MERITS OF THIS APPEAL 3

II. WELLPATH HAS NOT ESTABLISHED THAT IT WILL SUFFER IRREPARABLE HARM ABSENT A STAY 8

III. ISSUING A STAY WOULD HARM PLAINTIFFS, THE PUBLIC INTEREST, AND THE MONTEREY COMMUNITY 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Al Otro Lado v. Wolf,
952 F.3d 999 (9th Cir. 2020) 3, 11, 12

Courthouse News Serv. v. Planet,
947 F.3d 581 (9th Cir. 2020) 13

Ctr. for Auto Safety v. Chrysler Grp., LLC,
809 F.3d 1092 (9th Cir. 2016) 4

Doe #1 v. Trump,
957 F.3d 1050 (9th Cir. 2020) 8

E.E.O.C. v. Erection Co.,
900 F.2d 168 (9th Cir. 1990) 7

Elrod v. Burns,
427 U.S. 347 (1976) 14

Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,
24 F.3d 893 (7th Cir. 1994) 14

Hernandez v. County of Monterey ("Hernandez I"),
No. 13-cv-02354-BLF, 2023 WL 4688522 (N.D. Cal. July 21, 2023) . passim

Hernandez v. County of Monterey ("Hernandez II"),
No. 13-cv-02354-BLF, 2023 WL 4849877 (N.D. Cal. July 28, 2023) . 4, 5, 9, 11

Hilton v. Braunskill,
481 U.S. 770 (1987) 3

Hirschfeld v. Bd. of Elections,
984 F.2d 35 (2d Cir. 1993) 11

Kamakana v. City & Cnty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006) 7, 11, 13

Lugosch v. Pyramid Co. of Onondaga,
435 F.3d 110 (2d Cir. 2006) 14

Matchett v. Superior Ct.,
40 Cal. App. 3d 623 (1974) 10

Nixon v. Warner Commc'ns, Inc.,
435 U.S. 589 (1978) 13

Nken v. Holder,
556 U.S. 418 (2009)..... 2, 3, 12

Oliner v. Kontrabecki,
745 F.3d 1024 (9th Cir. 2014) 3

Scholl v. Mnuchin,
494 F. Supp. 3d 661 (N.D. Cal. 2020).....8

United States v. Mitchell,
971 F.3d 993 (9th Cir. 2020) 8

STATUTES

42 U.S.C. § 11101.....10

Cal. Evid. Code § 1157 9

INTRODUCTION

This case concerns the medical, mental health, and dental care at the Monterey County Jail ("the Jail") provided by Defendants-Appellants the County of Monterey, Monterey County Sheriff's Office, and Wellpath, Inc. (formerly California Forensic Medical Group, collectively "the County and Wellpath"). The Plaintiffs are the class of all incarcerated people at the Jail. The County and Wellpath have appealed the district court's July 21, 2023 order unsealing more than thirty reports issued by neutral monitors appointed by the court to assess the adequacy of care in these areas. Plaintiffs-Appellees filed the reports in connection with their pending motion to enforce the parties' settlement agreement. The pending motion seeks to end eight years of noncompliance with the vast majority of the settlement's requirements. The monitors' reports evidence the County and Wellpath's persistent noncompliance and are central to the parties' dispute at issue in Plaintiffs-Appellees' pending enforcement motion.

The County and Wellpath moved to stay the July 21 order in the district court. The court issued an order on July 28, 2023 denying the stay request, but extended the deadline for Plaintiffs-Appellees to re-file the monitors' reports on the public docket to August 10, 2023, with redactions to protect the privacy of incarcerated people and care providers. Wellpath now seeks an emergency stay of the court's July 21 and July 28 orders pending resolution of this appeal.

Wellpath presents no reason to disturb the district court's careful exercise of its discretion. Wellpath raised the same arguments to the district court as it raises now. The district court rejected those arguments. Wellpath provides no compelling reason why this Court should reach a different conclusion. Wellpath has shown no likelihood of success in this appeal and no harm that will flow from the district court's well-reasoned orders. On the contrary, a stay would irreparably harm the rights of thousands of current and former members of the Plaintiff class who are entitled to know the subject matter of Plaintiffs-Appellees' pending enforcement motion, which counsel was forced to heavily redact, as well as the evidence upon which the district court will base its eventual ruling. The district court appropriately exercised its discretion to ensure public access to the parties' evidence while also protecting the privacy of incarcerated people and care providers through narrow redactions. There is no basis for this Court to interfere with the district court's careful and well-reasoned orders now.

LEGAL STANDARD

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotations and citations omitted). To obtain a stay, the moving party must satisfy a four-factor test: "(1) whether the stay applicant

has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id*. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "'The first two factors … are the most critical'; the last two are reached only '[o]nce an applicant satisfies the first two factors.'" *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (quoting *Nken*, 556 U.S. at 434-35) (alterations in original). This Court reviews district court orders unsealing judicial records for abuse of discretion. *Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014).

ARGUMENT

I. WELLPATH HAS NOT SHOWN IT IS LIKELY TO SUCCEED ON THE MERITS OF THIS APPEAL

A stay applicant must show "more than a mere 'possibility' of relief" to meet its burden of demonstrating a likelihood of success. *Nken*, 556 U.S. at 434. Accordingly, Wellpath must make a "strong showing" that this Court is likely to find that the district court abused its discretion when it denied the County and Wellpath's request to seal the neutral monitor reports in their entirety. *Id*. (quoting *Hilton*, 481 U.S. at 776). Just as it did in the district court, Wellpath has not even attempted to make that showing. *Hernandez v. County of Monterey ("Hernandez II")*, No. 13-cv-02354-BLF, 2023 WL 4849877, at *2 (N.D. Cal. July 28, 2023)

(Freeman, J.) ("While Defendants clearly do not like the Court's conclusion, they have not attempted to explain how the Court's application of the relevant legal standard to Defendants' proffered reasons for sealing constituted an abuse of discretion.").

Even had it tried to meet its burden, Wellpath cannot show that the district court abused its discretion. The court correctly concluded that because the monitors' reports were filed in connection with Plaintiffs-Appellees' enforcement motion, which seeks to enforce much of the remedy entered in this case, the correct legal standard required Wellpath to show "compelling reasons" for sealing the monitors' reports in their entirety. *See Hernandez v. County of Monterey ("Hernandez I")*, No. 13-cv-02354-BLF, 2023 WL 4688522, at *2 (N.D. Cal. July 21, 2023) (Freeman, J.); *see also Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016). The district court correctly applied the "compelling reasons" standard to the facts before it and exercised its discretion to unseal the monitors' reports with privacy-protective redactions. Wellpath's arguments on appeal do not justify disturbing that result.

First, Wellpath claims that it was denied "a meaningful opportunity to respond to or otherwise oppose" the district court's order unsealing the reports. *See* Defs.-Appellants' Emergency Mot. Under Cir. Rule 27-3 for a Stay Pending Appeal ("Mot. to Stay"), Dkt. Entry 9 at 12; *see also id.* at 14 (falsely claiming that

"[t]he district court … suddenly, at the request of third-parties, and without any input from the parties or the neutral monitors, abruptly ordered the unsealing of the neutral monitor reports"). This is patently false. Wellpath could have, but did not, file a response to Plaintiffs' April 26, 2023 administrative motion whether to seal the monitors' reports (Dist. Ct. Dkt. 776). Only the County responded. *See* Dist. Ct. Dkt. 782; *see also Hernandez I*, 2023 WL 4688522, at *2. Based on this briefing—not on the proposed intervenors' motion, which the court has yet to adjudicate—the district court issued its July 21 order. *Contra* Mot. to Stay at 12-13 (speculating that the district court's July 21 order was "prompted by the media's desire to access confidential documents"). Only then did Wellpath get involved in this dispute, including by briefing an incorrect legal standard in its motion to stay before the district court and submitting impermissible reply evidence in the form of a declaration from Wellpath's Health Services Administrator, Paulette Torres Collazo. *See* Dist. Ct. Dkts. 806, 817, 817-1. Nevertheless, the district court considered Wellpath's evidence and found it unpersuasive. *Hernandez II*, 2023 WL 4849877, at *3.

Wellpath cites no authority to support its claim that the district court abused its discretion by concluding that Ms. Collazo's declaration did not provide "legitimate reasons to seal the reports or to grant a stay." *Id.*; *see also* Mot. to Stay 13. Wellpath complains about the district court's briefing schedule. *See* Mot. to

Stay at 13. The complaint is baseless. The district court's July 21 order allowed for a seven-day period before any reports were to be filed on the public docket. *Hernandez I*, 2023 WL 4688522, at *4. This allowed plenty of time to brief any stay motion.

Second, Wellpath attempts to mislead this Court by asserting that the monitors' reports have been sealed throughout the litigation. Wellpath avers that "[t]he district court had previously ordered all neutral monitor reports to be filed under seal" and that "the neutral monitors relied upon that prior order of the court when preparing their Reports." *Id.* at 14. Wellpath provides no citation to any such order, leaving it to this Court and counsel to comb the record in search of support for Wellpath's argument. Appellees' counsel has found no such blanket sealing order on the district court docket. On the contrary, the district court's prior sealing orders correctly balance the movant's asserted interest in secrecy against the right of access. *See, e.g.*, Order Re: Mots. To Seal, Dist. Ct. Dkt. 366 (sealing only those portions of documents implicating particularized safety and security and/privacy interests); Order Granting Pls.' Admin. Mot. to File Under Seal, Dist. Ct. Dkt. 604 (same); Order Den. Cnty's Admin. Mot. to File Under Seal, Dist. Ct. Dkt. 650 (denying motion to seal exhibits after balancing confidentiality and access interests).

Plaintiffs have insisted for years that public filing of the monitors' reports is

necessary and appropriate. *See* Decl. of Van Swearingen In Supp. of Pls.' Objs. To Reply Evid., Dist. Ct. Dkt. 818-1 at 4. The monitors' expectations were the subject of a factual dispute between the parties, and the district court found that unsealing the reports with redactions aligned with the expectations of the monitors who drafted all but one of the 33 reports at issue. *Hernandez I*, 2023 WL 4688522, at *2-3. Wellpath presents nothing to show that this factual finding was clearly erroneous. *See* Mot. to Stay at 12-14.

Even if the monitors had a uniform expectation of confidentiality, the district court's July 21 order would still be the correct result. The court rightly concluded that "a court-appointed monitors' desire for confidentiality" would not be a compelling reason to seal the reports, following this Court's instruction in *Kamakana* that "a non-party's reliance on a blanket protective order … is not a 'compelling reason' that rebuts the presumption of access." *Hernandez I*, 2023 WL 4688522, at *2 (quoting *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1183 (9th Cir. 2006)).

Wellpath has provided no compelling reason to overturn the presumption in favor of public access, which is only heightened in cases such as this that implicate the conduct (or misconduct) of public entities. *See E.E.O.C. v. Erection Co.*, 900 F.2d 168, 171-72 (9th Cir. 1990) (Reinhardt, J., concurring in part and dissenting in part). The district court was aware of this case's history, including Wellpath's

previous assertions of the monitors' reliance on confidentiality, and appropriately unsealed the reports anyway. Nor did the district court abuse its discretion in determining that the reports are not covered by any Protective Order—an argument Wellpath has abandoned on appeal. *Hernandez I*, 2023 WL 4688522, at *2.

Wellpath has not argued, let alone shown, a likelihood of success on its claim that the district court abused its discretion in determining that no compelling reason exists to seal the monitors' reports in their entirety. The first *Nken* factor weighs against a stay.

II. WELLPATH HAS NOT ESTABLISHED THAT IT WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Wellpath claims it will suffer irreparable harm because their appeal will be "moot" once the monitors' reports are filed on the public docket with privacy-protective redactions. Mot. to Stay at 12. It is true that once the reports are made public, they cannot be erased from the public forum. However, this alone does not relieve Wellpath of its obligation to demonstrate that "irreparable harm is probable—as opposed to merely possible—if the stay is not granted." *United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020). Nor can a stay applicant meet its burden to prove irreparable injury "by submitting conclusory factual assertions and speculative arguments that are unsupported in the record." *Doe #1 v. Trump*, 957 F.3d 1050, 1059-60 (9th Cir. 2020); *see also Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 682 (N.D. Cal. 2020) (allegations of harm that are "premised on

[the party's] view of the merits" are insufficient to justify a stay); *see also id.* ("The failure here to produce any evidence regarding [asserted injuries] militates against finding a likelihood of irreparable harm."). Wellpath falls far short of this threshold.

As in their motion to stay before the district court, Wellpath principally relies on sweeping assertions that it will be harmed if the reports are made public with limited redactions. Mot. to Stay at 14-16; *see also Hernandez II*, 2023 WL 4849877, at *2 (finding that the County and Wellpath "d[id] not identify any concrete injury that would flow from public access to the neutral monitor reports"). The purported injuries that Wellpath points to are purely speculative, and in some cases contradicted by the facts in the record.

Wellpath claims that "production of the reports will discourage Wellpath's employees from engaging in the quality review process." Mot. to Stay at 14. Wellpath offers no evidence to support this claim. Monitoring reports in similar institutional lawsuits are routinely made public without this result. *See* Dist. Ct. Dkt. 786 at 4-5 (collecting cases). And the district court has already mitigated this risk by mandating redactions of provider information. *Hernandez I*, 2023 WL 4688522, at *4.

The regulations Wellpath cites as governing quality reviews are equally inapposite. *See* Mot. to Stay at 14 (citing Cal. Evid. Code § 1157(a) which applies

to discovery of "records of organized committees," and 42 U.S.C. § 11101, which encourages effective peer review by physicians). Wellpath's reliance on *Matchett v. Superior Ct.*, 40 Cal. App. 3d 623, 629 (1974), is also misplaced, as that case held that Section 1157 is specifically "aimed at malpractice actions in which a present or former hospital staff doctor is a defendant"—none of which is at issue in this case.

Here, the neutral monitors' reports are governed by the settlement agreement, which requires the monitors to assess and report on Defendants' substantial compliance with the requirements in the settlement agreement and implementation plans. Dist. Ct. Dkt. 494 at 21-23. Wellpath staff's participation in the monitoring process is required by the district court's orders appointing the neutral monitors and empowering them to "access … all jail facilities," "meet and interview personnel," "review County or [Wellpath] documents," and "access … current inmate health records, including mental health records." Dist. Ct. Dkt. 753 at 5-6; *see also* Dist. Ct. Dkts. 563, 658, & 744 (same).

Wellpath further argues that unsealing the monitors' reports might somehow "create distrust between Wellpath's staff and their patients," without specifying why that would be true or how it would irreparably harm Wellpath, and without evidence to support the likelihood of this "distrust" arising. Mot to Stay at 15. Similarly, Wellpath speculates that "increase in media attention and public aware-

ness of [the reports'] content" will make "hiring and compliance efforts more difficult," and "fuel distrust among the parties." *Id.* at 16. Again, Wellpath provides no evidence to support these assertions and does not show how it would cause Wellpath irreparable harm. Wellpath does not even attempt to show why the district court's careful evaluation and ultimate rejection of these same arguments constitutes an abuse of discretion. *See Hernandez II*, 2023 WL 4849877, at *3.

As this Court has held, "[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Kamakana*, 447 F.3d at 1179. Wellpath has not made this showing. Moreover, any harm Defendants might suffer from public knowledge of their noncompliance with the settlement agreement "is largely self-inflicted," and "self-inflicted wounds are not irreparable injury." *Al Otro Lado*, 952 F.3d at 1008 (internal quotations and citations omitted). If Wellpath provided adequate medical, mental health, and dental care to people at the Jail as required by the settlement agreement and the district court's orders, it would have nothing to fear from disclosure of the monitors' reports. That Wellpath seeks a stay to continue hiding evidence of its noncompliance in order to avoid public knowledge of its shortcomings "'severely undermines' its claim for equitable relief." *Id.* (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993).

Wellpath carries the burden of establishing a threat of irreparable harm absent a stay. Wellpath has failed to make that showing. The Court should deny Wellpath's stay request.

III. ISSUING A STAY WOULD HARM PLAINTIFFS, THE PUBLIC INTEREST, AND THE MONTEREY COMMUNITY

The third and fourth factors—the harm that would be caused by a stay and the public interest—are only considered "[o]nce an applicant satisfies the first two factors." *Nken*, 556 U.S. at 435. Because Wellpath has not shown that the appeal is likely to succeed or that it will suffer irreparable harm absent a stay, this Court "need not dwell on the final two factors." *Al Otro Lado*, 952 F.3d at 1014 (internal quotations and citations omitted). However, these factors favor denying the stay.

A stay would substantially injure Plaintiffs. There are approximately 900 people incarcerated at the Jail at any given time, and thousands more who have previously been incarcerated there. *See, e.g.*, Joint Status Report, Dist. Ct. Dkt. 738 at 7. These current and former members of the Plaintiff class are entitled to know the evidence upon which the district court relies to decide Plaintiffs' pending enforcement motion. As shown by the significant redactions of Plaintiffs-Appellees' moving papers—which were required to maintain the neutral monitors' findings conditionally under seal—granting a stay would prevent class members from knowing even the subject areas of any order issued by the district court, or the findings from the reports that would supply the basis for that order. This is

vastly prejudicial to the Plaintiff class, who have suffered shockingly high death rates and inadequate care for years without access to the truth of the monitors' findings. *Cf.* Dist. Ct. Dkt. 788 at 9 (noting death and suicide rates at the Jail far above national and statewide averages).

The fourth factor also weighs in favor of unsealing the reports. The public—including members of the press, family members of people who have died in custody, and other members of the Monterey community—has First Amendment and common law rights to access the monitors' reports and the evidence from the reports that will be presented at the district court's August 24, 2023 hearing on Plaintiffs-Appellees' pending enforcement motion. *See Courthouse News Serv. v. Planet*, 947 F.3d 581, 591-92 (9th Cir. 2020) (First Amendment right of access applies to civil proceedings and filed documents).

The public's interest in obtaining the information in the monitors' reports about the care provided at the Jail lies within the heartland of the right of access to judicial records, which "is justified by the interest of citizens in 'keep[ing] a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (alterations in original) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978)). The public, and the Plaintiff class, has a right to an open adjudication of the issues regarding inadequate care at the Jail.

Wellpath argues that a stay would not harm Plaintiffs because it is not

seeking to delay the August 24 hearing, only "ask[ing] that that hearing be conducted while the Reports remain under seal." Mot to Stay at 17. This ignores the fact that the evidence in the reports is central to the enforcement proceedings, and maintaining them under seal would necessitate the district court to restrict public access to the hearing. As this Court has recognized, "a necessary corollary of the right to access is a right to timely access." *Planet*, 947 F.3d at 594. Accordingly, delaying Plaintiff class members' and the public's exercise of their First Amendment rights to access these records and the hearing would "unquestionably constitute[] irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (delay in unsealing records was "effectively a denial of any right to contemporaneous access—where '[e]ach passing day may constitute a separate and cognizable infringement of the First Amendment'" (quoting *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994))).

Wellpath further argues that unsealing the reports would harm the public interest by creating a "chilling effect on healthcare providers' ability to conduct candid compliance and patient safety reviews." Mot. to Stay at 18. But as previously discussed, the monitoring reports at issue here are distinct from the committee and peer review processes that Wellpath references. *See* Section II, *supra*. Moreover, the district court has ordered redactions of provider identities in

the reports, and ordered that self-assessment documents such as death reviews remain sealed in their entirety. *See Hernandez I*, 2023 WL 4688522, at *4. Granting a stay under these circumstances would signal to other defendants subject to monitoring in similar litigation that merely threatening reduced engagement by its staff in the monitoring process will be sufficient to keep any misfeasance the monitors find out of the public's eye.

The third and fourth factors weigh heavily against Wellpath's stay request.

CONCLUSION

For the foregoing reasons, this Court should deny Wellpath's Motion for Stay Pending Appeal.

DATED: August 8, 2023

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Cara E. Trapani*
Cara Trapani

Attorneys for Plaintiffs–Appellees

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending before the Court.

DATED: August 8, 2023

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Cara E. Trapani*
Cara Trapani

Attorneys for Plaintiffs–Appellees

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 27(d), Fed. R. App. P. 27-1(1)(d), Fed. R. App. P. 32 (a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 3,473 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), and does not exceed 20 pages.

DATED: August 8, 2023

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: */s/ Cara E. Trapani*
Cara Trapani

Attorneys for Plaintiffs–Appellees