No. 19-15159

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KAREN STROMBERG, ET AL.,

Plaintiffs-Appellees,

v.

QUALCOMM INCORPORATED,

Defendant-Appellant.

Appeal from the U.S. District Court for the
Northern District of California,
No. 5:17-md-02773-LHK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006-4706
(202) 737-0500
aparrish@kslaw.com

*Counsel for the Chamber of Commerce
of the United States of America*

Dated: June 10, 2019

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America certifies that it is a non-profit membership organization with no parent company and no publicly traded stock.

/s/ Ashley C. Parrish
Ashley C. Parrish

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including cases—like this one—that threaten to dramatically expand class-action litigation. The Chamber has a strong interest in ensuring that courts undertake the rigorous analysis required under Rule 23 before permitting a case to be litigated as a class action. Its members depend on courts to ensure that both "the prerequisites of Rule 23(a)" and "Rule 23(b)(3)'s predominance criterion" have been satisfied before any class is certified. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33–34 (2013) (quotation marks and citations omitted).

STATEMENT OF COMPLIANCE WITH RULE 29(a)

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Appellees Karen Stromberg, et al. have consented to the filing of this brief. Appellant Qualcomm Incorporated has also consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court in this case employed an impermissible, certify-now-worry-later approach to deciding the class-certification motion. Its rush to judgment—denying even a hearing—is apparent on the face of an order that, instead of reflecting the careful analysis that Rule 23 requires, brushes aside important individualized issues and approves a nationwide class action that is so large and contains so many variegated members that trying to litigate the case would be impossible without stripping defendants of individualized defenses.

Named plaintiffs' theory is that Qualcomm overcharged for licenses to its standard-essential patents, with the result that manufacturers paid more than they would have for components of devices that use Qualcomm technology. But the named plaintiffs are not the manufacturers; nor do they even seek to represent manufacturers. Instead, the class is composed entirely of *indirect* purchasers—individuals who bought mobile telephones from retailers or manufacturers that might have been injured by Qualcomm's allegedly anticompetitive practices.

In many states, this type of indirect-purchaser claim is precluded, meaning that mobile-telephone purchasers in those states have no cause of action. Nonetheless, the district court ignored these salient differences between individual purchasers, permitting millions to sue under California's more permissive rule despite their lack of antitrust standing—that is, a cause of action—to sue in their home states. The court then accepted named plaintiffs' flawed pass-through damages theory, one under which class members would recover regardless of whether they paid anything at all for their telephones or whether the manufacturer was paying any Qualcomm licensing fees that could have been "passed through." Blowing past all reasonable limiting principles, the court certified a class of between 230 and 250 *million* people—a total that is within a rounding error of the entire adult population of the United States. And yet the district court did not require named plaintiffs to explain how they plan to administer this class. No problem for the district court: as it recognized, with a class this large, Qualcomm would almost certainly have to settle to avoid ruinous liability, regardless of the merits of its individual defenses or plaintiffs' theories.

The district court's fatally flawed class-certification order should be reversed.

ARGUMENT

At least three errors infect the district court's certification decision. *First*, the court allowed plaintiffs to use the class-action device to grant causes of action to consumers in states in which they have none, essentially anointing California the nation's antitrust regulator. *Second*, in a case where 250 million different customers paid different amounts of money, or none at all, for mobile telephones—many of which were manufactured without Qualcomm receiving a penny in royalties—the court elided over named plaintiffs' failure to show that common issues predominate. *Third*, the court certified a class that on its face is unmanageably vast. The district court's certify-now-worry-later approach is contrary to law, and its order should not be allowed to stand.

I. The District Court's Certification Decision Improperly Elevates California to the Role of National Antitrust Enforcer.

In uncritically accepting named plaintiffs' sweeping choice-of-law theory, the district court granted causes of action to plaintiffs who have none. The result is a clear violation of the bedrock principle that the class action device cannot be used to expand the rights of individual plaintiffs or to eliminate individual defenses.

A. In *Illinois Brick Co. v. Illinois*, the Supreme Court limited antitrust claims to those persons who purchased directly from the alleged antitrust violator, reasoning that "the antitrust laws will be more effectively enforced by concentrating the full recovery for [an] overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." 431 U.S. 720, 735 (1977). *Illinois Brick* is the background rule, and it strips indirect purchasers of an antitrust cause of action unless state law provides otherwise. *See generally California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *cf. Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019) (reaffirming *Illinois Brick* and finding that customers who purchase apps from Apple Inc.'s App Store are direct purchasers from Apple). Although some states—such as California—have elected to "repeal" the *Illinois Brick* decision by means of legislation, nearly half of them have not.

Given that more than 40 years have passed since *Illinois Brick*, it is more than fair to assume that legislative inaction in non-repealer states reflects their considered policy judgment. There are, moreover, sound reasons for that judgment: by declining to permit indirect-purchaser suits, state legislatures foster a business-friendly environment that they have concluded benefits the citizens of their states. The *Illinois Brick* rule offers a manageable common-sense balance between the rights of consumers, the responsibilities of companies who provide them with goods and services, and the resources of taxpayer-funded courts that would otherwise be tasked with the herculean labor of tracing alleged overcharges to direct purchasers into alleged overcharges to indirect purchasers. And it prevents double recovery of trebled damages, "ensur[ing] that the overcharges will be paid only once to avoid over-deterrence." Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 Antitrust L.J. 167, 194 (2009).

The district court declined to afford those states' policy judgments the weight to which they are entitled; instead, it effectively made California the nation's antitrust regulator. As Qualcomm has argued, that decision violates California's own choice-of-law rules, which required the court to consider those states' interests in enforcing their own laws.

See Opening Br. of Qualcomm, Inc., Doc. 12, at 60–65 (filed June 3, 2019) ("Qualcomm Br.").

B. Permitting California to set the rules for commercial transactions in other states also implicates broader issues of federalism and runs afoul of constitutional protections of state sovereignty. Even if California *sought* to regulate commerce in Texas, Georgia, or Pennsylvania, and passed legislation to that effect, that legislation would not be consistent with the Due Process Clause and the Full Faith and Credit Clause of the United States Constitution. States may legislate only within their own boundaries. *E.g.*, *Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881) ("No state can legislate except with reference to its own jurisdiction."); *cf. Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

Moreover, because many of the transactions at issue here took place entirely outside California, between persons who are not California residents, enforcing California's antitrust rules on those transactions violates the Dormant Commerce Clause. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."). As the *Healy* Court held, "the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id.* The district court's order here plucked a rule from California's "regulatory regime" and "project[ed]" it indiscriminately into transactions in other states that have chosen to reject the rule.

Courts are, of course, bound to respect the judgment of states that have elected to repeal the *Illinois Brick* rule by means of legislation. But by the same token courts must also respect the decisions of those states that have chosen not to do so. The Constitution demands no less. The district court's order fell short of respecting this basic requirement.

C. The class-action device cannot overcome or avoid these concerns. The Rules Enabling Act precludes using the class action device—a creature of the Federal Rules—to "abridge [or] enlarge" the parties' substantive rights. 28 U.S.C. § 2072(b). Nevertheless, the district court order expanded the rights of indirect purchasers in the non-repealer states.

Indirect purchasers in non-repealer states simply do not have a cause of action or standing to seek redress for harm allegedly suffered by a third party and passed through to them in higher prices. *See In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) (summarizing *Illinois Brick*'s rule as "indirect purchasers may not use a pass-on theory to recover damages and thus have no standing to sue"). As a result, in certifying a nationwide class, the court's order stripped Qualcomm of a viable defense against claims by those consumers. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense"); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (noting that the class cannot be certified if it would prevent defendant from litigating its "statutory defenses to individual claims").

II. Plaintiffs Cannot Show That Common Issues Predominate.

Named plaintiffs cannot satisfy the "demanding requirement" of proving that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3); *Comcast*, 569 U.S. at 34; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014). The district court should have applied a "rigorous analysis" to named plaintiffs' evidence. But instead, the court accepted named plaintiffs' damages theory on little more than plaintiffs' say-so. Even under a *non*-rigorous analysis, however, individual issues predominate.

A. There is an insurmountable mismatch between named plaintiffs' theory of liability and their theory of damages. Purchasers bought different mobile telephones, at different times, from different retailers, at different prices—and, in some cases, received them for a significantly reduced cost or for free. Although a handful of class members may have transaction records of all of their mobile phone purchases during the proposed damages period, most class members likely do not. There is accordingly no ready way to determine which purchasers could have been injured as a result of the alleged antitrust violations. Which purchasers were injured and, if so, by how much is entirely speculative.

This underlying problem is reflected in the named plaintiffs' theory of damages. For most class members, that theory is a variation on their *Illinois Brick*–repealer central theme: mobile telephone makers passed through the higher prices, in some unspecified and yet-to-be-determined amount (but generally no more than a few dollars per customer) that varied from company to company, customer to customer, and transaction to transaction. Named plaintiffs seek to recover treble the undetermined amount paid, whatever it may be, for each of the 250 million or so class members.

To prove that common issues predominate, plaintiffs must propose a damages model consistent with their theory of liability and "establish[] that damages are capable of measurement on a classwide basis." *Comcast*, 569 U.S. at 34. As Qualcomm has pointed out, named plaintiffs' model fails to account for many confounding factors that suggest the passed-through cost, if it could be disaggregated at all, would be swallowed by other factors. Qualcomm Br. 30–34.

One such factor is focal-point pricing. Once a product passes some cost threshold, most sellers set retail prices that end in a 9. Beyond another cost threshold, those sellers will often set prices just below a benchmark $50 or $100 price point. *E.g.*, Louis Ramirez, *iPhone Price Comparison: Here's How Much Every iPhone Costs*, (last updated Sept. 12, 2018), *available at* https://bit.ly/2MjomWW (prices for all configurations of Apple iPhones end in 9, and most end either in 49 or

99); Samsung, *Buy the Samsung Galaxy S10*, (last visited June 10, 2019), *available at* https://bit.ly/2Eklray (prices for all configurations of Samsung Galaxy mobile telephones end either in 49.99 or 99.99). As this Court is surely aware, this is not a new practice, and there is no reason to believe these manufacturers would change that pricing strategy to pass on $3–$5 in savings to customers. In the "but for" world where Qualcomm did not charge allegedly excessive royalties, in other words, plaintiffs would pay the same amount they are paying now, but the sellers would keep the difference.

Similarly, mobile telephone retailers provide incentives or discounts that reduce or even eliminate the cost to the consumer of a mobile telephone. Qualcomm Br. 32. Plaintiffs have no answer for the fact that consumers who received a mobile telephone for free cannot, by definition, have been overcharged for that mobile telephone.

B. There is another large group of uninjured customers included in the now-certified class: individuals who bought Apple iPhones after Apple stopped paying *any* Qualcomm royalties. Qualcomm Br. 35–40. Plaintiffs' experts offered no calculation of *any* economic impact on these customers. That failure is understandable, because even if named plaintiffs' damages theory were meritorious, there is no plausible way in which Apple could have "passed on" a cost *it was not paying* to purchasers of its products. As this Court has recognized, "a methodology for calculation of damages that [cannot] produce a class-wide result [i]s not sufficient to support certification." *Jiminez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014).

This group of uninjured purchasers is smaller than the almost inconceivably enormous class but still comprises millions on its own—after all, Apple iPhones are among the most popular and widely purchased mobile telephones. The inclusion of so many uninjured class members illustrates one of the dangers of certifying so large a class, especially with the no-peeking procedure the district court appears to have used. Indeed, the post-2016 Apple iPhone purchasers would *by themselves* likely be an unmanageably large class. *See, e.g.*, *Abrams v. Interco Inc.*, 719 F.2d 23, 30–31 (2d Cir. 1983) (rejecting nationwide class of 3.1 million consumers as "unmanageable" due to size, "different products involved, [and] … fluctuations over time").

It is true that class counsel ginned up a new damages theory under which they contend that iPhone purchasers suffered *some* attenuated and likely unquantifiable injury, so as to keep this large subgroup in the class. But named plaintiffs presented that new theory for the first time in a reply brief. The district court's uncritical acceptance of that erroneous new theory *without a hearing,* thus denying Qualcomm any opportunity to respond, is a plain due-process violation and a far cry from the "close look" courts are required to give a damages model to ensure it measures damages "across the entire class." *Comcast*, 569 U.S. at 34–35.

In any event, the problem is more fundamental than named plaintiffs' new theory admits: the theory does not tie *actual damages* to *actual injuries* suffered by class members. A damages model that passes on *any* damages (again, trebled) to the uninjured Apple iPhone plaintiffs overcompensates a significant portion of the class with an arbitrary windfall. To the extent other plaintiffs are actually injured, that windfall comes at their expense. To the extent named plaintiffs' theories of the case are meritless, the windfall comes at Qualcomm's expense.

And even if the theory were meritorious, its tardy presentation suggests that when it comes to protecting the rights of absent class members, class counsel have other fish to fry. Given the sheer number of absent class members here, that problem is likely to be repeated again and again as class counsel prioritize what they view as the most lucrative claims, leaving whatever rights other absent class members may have to languish. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (rejecting "single giant class" when "interests of those within the single class are not aligned"); *id.* at 629 (noting that Rule 23 must be "applied with the interests of absent class members in close view").

Plaintiffs have suggested that the district court can solve some of these problems by parceling off a hundred thousand class members here or a million there into subclasses. But named plaintiffs have offered no details on how that parceling could be appropriately accomplished—and again, the court gave them a free pass on the question. Moreover, with a 250-million-member class, even the number of subclasses, each presenting a different factual and legal scenario, will quickly become unmanageable.

III. This Court Should Not Endorse This Unmanageable Class.

A. Plaintiffs bear the burden of showing that a class is manageable. *See* Fed. R. Civ. P. 23(b)(3)(D); *Wal-Mart*, 564 U.S. at 350. Named plaintiffs have failed to do so here—the record is devoid of any plan to process, verify, or administer the billion-plus claims they seek to bring on behalf of this class of 250 million individuals, or even to calculate individual overcharges.

Rule 23's requirements were not put in place unthinkingly. The Supreme Court has repeatedly reaffirmed that the class action remains an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Short-circuiting Rule 23's requirements skews the court's procedures in favor of named plaintiffs, stripping defendants of due process rights and prejudicing absent class members who may have different or better claims than named plaintiffs. Accordingly, courts *must* perform a "rigorous analysis" to ensure that parties seeking class certification "affirmatively demonstrate [their] compliance with the Rule." *Wal-Mart,* 564 U.S. at 350–51.

The district court's approach turns that requirement on its head. Instead of performing a rigorous analysis rooted in named plaintiffs' showing, it skipped the analysis entirely—simply stating, for example, that it "expects" plaintiffs will be able to "propose" some means of calculating individual damages. Order at 63. That is not "analysis," "rigorous" or otherwise. It is guesswork.

No class of this size can plausibly be considered manageable. Even the district court conceded that trying the case with a 250-million-member class, encompassing more than *one billion* individual claims, presenting the myriad fact patterns entailed in so many claims, "would be tough." CMC Tr. at 46:4–25 (Apr. 6, 2018). Calling this task "tough" might be proper English, "but only because there is a figure of speech called understatement and a literary device known as sarcasm." *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994). In blunter terms, managing this class would be impossible. Setting aside the question whether the class action mechanism would be appropriate for resolving the issues raised by named plaintiffs' complaint, it is clear that moving forward with *this* class is not "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Indeed, given the novelty of plaintiffs' claims, and because California's Cartwright Act allows litigants to recover "three times the damages sustained," plus "preliminary or permanent injunctive relief," as well as "a reasonable attorneys' fee together with the costs of the suit," Cal. Bus. & Prof. Code § 16750(a), there is no risk of a negative-value suit and it is unclear what benefit is gained by forcing plaintiffs' claims to be litigated by a nationwide class of this size. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (noting that the "most compelling rationale for finding superiority in a class action" is the "existence of a negative value suit"). Certification is not justified where, as here, there are other realistic possibilities for redress, the manageability problems of class litigation are significant, and the statute is structured to avoid any concern about "the disparity between [plaintiffs'] litigation costs and what they hope to recover." *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001).

B. Not only is the class hopelessly unmanageable from an adjudication perspective, its size presents inherent due-process concerns because it places a thumb (or in this case, 250 million of them) on the scales in favor of settlement. Although class certification is nominally a threshold question, "[w]ith vanishingly rare exception[s], class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009); *see also* Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 9 (Fed. Judicial Ctr. 2010), *available at* https://bit.ly/2I2wp4Y. With class certification, the potential costs of discovery and trial unleash "hydraulic" pressure to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 639 (1989).

Here, where the proposed class includes 250 million members, that pressure is vastly increased. As the Supreme Court has recognized, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded on other grounds by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *see also* Fed. R. Civ. P. 23(f) advisory committee's notes, 1998 Amendments (noting defendants may "settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Halliburton*, 573 U.S. at 296 n.7 (Thomas, J., concurring) (noting "the substantial *in terrorem* settlement pressures brought to bear by certification"). As Judge Posner noted, this pressure can overcome even the most meritorious defense:

> When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good. For by aggregating a large number of claims, a class action can impose a huge contingent liability on a defendant.

Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 678 (7th Cir. 2009) (citations omitted).

The result is that bigger classes create an ever more extraordinary pressure to settle. A class of 250 million members elevates that factor far beyond the point where actually litigating the claims and defenses, and thus exposing the defendant to a court's or jury's view of damages in the event of a finding of liability, could be considered "economically prudent"—or, indeed, even rational. Awarding even *nominal* damages per plaintiff to a class this size would result in a judgment of hundreds of millions of dollars. Again, the district court gave away the game, stating that it "would be shocked if this [case] goes to trial." CMC Tr. at 46:4–25

(Apr. 16, 2018). If this class is not too large, then no class ever could be too large.

Moreover, the massive class certified by the district court virtually guarantees that any settlement will be correspondingly large, *regardless of the validity of the claims or of Qualcomm's defenses*. The economic distortion resulting from forcing settlements in this and similar cases harms not only defendants but also consumers. When the claims underlying vast settlements have not been shown by trial to have merit, the result is that future customers pay—whether in money or in lost innovation—to subsidize past customers' windfall based on little more than the impending threat of ruinous litigation. This type of settlement benefits no one but the lawyers.

CONCLUSION

This Court should reverse the order granting class certification.

Respectfully submitted,

/s/ Ashley C. Parrish

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Ashley C. Parrish
Counsel of Record
Joshua N. Mitchell
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, DC 20006-4706
(202) 737-0500
aparrish@kslaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States

Dated: June 10, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1), Fed. R. App. P. 32(a)(7)(B), and Fed. R. App. 29(a)(5) because this brief contains 4,116 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 Century Schoolbook 14-point font.

Respectfully submitted,

/s/ Ashley C. Parrish
Ashley C. Parrish

Counsel for Amicus Curiae

Dated: June 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, 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.

Respectfully submitted,

/s/ Ashley C. Parrish
Ashley C. Parrish

Counsel for Amicis Curiae

Dated: June 10, 2019