UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 15-15857 (Consolidated with No. 15-15754)

GRAND CANYON TRUST, *et al.*,
Plaintiffs-Appellants,
v.

HEATHER PROVENCIO and UNITED STATES FOREST SERVICE,
Defendants-Appellees, and

ENERGY FUELS RESOURCES (USA), INC., *et al.*,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court
for the District of Arizona
Case No: 13-8045-DGC

APPELLANTS' PETITION FOR REHEARING EN BANC

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SUMMARY OF BASIS FOR REHEARING EN BANC

The panel's decision is the first ever to hold that plaintiffs with Article III standing based on an undisputed interest in protecting federal public lands do not have "prudential standing" to challenge an industrial use of those public lands. En banc review is needed to (1) "secure or maintain uniformity of the court's decisions," and (2) resolve "a question of exceptional importance" involving laws governing the western public lands. Fed. R. App. P. 35(a).

The Grand Canyon Trust, Center for Biological Diversity, and Sierra Club (collectively, "the Trust") asserted, among other claims, that the U.S. Forest Service incorrectly applied an exemption in the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et. seq.* ("FLPMA") that allows for mining on "withdrawn" public lands—lands where mining is otherwise off limits. Prudential standing was lacking, the panel held, because the Trust's interests were not among the "zone of interests" protected by the statutory provisions in question.

According to the panel, despite the fact that the Trust's claim was brought pursuant to FLPMA, the zone of interests of FLPMA was irrelevant because the prudential-standing inquiry should focus solely on the 1872 Mining Law. The panel then held that the Trust's recreational and conservation interests were not even arguably within the Mining Law's zone of interests, reasoning that because the Mining Law confers property rights on those seeking to mine, only those

holding competing property rights in public land may challenge agency decisions related to mining rights.

This holding is incompatible with Ninth Circuit and Supreme Court precedent for two reasons. First, it contradicts all other Ninth Circuit and Supreme Court decisions applying the zone-of-interests test to FLPMA claims, which hold that recreational and conservation interests are protected by FLPMA. Second, the decision's application of the zone-of-interests test to the Mining Law conflicts with Supreme Court precedent holding that competing interests in how land is used – like those the Trust asserts – are protected when a statute manages land uses by allocating property rights to the detriment of those competing interests.

The panel's application of the zone-of-interests test has broad, and serious, ramifications across the western public lands. The valid-existing-rights exemption is used throughout the major public land statutes that protect public resources by allowing public lands to be "withdrawn" from mineral entry. It appears not only in FLPMA, but in the Wilderness Act of 1964, the Wild and Scenic Rivers Act of 1968 and other laws, and the exemption is used under the Antiquities Act of 1906 (for presidential establishment of National Monuments).

None of these statutes include a test for determining whether existing rights are valid. Instead, every validity determination made under these statutes uses caselaw developed under the 1872 Mining Law. Yet under the panel's holding, the

interests protected by these laws – interests in safeguarding public environmental and other non-mining resources – are irrelevant to the zone-of-interests analysis.

According to the panel's reasoning, because those interests do not involve competing property rights protected by the Mining Law, those with non-mining interests in public lands could never challenge arbitrary or unlawful federal agency decisions to allow mining in withdrawn areas – like wilderness areas, national parks, national monuments, and other protected lands. Because of these far-reaching consequences, the zone-of-interests issue warrants en banc review.

BACKGROUND

The 1872 Mining Law allows miners to enter federal public lands to explore for minerals, "locate" mining claims, and discover "valuable mineral deposits." 30 U.S.C. §§ 22–23, 26. By discovering a valuable mineral deposit on a mining claim, a miner gains a "unique form of property" in the public lands amounting to a possessory interest to occupy and mine the claim. *United States v. Locke*, 471 U.S. 84, 86, 104–05 (1985).

When the federal government wants to place public lands off limits to mining, it "withdraws" the land from entry and claim location under the Mining Law. One way a mineral withdrawal can be made is by the Secretary of Interior, exercising authority under FLPMA to protect non-mining "public values." *See* 43 U.S.C. §§ 1714(a), 1702(j). These withdrawals are "subject to valid existing

rights," an exemption that allows for mining of valid claims established by the time the withdrawal is made. 43 U.S.C. §§ 1701; Pub. L. 94-579 § 701 note (h). To have such rights, a mining claimant must have discovered a "valuable mineral deposit" before the withdrawal. *See Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999). A deposit is "valuable" when it can be "extracted, removed, and marketed at a profit." *United States v. Coleman*, 390 U.S. 599, 600 (1968).

In 2009 and 2012, the Secretary used FLPMA's withdrawal authority to impose a ban on uranium mining covering about a million acres of public lands around Grand Canyon National Park. *See* 74 Fed. Reg. 35,887 (July 21, 2009); 77 Fed. Reg. 2317 (Jan. 17, 2012); *see Nat'l Mining Assoc. v. Zinke*, 877 F.3d 845 (9th Cir. 2017). The withdrawn area included a uranium mine, called Canyon Mine, located on mining claims just south of the Park. ER 231; ER 183. A mining company staked those claims in the 1970s, began building the mine in the 1980s, but closed it in the early 1990s before any uranium was mined due to unfavorable market conditions. ER 232, 585, ER 181.

In 2011, the mine's owner, Energy Fuels, told the Forest Service that it wanted to start mining uranium at Canyon Mine. ER 183. Because the withdrawal had by then banned mining in the area except on valid, existing claims, the Forest Service prepared a mineral report to determine whether Energy Fuels had "valid existing rights" that were exempt from the withdrawal. ER 231–32; ER 183. The

agency evaluated the mine's profitability under the Mining Law's test for a valuable mineral deposit and concluded that Energy Fuels had valid existing rights to develop the Canyon Mine. ER 227–28, 231.

The Trust sued to challenge that conclusion. One of the Trust's claims asserted that the Forest Service's valid-existing-rights determination was faulty, for it failed to properly account for all the costs of running the mine, including those to comply with environmental and other regulations. ER 100–101 (complaint Claim 4). On that claim, the district court entered summary judgment against the Trust, holding that the Trust had not satisfied the requirement that a plaintiff's interests be among those within the "zone of interests" protected by the statute in question. ER 16–20. To reach that conclusion, the court reasoned that the Trust's claim was governed solely by the Mining Law – not FLPMA – and that the Trust's interests in protecting public lands from mining conducted on invalid claims were not within the zone of interests protected by the Mining Law. *Id.*

The panel affirmed, holding that FLPMA's zone of interest was not germane and that the Mining Law protects only those "competing interests in public land that are, or are akin to, property rights." *Havasupai Tribe v. Provencio*, 876 F.3d 1242, 1254 (9th Cir. 2017). Reasoning that the Trust's interests "do not derive from anything like a property right," the panel affirmed the judgment dismissing this claim. *Id.*

ARGUMENT

I. En banc review is needed to ensure uniform application of the zone-of-interests test.

The zone-of-interest test is satisfied when a plaintiff's interest is "arguably" among those to be protected by the statutory provision in question. *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust*, 522 U.S 479, 492 (1998). The test looks to the "particular provision of law upon which the plaintiff relies," *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997)—the provision "whose violation forms the legal basis for [the plaintiff's] complaint." *Bennett*, 520 U.S. at 176 (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883 (1990)). Rehearing en banc should be granted to re-examine the panel's application of the zone-of-interests test for two reasons.

First, the panel should not have disregarded the interests that FLPMA protects, for the Trust's claim derives from FLPMA's withdrawal provisions and its valid-existing-rights exemption. It is those statutory provisions whose violation forms the legal basis for the Trust's complaint. It is because of the FLPMA withdrawal that the Forest Service issued the valid-existing-rights determination challenged by the Trust. Thus, it is the interests that those FLPMA provisions protect that govern the zone-of-interests test.

Second, even if the panel was correct that the only relevant interests are those protected by the "valuable mineral deposit" requirement in the Mining Law,

the panel's conclusion that the Trust's interests were not even "arguably" protected by that statutory provision directly contradicts longstanding Supreme Court precedent.

A. The interests FLPMA protects should not have been disregarded.

1. The statutory provisions in question are FLPMA's withdrawal authority and valid-existing-rights exemption.

The panel determined that the interests protected by FLPMA's valid-existing-rights requirement were not relevant. At the outset, the panel correctly noted that "the central issue in this case is … [FLPMA's] requirement that any withdrawal must be 'subject to valid existing rights.'" *Havasupai*, 876 F.3d at 1253 (citing 43 U.S.C. § 1701 note). It also correctly recognized that "FLPMA allows the Secretary to take environmental concerns into account," and that the Grand Canyon withdrawal was made to protect "public values" other than those promoted by the Mining Law. *Id.* at 1253 (citing 43 U.S.C. § 1702(j)). Yet it then nevertheless held that FLPMA was not applicable to the zone-of-interests inquiry. Its reasons were twofold.

First, the panel found that accounting for environmental concerns in issuing the withdrawal was a matter committed to the Secretary of Interior's discretion, leaving no standards for judging "an assessment of those factors." 876 F.3d at 1253. Second, it noted that the Mining Law, not FLPMA, supplies the test for determining whether valid rights exist. *Id.*

This analysis should be re-examined en banc. On the first point, the Trust's claim did not challenge the Secretary of Interior's decision to issue the withdrawal. The Trust's claim is against the Forest Service. It asserts that the validity determination – a decision the Forest Service made to conform with FLPMA's withdrawal provisions and valid-existing-rights exemption – was flawed. Those provisions of FLPMA protect the Trust's interests by closing public lands to mining so that they may be put to the other uses FLPMA's multiple-use mandate calls for, like outdoor recreation and preserving ecological, environmental, and other values. 43 U.S.C. § 1701(a)(8).

On the second point, the fact that FLPMA does not spell out the test for determining valid existing rights does not eliminate the congressional purposes behind FLPMA's withdrawal and valid-existing-rights provisions. Because it is FLPMA's withdrawal provisions and valid-existing-rights exemption "whose violation forms the legal basis" for the Trust's complaint, the relevant interests are those protected by these FLPMA provisions. *See Bennett*, 520 U.S. at 176. It makes no difference that determining whether these provisions were violated requires reference to legal standards developed under the Mining Law. It is the gravamen of the Trust's claim—FLPMA—that governs the zone-of-interests inquiry.

2. FLPMA's withdrawal provision and valid-existing-rights exemption benefit non-mining users of public land.

FLPMA grants the Secretary of Interior broad authority to protect public lands by "mak[ing], modify[ing], extend[ing], or revok[ing] withdrawals." 43 U.S.C. § 1714(a). This authority allows the Secretary to protect scenic, ecological, environmental, recreational and other values. 43 U.S.C. § 1701(a)(8). Thus, FLPMA's withdrawal provision and the associated requirement that mining can proceed only if valid existing rights were established before the withdrawal, squarely match the Trust's interests.

Not only does FLPMA's valid-existing-rights exemption benefit the Trust, but so too does the process for determining whether FLPMA's validity requirement has been met. Whether FLPMA's valid-existing-rights exemption is satisfied depends on whether a "valuable mineral deposit" has been discovered. *Hjelvik*, 198 F.3d at 1074. The "valuable mineral deposit" test, which has been developed through the courts and the federal agencies under the Mining Law, asks whether the mineral deposits can be "extracted, removed, and marketed at a profit." *Id.* Mining costs must be considered to determine profitability. *Coleman*, 390 U.S. at 602. These costs to be considered include the expense of "complying with any environmental and reclamation laws." *Indep. Mining v. Babbitt*, 105 F.3d 502, 506–07 (9th Cir. 1997). *See also Clouser v. Espy*, 42 F.3d 1522, 1530 (9th Cir. 1994) (costs include those to "reduce incidental environmental damage").

The Trust's claim on the merits focused on the agency's failure to account for these environmental compliance requirements and costs – requirements squarely benefitting conservation users of the public lands at Canyon Mine. *See United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1284–85 (9th Cir. 1980) (under the Multiple Use Act of 1955, 30 U.S.C. § 612, recreational users of mining claims are "permittees and licensees" of the federal government with recognized interests in public land).

Accordingly, the Trust does not have to be a mining company to challenge validity determinations under FLPMA. Non-miners may enforce the valid-existing-rights requirement. *See Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 375–77 (9th Cir. 1999) (adjudicating claim challenging a validity determination under the Wilderness Act).

3. The panel's holding is incompatible with decisions of the Ninth Circuit and Supreme Court applying the zone-of-interests test under FLPMA.

The panel's holding that the Trust cannot challenge FLPMA valid-existing-rights decisions conflicts with all of the controlling decisions applying the zone-of-interests test under FLPMA. As the Ninth Circuit has observed, "FLPMA requires that 'the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values.'" *Desert Citizens Against Pollution v. Bisson*,

231 F.3d 1172, 1179 (9th Cir. 2000) (quoting 43 U.S.C. § 1701(a)(8)). "That policy," the Court has explained, encompasses a plaintiff's interests in "seeking to invalidate an allegedly unlawful transfer of federal land that will deprive [plaintiffs'] members of their aesthetic and recreational interest in the land." *Id.* *See also W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 486 (9th Cir. 2011) (plaintiffs with interests in protecting public lands were within FLPMA's zone of interests).

The Supreme Court affirmed FLPMA's broad zone of interests. "We have no doubt that 'recreational use and aesthetic enjoyment' are among the *sorts* of interests [FLPMA and another statute] were specifically designed to protect." *Lujan*, 497 U.S. at 886 (conservationists' challenge to Secretarial withdrawal decisions within FLPMA's zone of interests).

The panel's decision contravenes these cases. FLPMA's withdrawal and valid-existing-rights provisions – the gravamen of the Trust's claim – are based on the congressional purpose that withdrawals "withhold[] an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area…." 43 U.S.C. § 1702(j). As the same panel acknowledged while upholding the withdrawal around the Grand Canyon, the

withdrawal was made to protect the public's interests in water, wildlife, and other non-mining resources. *Nat'l Mining Assoc.*, 877 F.3d at 866.

Indeed, "FLPMA explicitly provides that 'it is the policy of the United States that ... judicial review of public land adjudication decisions be provided by law.'" *Perkins v. Bergland*, 608 F.2d 803, 805 (9th Cir.1979) (citing 43 U.S.C. § 1701(a)(6)). That policy should remove any doubt about the reviewability of the Forest Service's valid-existing-rights determination.

B. The Supreme Court has not limited standing to only those with property rights under the Mining Law and other statutes.

In addition to improperly finding that FLPMA's zone of interests was irrelevant, the panel incorrectly limited the zone of interests of the Mining Law's "valuable mineral deposit" requirement. That requirement protects the Trust's recreational and conservation interests, in part by restricting whether and which public lands may be mined, thereby protecting non-mining interests in those lands.

That principle comes from a long line of Supreme Court decisions holding that a statutory limitation on the markets that a person may serve arguably protects the financial interests of that person's competitors. *See Nat'l Credit Union Admin.*, 522 U.S at 488–93 (discussing four cases reaching that result). The Supreme Court and the Ninth Circuit have applied the same "competitor-standing" principle to non-financial "markets." *See e.g.*, *Bennett*, 520 U.S. at 176–77 (those with

economic interests were within zone of interests of part of the Endangered Species Act, even though the ESA is meant to preserve species); *Pit River Tribe v. BLM*, 793 F.3d 1147, 1155–1158 (9th Cir. 2015) (public land users affected by leases under the Geothermal Steam Act were within the zone of interests of that Act, despite the fact that the statutory goal was to develop geothermal resources); *Nat'l Wildlife Fed. v. Burford*, 871 F.2d 849, 852–55 (9th Cir. 1989) (plaintiffs were within the zone of interests of the Federal Coal Leasing Amendments Act to challenge agency's determination that leases were made at fair market value, even though the fair-market-value determination was purely economic).

In *Bennett*, the Court found that water users with economic interests in a federal project were within the zone of interests of the Endangered Species Act's requirement that the "best scientific and commercial data" be used in making species-preservation decisions. *See* 520 U.S. at 176–77. The Court reasoned that the best-data requirement protects not only interests in preserving species, but also competitive interests in ensuring that the ESA is not implemented "haphazardly," avoiding "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Id.*

On this argument, the panel acknowledged that the "valuable mineral deposit" requirement arguably protects not only miners, but "others with competing claims." *Havasupai*, 876 F.3d at 1254. But the decision then

improperly limited any consideration of other interests to only those with property rights in public lands. "[The] Mining Act protects those with competing interests in public lands that are, or akin to, property rights." *Id*. Under this reasoning, all those with recreational or environmental protection interests on public lands are precluded from ever challenging an agency's valid existing rights determination. In so holding, the panel defined the competing interests far too narrowly, contradicting longstanding Supreme Court precedent.

In concluding that the Mining Law protects only those who hold "property rights" in public land, the panel confused *how* the statute protects competing interests with the *type* of interests it protects. The Mining Law's valuable-mineral-deposit requirement is the mechanism for accomplishing the Law's goals. It says where miners can and cannot mine and thereby regulates mining on federal public lands, while also conferring a kind of property right on miners who discover valuable mineral deposits. The Mining Law uses property rights to encourage valuable mineral deposits to be mined but simultaneously withholds rights to possess and mine non-valuable deposits. Thus, the property rights the Law creates cannot be separated from the land uses the Law regulates.

The zone of interests protected by the "valuable mineral deposit" requirement thus covers interests, such as the Trust's, in *limiting* the public lands that may be mined. Put differently, it prevents "haphazard" mining, avoiding

needless dislocation of the public lands produced by mining non-valuable deposits. *See Bennett*, 520 U.S. at 176–77.

Indeed, the Supreme Court has stressed that the "valuable mineral deposit" requirement ensures that "the rights of the public [are] preserved." *Cameron v. United States*, 252 U.S. 450, 460 (1920). This is because "no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public." *Id*. Accordingly, because the Trust has an interest in limiting mining on public lands – the focus of its challenge to the agency's valid-existing-rights determination – the "valuable mineral deposit" requirement protects the Trust's interests.

The Supreme Court's holding in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), is squarely on point. In *Patchak*, the statutory provision in question authorized the Secretary of Interior to acquire property interests "for the purpose of providing land for Indians." *Id.* at 211; 25 U.S.C. § 5108. When the Secretary bought a parcel of land to be used for a tribe's new casino, a neighboring landowner sued. *Id.* The Court stressed that the landowner was not asserting a competing property interest in the parcel at issue, for if he had, his suit would have been barred for other reasons. *Id.* at 216–217. Instead, he asserted economic, environmental, and aesthetic interests in keeping the

land casino-free. *Id.* at 224. The Court held that these interests in preventing a land use were within the zone of interests protected by the land-acquisition statute because acquiring land was necessarily bound up with considerations of land use. *Id.* at 225–27.

The Trust's case is on all fours. Letting miners acquire property interests in "valuable mineral deposits" is inseparable from the land use thus authorized – mining in a withdrawn area. Just like the statute at issue in *Patchak*, the Mining Law uses property interests to regulate a land use. But the Court in *Patchak* did not hold that only interests that "are, or are akin to, property rights" were arguably within the statute's zone of interests. Instead, it concluded that a plaintiff who had no property interest in the land the Secretary bought for the tribe, but was affected by the resulting land use, was within the zone of interests arguably protected by the statute. 567 U.S. at 225–27. The panel's contrary holding here is incompatible with *Patchak*.

The panel's decision also improperly focused on the Mining Law's "encouragement" to discover valuable minerals. 876 F.3d at 1254. Even if that is true, it is not dispositive. The Court has repeatedly stressed that Congress need not intend to benefit plaintiffs for their interests to "arguably" fall within a statute's zone of interests. *See, e.g.*, *Clarke v. Securities Indus. Assoc.*, 479 U.S. 388, 399–400 (1987) ("The test is not meant to be especially demanding; in particular, there

need be no indication of congressional purpose to benefit the would-be plaintiff."). The Court's most recent zone-of-interest decision confirmed the Court's "lenient approach" to zone-of-interest issues and that "in the APA context" the test "is not 'especially demanding.' … [W]e have often conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff…" *Lexmark Int'l v. Static Control Components*, 134 S.Ct. 1377, 1389 (2014) (internal quotation omitted). For this reason, in *Patchak*, the Court explained that it did not matter that the plaintiff was "not an Indian or tribal official seeking land." 567 U.S. at 225 n.7.

So too here, it does not matter that the Trust does not seek economic gain from mining public lands. What matters is that Congress unmistakably created a limit on the public lands that miners could occupy and mine by adopting the valuable-mineral-deposit requirement. Because the Trust has interests in limiting where miners may mine, the zone-of-interests test is satisfied.

II. Whether non-miners may challenge validity determinations for mines on protected public land is a question of exceptional national importance.

Although this case deals with one mine in one withdrawn area, the on-the-ground effects across the western public lands are vast. Within the area covered by the Grand Canyon withdrawal alone, "over 10,000 mining claims had been located within the withdrawal area by 2009." SER 1000. Similar valid-existing-rights

exceptions appear not only in FLPMA, but also in essentially all major congressional statutes and related presidential orders withdrawing land from mineral entry (using the same "valuable mineral deposit" test).[1]

For example, the Wilderness Act of 1964 states that: "Subject to valid rights then existing … the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws…." 16 U.S.C. § 1133(d)(3). This was the same valid-existing-rights provision adjudicated by the Ninth Circuit in *Dombeck*, without any concerns as to the prudential standing of the conservation group plaintiffs. 168 F.3d at 375–78. *See also* Wild and Scenic Rivers Act of 1968, 16 U.S.C. § 1280(a)(iii) (making withdrawal "subject to valid existing rights"). The Antiquities Act of 1906 too has been used by presidents to withdraw tens of millions of acres within National Monuments from mineral entry, all using similar valid-existing-rights exceptions. *See, e.g.*, *Cameron*, 252 U.S. at 456.

Yet under the panel's decision, non-mining users of these protected lands are

[1] *See* Huber, "*The Durability of Private Claims to Public Property*," 102 GEORGETOWN LAW JOURNAL 991, 1002–03 (2014)(noting that in one recent statute, establishing new wilderness areas, three new national parks, and a national monument, "[n]early every change in land status … [was] declared to be 'subject to valid existing rights' – indeed, the phrase is used sixty-three times in the legislation"). "The VER phrase appears in over 100 federal statutes." Laitos, "*The Nature and Consequence of 'Valid Existing Rights' Status in Public Land Law*," 5 JOURNAL OF MINERAL LAW & POLICY 399, 403, n. 20 (1990).

precluded from ever challenging the government's determinations allowing mining to proceed under an asserted valid existing right. This real and serious threat to our nation's most cherished landscapes warrants en banc review.

CONCLUSION

This Court should grant this petition for rehearing en banc and issue an opinion accordingly.

Respectfully submitted this 26th day of January, 2018.

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STATEMENT OF RELATED CASES

Plaintiffs/Appellants state that they are unaware of any related cases before this Court.

CERTIFICATION OF COMPLIANCE UNDER CIRCUIT RULE 40-1

I certify that: Pursuant to Circuit Rule 40-1(a), this Petition is proportionately spaced, has a typeface of 14 points or more, and contains fewer than 4,200 words.

/s/ Roger Flynn — *1-26-18*
Roger Flynn — Date

CERTIFICATE OF SERVICE OF ELECTRONIC FILING OF BRIEF

I also certify that on January 26, 2018, I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all of participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Roger Flynn
Roger Flynn