Nos. 20-1655 (L), 20-1671

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Petitioner,
and

PK VENTURES I LIMITED PARTNERSHIP,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Final Order of
the Federal Energy Regulatory Commission
(168 FERC ¶ 61,185; 171 FERC ¶ 61,046)

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, CALIFORNIA, CONNECTICUT, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, OREGON, VERMONT; AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY'S PETITION TO VACATE AND REMAND THE COMMISSION'S ORDER

ROBERT W. FERGUSON
Attorney General of Washington
CINDY CHANG
KELLY T. WOOD
Assistant Attorneys General
800 5th Avenue, Suite 2000
Seattle, Washington 98104-3188
(206) 326-5491

Additional Counsel for Amici Curiae Listed on Signature Page

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I. INTEREST OF AMICI CURIAE

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, the States of Washington, California, Connecticut, Maine, Michigan, Minnesota, New Jersey, Oregon, and Vermont; and the Commonwealth of Virginia ("Amici States") submit this brief in support of Petitioner North Carolina Department of Environmental Quality's ("NCDEQ") petition to vacate and remand Respondent Federal Energy Regulatory Commission's ("Commission") Order, which found that NCDEQ waived its authority under Section 401 of the Clean Water Act ("Section 401") to issue a water quality certification to McMahan Hydroelectric, LLC (the "Applicant") for the Bynum Hydroelectric Project ("Bynum Project").

Like North Carolina through NCDEQ, the Amici States exercise authority under Section 401 of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, to issue or deny water quality certifications for projects that may result in a discharge and require a federal license or permit. *See generally* 33 U.S.C. § 1341. Amici States implement Section 401 in a manner that is consistent with the Clean Water Act, their state laws, and proprietary and statutory interests in water quality within their states. Accordingly, Amici States have substantial interests in the proper application of the state waiver provision of Section 401 as presented in this petition for the Court's review.

II. INTRODUCTION

"The states remain, under the Clean Water Act, the 'prime bulwark in the effort to abate water pollution,' and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law." *Keating v. Fed. Energy Regulatory Comm'n*, 927 F.2d 616, 622 (D.C. Cir. 1991) (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)).

The primacy of states' regulatory authority over their waterways is evident in Section 401 of the Clean Water Act. Under this provision, states determine whether a project seeking a federal license or permit complies with state water quality standards and other applicable state laws. These projects, such as hydropower dams and natural gas pipelines, are often complex and have potentially enormous water quality impacts. In order for states to make informed and reasoned decisions, they must be able to undertake a complete assessment of the project's water quality impacts and mitigation proposals. This state authority is particularly important for natural gas pipeline and hydropower projects that are largely otherwise regulated by federal law. *See, e.g., California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 506 (1990). Because this process can reasonably extend beyond one year for complex projects, an applicant's withdrawal and resubmission of its request for certification is a practical procedure

that is permissible under the plain language of the Clean Water Act, consistent with the legislative intent of the Act, and that furthers the principles of judicial economy and the public interest.

Accordingly, the Court's *de novo* review of the Commission's interpretation of Section 401's waiver provision should hold that the Commission erred in finding NCDEQ waived its Section 401 certification authority. *See Ala. Rivers All. v. Fed. Energy Regulatory Comm'n*, 325 F.3d 290, 296-97 (D.C. Cir. 2003) (holding Commission's interpretation of Section 401 is not to entitled judicial deference because the Commission is not charged with administering the statute). Amici States respectfully request this Court to vacate and remand the Commission's license order to incorporate NCDEQ's Section 401 certification.

III. ARGUMENT

A. The Commission's Waiver Finding Undermines States' Authority to Regulate Water Quality Within their Borders.

The Clean Water Act plainly states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources.

33 U.S.C. § 1251(b). Throughout the Act, Congress repeatedly underscores states' authority to regulate water quality within their borders and impose additional protections that go beyond the federal requirements. *See, e.g., id.* § 1313 (states

determine water quality level requirements so long as they meet baseline federal standards); *id.* § 1370 (states may limit pollutant discharge or require control or abatement of pollution so long as the requirements are at least as stringent as the Act).

Section 401 recognizes the primacy of state regulation over water quality by requiring applicants for a federal license or permit for activity that may result in a discharge into navigable waters to obtain state certification that any such discharge complies with the Clean Water Act and other requirements of state laws. *See id.* § 1341(a)(1); *see also City of Fredericksburg, Va. v. Fed. Energy Regulatory Comm'n*, 876 F.2d 1109, 1112 (4th Cir. 1989) (holding the Commission's license for hydroelectric dam project was invalid because the applicant failed to obtain Section 401 certification); *Keating*, 927 F.2d at 622 ("Through [Section 401], Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval."). Through this certification process, states may impose effluent and other limitations and requirements that become conditions of the federal license or permit. 33 U.S.C. § 1341(d).

Courts have long recognized states' critical role in regulating water quality. *See, e.g., PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994) ("States are responsible for enforcing water quality standards on

intrastate waters."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 646 (4th Cir. 2018) (holding federal agency may not replace or alter state water quality condition attached to a Section 401 certification); *Keating*, 927 F.2d at 622.

And, as this Court has acknowledged, the legislative history for the Clean Water Act further substantiates the intentional preservation of states' authority to regulate water quality. *See, e.g., Sierra Club*, 909 F.3d at 647 ("Legislative history further emphasizes the central role Congress intended the States to play under the regulatory scheme laid out in the Act.").

Accordingly, a determination that weakens states' ability to regulate water quality within their borders is contrary to the plain language, case law, and legislative intent of the Clean Water Act. Although the Act prescribes how a state may waive its Section 401 authority, to effectuate the statutory plain language and the Congressional intent to preserve states' fundamental rights to protect water quality in their states, this provision must be construed in favor of non-waiver. *See* 33 U.S.C. §1341(a)(1). In this case, the Commission's finding of waiver undermines the fundamental purposes of the Clean Water Act and, for the reasons described herein, is contrary to law.

B. *Hoopa Valley Tribe* Is a Narrow, Fact-Specific Decision that Is Not Applicable to this Case.

The Commission relies heavily on the D.C. Circuit's ruling in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019),

to conclude that NCDEQ waived its Section 401 certification authority. For the reasons stated below and in NCDEQ's Brief, the Amici States maintain that *Hoopa Valley* is a flawed decision that is factually inapposite. Amici States therefore urge this Court to follow its own and Second Circuit precedent that Section 401 does not require a state to make a certification decision within one year of an applicant's first request if that request is incomplete or withdrawn. *See AES Sparrows Point LNG v. Wilson*, 589 F.3d 721, 729 (4th Cir. 2009) (holding the one-year waiver period does not begin until the request is valid and complete); *see also infra* Section C for discussion regarding *N.Y. State Dep't of Environmental Conservation v. Fed. Energy Regulatory Comm'n*, 884 F.3d 450, 456 (2d. Cir. 2018) (states may request the applicant to withdraw and resubmit an application deemed incomplete).

On its face, *Hoopa Valley* is a narrow, fact-specific ruling that does not apply here. In *Hoopa Valley*, California and Oregon had Section 401 certification authority for the relicensing and decommissioning of a series of dams along the Klamath River. In 2004, the project applicant filed its application with the Commission to relicense certain dams and decommission others. The project applicant first filed its requests for Section 401 certification with California and Oregon in 2006. Four years later, the states entered into a settlement agreement with the project applicant and other interested parties, which preconditioned

decommissioning on a number of future events—including securing federal funds. To accommodate the undefined timeline of these events, the settlement agreement included a specific term that the project applicant "shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the [Clean Water Act] during the Interim Period." *See Hoopa Valley*, 913 F.3d at 1102.

Beginning in 2012, Hoopa Valley Tribe, which was not party to the settlement agreement but whose reservation is downstream from the project, began petitioning for a declaration that Oregon and California had waived their Section 401 authority. Those efforts culminated in a petition to the D.C. Circuit Court of Appeals.

The D.C. Circuit agreed with the Tribe and held that California and Oregon waived their Section 401 certification authority for the project. *Id.* at 1105. However, the court specifically highlighted that its decision is deliberately narrow and based on the facts in the *Hoopa Valley* record:

> The record does not indicate that [the applicant] withdrew its request and submitted a wholly new one in its place, and therefore, *we decline to resolve the legitimacy of such an arrangement. We likewise need not determine how different a request must be to constitute a "new request" such that it restarts the one-year clock.*

913 F.3d at 1104 (emphasis added). As such, the D.C. Circuit made clear that its decision rests on the following facts: (1) an applicant entered a written agreement

with reviewing states to delay certification; and (2) the applicant's "coordinated withdrawal-and-resubmission scheme" of identical documents occurred for more than a decade. *Id.* These core facts are not present in the case before this Court, nor are they in the vast majority of instances when Amici States exercise their Section 401 certification authority.

Specifically, the Commission misapplies *Hoopa Valley* by concluding that a "formal agreement" between the applicant and the state licensing agency is not necessary to deem the state's authority waived. *See* 168 FERC ¶ 61,185 at 62088; 171 FERC ¶ 61,046 at 61451–52. In fact, the D.C. Circuit reasoned that it was California and Oregon's "deliberate and *contractual* idleness" that amounted to a failure or refusal to act under Section 401. *Hoopa Valley*, 913 F.3d at 1104 (emphasis added). The record here reflects that NCDEQ did not enter into *any* agreements—contractual or otherwise—with the Applicant to withdraw and resubmit its application; accordingly, *Hoopa Valley* does not dictate concluding that NCDEQ waived its Section 401 certification authority.

The Commission also misapplies *Hoopa Valley* by concluding that the Applicant's two withdrawals and resubmissions of its request for certification did not restart the one-year waiver period because the Applicant's resubmitted requests did not convey additional information to NCDEQ. *See* 168 FERC ¶ 61,185 at 62088; 171 FERC ¶ 61,046 at 61449–50. The Commission's rationale neglects the

fact that: (1) the Applicant submitted a water quality monitoring plan in support of its second application (after the withdrawal of the first application) (JA505 (Higgins Dec. ¶¶ 15–16)); (2) the Commission had not completed its Environmental Assessment at the time of the first withdrawal and resubmission (JA504 (Higgins Dec. ¶ 11)); and (3) the Commission completed its Environmental Assessment only four months prior to the Applicant's second and final withdrawal and resubmission (JA506, 508 (Higgins Dec. ¶¶ 19, 29)). Thus, the Applicant's resubmitted requests relied on additional new information that was not provided or available with the initial request. NCDEQ issued its certification less than a year after the Commission completed its Environmental Assessment and approximately two and a half years after receiving the Applicant's first, albeit incomplete, request for certification.

In contrast, the *Hoopa Valley* decision rests on the fact that the project applicant's request had been "complete and ready for review for more than a decade." 913 F.3d at 1105. The court characterized the specific factual scenario as "exploit[ing] the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time." *Id.* Nothing in the record supports a contention that NCDEQ or the Applicant were "exploiting" the certification process over an extended period of time; therefore, *Hoopa Valley* is distinguishable and the Commission's finding of waiver is erroneous.

C. The Clean Water Act Permits Withdrawal and Resubmission of Section 401 Certification Applications Without Waiving State Authority.

Setting aside *Hoopa Valley*, the Commission's waiver determination is erroneous because it is contrary to both the plain language and legislative history of Section 401's waiver provision, as well as analogous case law from the Second Circuit. These authorities make plain that Section 401 neither bars an applicant from voluntarily withdrawing and resubmitting a request for Section 401 certification nor justifies a waiver determination when that practice occurs.

First, the plain language of Section 401 provides that a state waives its authority to issue, condition, or deny a Section 401 certification *only* if the state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request." 33 U.S.C. § 1341(a)(1). The one-year timeframe runs only from the receipt of the applicant's request. The statute imposes no further restrictions on the timeframe of a state's review of a Section 401 application. No statutory language prohibits an applicant from withdrawing its request for certification at any time, for any reason. An applicant may withdraw a request because it has decided not to pursue the applicable federal permit, because it has submitted additional information or proposals for the state to review, or, as here, when information required for an application to be deemed complete cannot be obtained in time to avoid a state's denial of certification before the one-year period. The Commission's finding of

waiver when NCDEQ neither failed nor refused to act on the Applicant's request for certification is contrary to the text of Section 401. *See id.*

Second, the Commission's waiver determination runs counter to Section 401's legislative history. The current Section 401 was included in a 1970 amendment to the Federal Water Pollution Control Act as Section 21(b).[1] As originally drafted, state water quality certifications were not confined to a particular timeframe.[2] In the reconciliation process, Congress added the waiver provision only in response to concerns that a state could potentially block federally approved projects by simply not acting on an application for a water quality certification.[3] Thus, the proposed timeline and waiver provision "guard[ed] against a situation where the [certifying state] simply sits on its hands and does nothing."[4] When the Clean Water Act was reorganized and amended in 1972, Congress carried this language forward essentially unaltered into what is now Section 401.[5] When it did so, and as noted in the House Report, Congress' purpose remained focused on guarding against "sheer inactivity" by the states.[6]

Congress never intended to impede a project proponent's ability to voluntarily withdraw its application to avoid a Section 401 certification denial.

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[1] *See* Pub. L. No. 91-224, 84 Stat. 91, 108 (1970).
[2] H.R. REP. 91-127, at 42–43 (1969).
[3] 91 Cong. Rec. H.9264-65 (daily ed. Apr. 16, 1969) (House debate on H.R. 4148).
[4] *Id*. at H.9265 (statement of Congressman Chester Holifield).
[5] Pub. L. No. 92-500, 86 Stat. 816, 877–78 (1972).
[6] H.R. REP. 92-911, at 122 (1972).

And, in this case, there is no assertion that NCDEQ engaged in "sheer inactivity" or in an effort to indefinitely delay the proposal. As such, the Commission's waiver decision contravenes both the plain language of the Act and Congressional intent.

Finally, the Commission's waiver decision, and its focus on *Hoopa Valley*, conflicts with analogous authority from the Second Circuit. Specifically, in *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission* ("Millennium Pipeline decision"), the Second Circuit held that if a state believes an applicant has submitted insufficient information, it could "request that the applicant withdraw and resubmit the application." 884 F.3d at 456 (citing *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied* 138 S. Ct. 1697 (2018)). According to the court, the withdrawal and resubmittal procedure "restart[s] the one-year review period" and is a permissible alternative to denying certification for lack of necessary information. *Id.* at n.35. The Second Circuit cited the withdrawal and resubmittal process as a way to ensure that a state can avoid waiver and work with the applicant to refile in accordance with its requirements in cases where the applicant submits insufficient information, even in cases where the waiver period starts before a complete application has been received. *Id*. at 456.

The Millennium Pipeline decision is compelling authority for the facts in the present case. Unlike *Hoopa Valley*'s open-ended delay, the two-year length of time

between the applicant's certification request and the agency's decision in Millennium Pipeline is much more analogous to the timeframes presented in this case. Also similar are the reasons for that timeframe, with the state agencies in both cases awaiting information in the Commission's Environmental Assessment documentation to perform an adequate review of the proposal's water quality impacts. In fact, the Second Circuit's ruling cited with approval the exact withdrawal and resubmission procedures employed by the Applicant and NCDEQ to avoid premature decisions by the certifying state agency. *See id.*

D. Withdrawal and Resubmission of Section 401 Certification Applications Without Waiving State Authority Is Effective and Efficient.

Allowing project proponents to voluntarily withdraw and resubmit applications until information necessary for states to make their Section 401 certification decisions is available, or when applicants submit new proposals or information for the state to consider, is a useful and productive practice for some certifications, especially for complex projects such as those involving hydropower. Because of the level of environmental review associated with these projects, state review frequently requires analysis of a complex suite of potential impacts, including: the project's impact on water temperature; flow for habitat, aesthetics, and recreation; water chemistry and pH, dissolved oxygen, turbidity, and gas supersaturation; and impacts to existing and designated uses of the water body.

Assembling the suite of information required to assess these impacts often requires more than one year.

For example, the technical studies necessary to evaluate dam impacts often require assessment of a full year-long water cycle. As such, these studies—and others—frequently extend well beyond a year. If such information is not available within Section 401's one-year timeframe, states often cannot evaluate and issue certifications due to inadequate information on impacts. As a result, states, project applicants, and, until recently, the U.S. Environmental Protection Agency have long recognized the advantage of allowing the project applicant to withdraw and resubmit its application upon completion of the technical studies to enable states to base their certification decisions on the fully evaluated impacts of the project. *See Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes*, Environ. Protection Agency, Office of Wetlands, Oceans, and Watersheds, at 13 (April 2010 Interim) (withdrawn June 7, 2019 pursuant to "Promoting Energy Infrastructure and Economic Growth," Executive Order No. 13868, 84 FR 15495 (Apr. 10, 2019)).[7]

Moreover, states may also need more than one year to obtain the Commission's environmental analysis as required by the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. §§ 4321–47. Washington State and other

[7] *Available at* https://www.nrc.gov/docs/ML1121/ML112160635.pdf.

Amici States typically utilize the Commission's Environmental Assessment to inform Section 401 certification decisions. Indeed, "NEPA documents frequently include valuable and objective scientific analyses pertaining to water quality standards, especially information on hydropower project effects on uses designated by water quality standards." *See, e.g., Water Quality Certifications for Existing Hydropower Dams*, Washington State Dep't. of Ecology Publication No. 04-10-022, at 16 (March 2005).[8] States also frequently rely on the Commission's NEPA document(s) to satisfy state environmental policy acts, ultimately eliminating the need for states to perform expensive and unnecessarily duplicative efforts. Completion of the Commission's assessment is also critical because the analysis may change the scope and configuration of the project.

Requiring states to act on incomplete or changing applications also frustrates public interest because it places states in the untenable position of making Section 401 certification decisions on an incomplete record. For a certification request to be meaningful, states need sufficient information to determine whether a project will comply with water quality standards and requirements. Because states do not control the Commission's relicensing schedule, states required to approve or deny requests within one year—regardless of whether a complete certification request

[8] *Available at* https://fortress.wa.gov/ecy/publications/SummaryPages/0410022.html.

has been received—may not be able to conclude that a project would comply with state standards. Similarly, forcing states to act within a year of an applicant's original application regardless of the applicant's new or revised materials puts states in an untenable position. As such, if an applicant cannot withdraw and resubmit its certification request and restart the one-year certification timeframe, states may be forced to simply deny the requests because they cannot determine that the projects will comply with applicable state laws and water quality standards. The applicant may then seek judicial review of the denial, creating further administrative burdens and uncertainties for the state. Such an outcome fails to serve the public interest and will undermine the purpose of Section 401 by leading to additional delays and protracted litigation.

IV. CONCLUSION

For the foregoing reasons, Amici States respectfully request the Court to vacate the Commission's waiver determination and remand the Commission's Order to incorporate NCDEQ's Section 401 Certification for the Applicant's project.

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DATED October 2, 2020.

Respectfully submitted,

Counsel for Amici Curiae

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington
s/ Cindy Chang
CINDY CHANG
KELLY T. WOOD
Assistant Attorneys General
Washington Attorney General's Office
Environmental Protection Division
800 5th Avenue, Suite 2000
Seattle, Washington 98104-3188
(206) 326-5491

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
Attorney General of California
s/ Tatiana K. Gaur
SARAH E. MORRISON
Supervising Deputy Attorney General
TATIANA K. GAUR
CATHERINE M. WIEMAN
LANI M. MAHER
Deputy Attorneys General
California Attorney General's Office
Environment Section
300 South Spring Street, Suite 1720
Los Angeles, CA 90013
(213) 269-6329

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut
s/ Jill Lacedonia
JILL LACEDONIA
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General of Maine
s/ Scott Boak
SCOTT BOAK
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333
(207) 626-8800

FOR THE PEOPLE OF THE STATE OF MICHIGAN

DANA NESSEL
Attorney General of Michigan
s/ Fadwa Hammoud
FADWA HAMMOUD
Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

FOR THE STATE OF MINNESOTA

KEITH ELLISON
Attorney General of Minnesota
s/ Peter N. Surdo
PETER N. SURDO
Special Assistant Attorney General
Office of the Minnesota Attorney General
445 Minnesota Street
Saint Paul, MN 55101
(651) 757-1061

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
Attorney General of New Jersey
s/ Kristina Miles
Kristina Miles
Deputy Attorney General
Environmental Permitting and Counseling
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, NJ 08625
(609) 376-2804

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General
s/ Paul Garrahan
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
s/ Laura B. Murphy
LAURA B. MURPHY
Assistant Attorney General
Environmental Protection Division
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
(802) 828-1059

FOR THE COMMONWEALTH OF VIRGINIA

MARK R. HERRING
Attorney General of Virginia
s/ David C. Grandis
DONALD D. ANDERSON
Deputy Attorney General
PAUL KUGELMAN, JR.
Senior Assistant Attorney General,
Section Chief
DAVID C. GRANDIS
Senior Assistant Attorney General
Office of the Attorney General
202 North 9th Street
Richmond, VA 23219
(804) 225-2741

CERTIFICATE OF SERVICE

I certify that on October 2, 2020, I caused the foregoing brief to be filed with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Cindy Chang
Cindy Chang

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,535 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a 14-point, proportionally spaced serif typeface.

DATED: October 2, 2020

/s/ Cindy Chang
Cindy Chang