IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEXICAN FISHING COMPANY, et al. Plaintiffs-Appellants, vs. UNITED STATES DEPARTMENT OF COMMERCE, et al. Defendants-Appellees.	)	CASE NO. 22-30105 MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Local Rule 29, prospective *amicus curiae*, The Buckeye Institute, respectfully requests leave to file an amicus brief in this case. A copy of the Amicus Brief is attached to this filing. The brief focuses on points not made in the appellees' brief. Counsel for The Buckeye Institute has contacted counsel for the parties, who consent to the filing of this brief.

Respectfully submitted,

/s/ Jay R. Carson

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CERTIFICATE OF SERVICE

The foregoing Motion for Leave was served on all counsel of record via the Court's electronic filing system this 9th day of May 2022.

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Case No. 22-30105

In the United States Court of Appeals for the Fifth Circuit

MEXICAN FISHING COMPANY, CAPTAIN BILLY WELLS, A&B CHARTERS, INC. CAPTAIN ALLEN WALBURN, CAPTAIN KRAIG DAFCIK, VENTIMIGLIA, LLC CAPTAIN FRANK WENTIMIGLIA, FISHING CHARTERS OF NAPLES, CAPTAIN JIM RICKEY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE; GINA RAIMOMNDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; NOAA, A SCIENTIFIC AGENCY WITHIN THE DEPARTMENT OF COMMERCE; RICHARD W. SPINRAD, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE FISHERIES SERVICE, A LINE OFFICE WITHIN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, ALSO KNOWN AS NOAA FISHERIES; NICOLER. LEBOUEF, IN HER OFFICIAL CAPACITY AS ASSISTANT ADMISTRATION FOR NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,

Respondents

On Appeal from the United States District Court
For the Western District of Louisiana,

Civil Action No. 2:20-cv-2312
Honorable Susie Morgan, presiding

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

Case No. 22-30105

The undersigned counsel of record for *amicus* The Buckeye Institute certifies that The Buckeye Institute is an Ohio nonprofit organization[1]. Counsel is not aware of any person or entity as described in the fourth sentence of Rule 28.2.1 that have an interest in the outcome of this case other than those listed in the parties' certificates. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Jay R. Carson
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May 9, 2022

[1] Pursuant to Fed. R. App. 29(a)(4)(E), The Buckeye Institute has authored this brief in whole.

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INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy at the state and federal level. The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. Increasingly, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats.

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the roll-back of government regulations that unnecessarily burden and discourage private industry and initiative and intrude upon citizens' constitutional rights.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV.

The U.S. Supreme Court long recognized that the Amendment's essential purpose is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528 (1967). The Court, however, has also created a limited exception to the Fourth Amendment's otherwise bright line rule, allowing warrantless government surveillance in certain "closely regulated industries." *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 74 (1970); *Marshall v. Barlow's, Inc.,* 436 U.S. 312, 313 (1978). In the succeeding years, appellate courts found an ever increasing number of industries to be closely regulated. Yet in 2015, the Supreme Court emphasized that the closely regulated industry doctrine—like all judicially created exceptions to constitutional

commands—should be read as the exception and not the rule. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 424 (2015), citing *Barlow's, Inc*., 436 U.S. at 313.

Here, the district court's decision would, like Santiago's marlin grabbing the bait, swallow the rule whole and tow the Fourth Amendment's recognized protection against warrantless searches out to sea. *See* Ernest Hemingway, The Old Man and the Sea, Charles Scribner's Sons, 1952. The recreational charter fishing activity that the government seeks to subject to 24-hour electronic surveillance is unlike the closely regulated industries—such as the commercial fishing industry—where the warrant exception has been applied.

But more fundamentally, the closely regulated exception rests on the premise that certain industries are so comprehensively regulated that one engaging in them should have "no expectation of privacy." *See Barlow's, Inc.*, 436 U.S. at 313. While the recreational charter fishing industry, like most industries, is subject to *some* federal regulation, the regulatory requirements historically applied to fishing charters, both in terms of vessel safety requirements and wildlife conservation are nearly identical to those imposed on all recreational boaters and fishermen. Vessel owners who provide recreational fishing charters thus enter into the "industry" with the same expectations of privacy as any recreational boater or angler. And while these mariners may not reasonably expect to be exempt from dockside inspections or spot checks at sea, the history of fishing regulation—both commercial and

recreational—would give them no reason to expect that by participating in what the Appellees have described as "a beloved American pastime" that were surrendering all expectations of privacy and consenting to government tracking. See NOAA Fisheries, *Recreational Fishing: A Favorite American Pastime*, https://www.fisheries.noaa.gov/feature-story/recreational-fishing-favorite-american-pastime (accessed May 2, 2022).

Further, even if recreational charter fishing was a closely or pervasively regulated industry, applying the U.S. Supreme Court's three-part test articulated in *New York v. Burger*, 482 U.S. 691, 702-03 (1987), the GPS tracking requirement on recreational charter fishing captains and their guests fails to pass constitutional muster. While the government undoubtedly has an interest in protecting the nation's fisheries, the GPS monitoring that the government proposes does not further that interest. Further, the GPS monitoring does not present an adequate substitute for a warrant because it is not limited in time or scope. The district court's decision should therefore be reversed.

ARGUMENT

I. Recreational Charter Fishing is Not a Closely Regulated Industry

Since articulating the closely regulated industry exception in *Colonnade Catering*, which related to the alcohol sales industry, the U.S. Supreme Court has deemed three—and only three—industries so closely regulated as to permit

warrantless searches: retail firearms (*United States v. Biswell*, 406 U.S. 311 (1972)); mining industry (*Donovon v. Dewey*, 452 U.S. 594 (1981)); and vehicle dismantling (*Burger*, 482 U.S. 691).

To be sure, appellate courts have applied the exception to many other industries. For example, the Sixth Circuit has categorized pharmacies (*United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982)) and the sand and gravel industry (*Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir. 1979)) as closely regulated, but not bee apiaries (*Allinder v. Ohio*, 808 F.2d 1180 (6th Cir. 1987)). The Fourth Circuit and the Sixth Circuit have found precious metals dealing to fit within this category of businesses. *See Gallaher v. City of Huntington*, 759 F.2d 1155 (4th Cir. 1985); *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018). The Third Circuit has applied the closely regulated industry exception to the funeral home industry but not to trucking companies that haul asphalt. *Heffner v. Murphy*, 745 F.3d 56 (3rd Cir. 2014); *U.S. v. Schaefer, Michael and Clairton Slag, Inc.*, 637 F. 2d 200, 202 (3rd Cir. 1980). The Eighth Circuit, on the other hand, has held that the entire commercial trucking industry is closely regulated. *U.S. v. Parker*, 587 F.3d 871, 878 (8th Cir. 2009). The Ninth Circuit has held that massage parlors are so closely regulated as to allow warrantless searches and the Seventh Circuit has applied the exception to cigarette sales at convenience stores. *Kilgore v. City of South El Monte*, 3 F4th 1186, 1189 (9th Cir. 2021); *U.S. v. Hamad*, 809 F.3d 898, 906 (7th Cir. 2016).

Commentators surveying the state and lower federal courts noted that before 2015, the "narrow exception" described by the *Colonnade Catering* Court had grown to encompass industries ranging from those that plainly involved the public's health and safety—such as pharmaceuticals, the medical profession, nuclear power, storing and dispensing gasoline, construction, day cares and nursing homes, asbestos removal, and solid waste disposal—to industries such as "dog breeding, deer breeding, horse racing, hunting, taxidermy, and the sale of rabbits for research"—where the public interest was less apparent *Rethinking Closely Regulated Industries*, 129 HARV. L. REV. 797, 805-806 (2016) (internal citations omitted). And as the district court made clear, courts have applied the exception to the commercial fishing industry. But recreational charter fishing and commercial fishing are two distinct industries and the pervasive regulatory scheme that places commercial fishing vessels in the "closely regulated" category does not apply to recreational charter vessels.

A. Recreational Charter Captains Do Not Abandon All Reasonable Expectations of Privacy When Going to Sea.

In evaluating the possible extension of a court made exception, it is necessary to first consider the reasons the Court took the extraordinary step of finding an exception to the Fourth Amendment. Scholars have noted that *Colonnade* and *Biswell* involved industries with "such a history of government

oversight that no reasonable expectation of privacy ... could exist for a proprietor over the stock of such an enterprise." *Rethinking Closely Regulated Industries*, 129 Harv.L.Rev. 797, 803, quoting *Donovon*, 452 U.S. at 598-99. Federal appellate courts have consistently recognized that the exception's doctrinal premise is the reasonable expectations of privacy that an entrant into the industry might have based on the industry's history of regulation. *See Zadeh v. Robinson*, 928 F.3d 457, 464 (5th Cir. 2019) (citing *Barlow's, Inc.* 436 U.S. at 313).

The trial court thus points to cases holding that those who take to the water surrender some of their expectations of privacy. But those cases—which all dealt with commercial vessels—involved vessel boarding at sea, placing occasional observers on vessels for a limited time and purpose, and boarding and inspections on the dock. There is no dispute that commercial vessel owners lack reasonable expectations of privacy from these limited types of searches.

But the GPS tracking requirement at issue in this case is different in kind than the unannounced inspections in *Biswell*, *Donovon*, and *Burger* or the boat inspection cases relied on by the district court. In those cases, the government sought warrantless access to business locations where records were likely to be stored. But here, the government is not seeking to inspect any records or premises to verify regulatory compliance. Rather, the government is engaging in around-the-clock surveillance of the business owner's whereabouts.

The distinction is easy to understand when compared with searches on terra firma. While it is reasonable for a police officer to pull over a motorist where the officer has reasonable suspicion that the driver has committed a non-criminal regulatory traffic offense, is quite another matter to suggest that drivers should submit to hourly surveillance. Thus, based on the historic regulation of the industry, the junkyard operator in *Burger* doesn't have a reasonable expectation to be free of government officials' visits to his business or requests to see certain records, but he could reasonably expect that his comings and goings were not subject to government tracking.

Here, recreational charter fishermen, just like all recreational fisherman, have accepted the notion that they may be subject to dockside inspections—or in certain circumstances—spot boarding on the water. As the district court pointed out, "the expectation of finding the game warden looking over one's shoulder at the catch is virtually as old as fishing itself." Order, ROA.12497 (citing *Lovgren v. Bryne*, 787 F.2d 857 (3rd Cir. 1986) (relating to dock inspections for commercial fishermen)). But it does not follow that any history of any regulation stands as a signpost warning industry entrants to "abandon all expectation of privacy ye who enter." Rather, the diminished expectation of privacy—and thus the question of whether the closely regulated industry exception applies—must be related to the history of the *type* of regulation that have been imposed. Just as private recreational fisherman or boaters

would reasonably expect that leaving port does not equate to consent to government tracking, recreational charter captains' entrance into the industry should not be treated as a waiver of any expectations of privacy.

B. Recreational Charter Fishing is More Closely Akin to Lightly Regulated Recreational Fishing and Boating than Commercial Fishing.

In determining whether the exception applied, the district court defined the relevant industry broadly as "fishing." In so doing, the district court conflated the highly regulated commercial fishing industry with recreational charter fishing, which has never been found to be a closely regulated industry and is more akin to private recreational fishing than it is to large scale commercial operations.

Regulations on commercial fishing are indeed pervasive. They include an extensive list of safety equipment not required on recreational charter vessels such as life rafts, self-priming, power-driven fire hoses on some vessels, a certain fire-fighting and self-contained breathing equipment See 46 CFR 28. Commercial captains are also required to conduct drills and provide instruction relating to abandoning ship and fighting fires. *Id.* And these are just the regulations for safety equipment.

The regulation of recreational charter vessels, by contrast, is similar to the general regulations imposed on recreational boaters. This difference should come as no surprise. Just as a ride share company contracts to provide a car and driver for short-term transportation, charter captains rent out their boat and their services to

recreational fishermen. Certainly, ride share companies are subject to some additional regulations to ensure their customers' safety. But for the most part, ride share drivers and their vehicles are regulated like any private motorists and their vehicles. By comparison, charter buses, which transport more people at a time, are heavily regulated by the Federal Transit Administration and subject to a host of rules, including federal registration, a federally administered complaint procedure, and more rigorous safety requirements. *See* 40 CFR Part 604. Simply put, a recreational fishing charter captain is like a sea-going Uber driver—subject to the same general safety regulations and rules of the road as other drivers, but not heavily regulated that commercial transportation

Also, recreational charter vessels engage in fundamentally different activity than commercial fisherman. Recreational charters focus on day trips as opposed to extended cruises. They typically operate closer to shore and carry far fewer crew and passengers. They also catch far fewer fish. See Declarations at ROA 209-226.

Moreover, recreational boaters are subject to nearly identical registration safety regulations as the owners of recreational charter vessels. Recreational boaters are required to display registration decals identifying the vessel, as well as certain environmental placards. They are also required to carry lifejackets, fire extinguishers, and current flares and other signaling devices, and to have properly ventilated fuel tanks. *See A Boater's Guide to The Federal Requirements for*

Recreational Boats, U.S. Coast Guard, available at https://www.uscgboating.org/images/420.PDF (accessed May 2, 2022).

And relevant to the government's stated goal of conservation, persons fishing from a chartered recreational vessel are subject to the same bag limits and seasonal restrictions as recreational fishermen who use their own boats. *See Fishing Regulations and Seasonal Closures—Gulf of Mexico*, NOAA Fisheries, available at https://www.fisheries.noaa.gov/fishing-regulations-and-seasonal-closures-gulf-mexico (accessed May 3, 2022); *see also, Federal Fishing Regulations*, Gulf of Mexico Fishery Management Council, available at https://www.gulfcouncil.org/fishing-regulations/federal (accessed May 9, 2022).

In *Barlow's Inc*., the Supreme Court explained that when the regulations imposed on an industry are commonly imposed on other businesses or individuals, then the industry is not closely or pervasively regulated. *See Barlow's Inc.*, 436 U.S. at 314 (rejecting the notion that OSHA mandates that applied throughout interstate commerce constitute close regulation for purposes of the exception). Simply put, to be closely or pervasively regulated, the regulations in question must be specific — if not unique — to the industry. *Id.* at 313 and *Colonnade Catering* "represent responses to relatively unique circumstances").

All boating and Gulf fishing activity is subject to some level of federal regulation. The fact that recreational charter regulations have historically mirrored

the regulations applied to all boaters and fishermen indicates that the industry is *not* closely regulated.

C. *Patel* Has Narrowed the Closely Regulated Industry Exception

Further, the U.S. Supreme Court's decision in *City of Los Angeles, Calif. v. Patel* signaled the Court's concern that the closely regulated industry exception was quickly swallowing the rule. The *Patel* Court refocused the analysis on whether the industry posed an inherent risk to the public, implying that "the exception reaches only those industries posing such risks" *Rethinking Closely Regulated Industries*, 129 Harv. L. R. at 806.

The *Patel* Court also repeated the *Barlow's, Inc*. Court's theme that widely applicable regulations will not constitute close or pervasive regulation for a particular industry, holding that the regulatory regime governing hotels was "more akin to the widely applicable minimum wage and maximum hour rules" that the *Barlow's, Inc.* Court feared would deem "the entirety of American interstate commerce" to be closely regulated. *Patel*, 576 U.S. at 425. The *Patel* Court summed up its concern that the exception would swallow the rule thusly: "If such general regulations were sufficient to invoke the closely regulated industry exception, it would be hard to imagine a type of business that would not qualify." *Id.* Again, the regulatory scheme through which the government seeks to bootstrap its warrantless tracking requirement is little different from the regulatory scheme for non-charter,

noncommercial recreational fisherman and boaters. This Court should look to *Patel*'s guidance and treat the closely regulated industry exception as just —and one that does not apply to recreational charter fishing.

II. Even if the Recreational Charter Fishing Industry were a Closely Regulated Industry, the Tracking Requirement Fails the *Burger* Test.

Even if this Court were to expand the list of closely regulated industries to include recreational charter fishing, warrantless inspections in a closely regulated industry must still satisfy the three criteria the Supreme Court laid out in *New York v. Burger*: "(1) a substantial government interest, (2) a regulatory scheme that requires warrantless searches to further the government interest, and (3) 'a constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 692.

The district court found—and the Appellants did not dispute—that the government has a substantial interest in resource conservation and preventing over-fishing. Indeed, the charter captains share that same interest.

As to the second prong, however, the government does not need continuous warrantless GPS surveillance to further its stated interest of conservation and environmental protection. The district court found that the interest is furthered because with GPS tracking, the government will know when vessels are engaged in charter fishing for hire. An hourly record of where the vessel has been, however, does not reveal whether it was engaged in fishing—much less charter fishing. Many

vessel owners may leave port to travel to another port, to travel to an area to fish without paying passengers, or to simply spend an afternoon out on the water. Moreover, the tracking is not done in real time. Thus, just as the lagging data does not tell the government whether the vessel is actively fishing, it also does not tell the government where the vessel is in time to prevent some violation—it merely tells the government where the vessel has been.

By contrast, the *Burger* Court found that unexpected inspections make for better compliance in the context of companies engaged in automotive dismantling. *Burger*, 482 U.S. at 709–10. What conduct does the GPS tracking requirement deter through 24-hour location monitoring? The government seems to contend that the data is needed to verify location information already provided by the vessel captain. But the GPS tracking data does not indicate whether the vessel was actively engaged in fishing or merely travelling. And because the data is collected after the vessel returns to port, there is no real-time tracking that might allow immediate enforcement or seizure.

In explaining the third prong of its test, the *Burger* Court held that "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703; *Zadeh v. Robinson*, 928 F.3d 457, 467

(5th Cir. 2019). There is no question here that the vessel owner is being advised of the search. But the GPS tracking requirement fails *Burger's* requirement that the warrantless inspection regime must be "carefully limited in time, place, and scope." *Id*. at 703.

Here, there is no careful limitation as to time, place, and scope. The district court noted that the GPS tracker would ping only once an hour. But the district did not explain how that hourly ping represented any "careful" limitation of the government's surveillance. The course of a vessel at sea plotted based on hourly pings would allow anyone with a pen, paper, and ruler to arrive at a reasonable approximation of a vessel's location throughout its journey.

Further, the tracking is by design unlimited in place and scope. Under the GPS tracking requirement the government tracks the vessel anywhere it goes. And if the vessel remains in port, the government knowAnd, as noted above, the government tracks the vessel regardless of whether it is engaged in charter fishing for hire, private fishing, or simply cruising.

Contrast the continuous surveillance here with the enforcement regime found constitutional in *United States v. Kaiyo Maru No. 53*, 699 F.2d 989, 996 (9th Cir.1983). In that case, the government satisfied the limited time, place and scope prong because the Coast Guard "specifically limited its boardings to foreign fishing vessels actually engaged in fishing activities or otherwise within the [Fishery

Conservation Zone] after notifying the Coast Guard of intent to commence fishing activities and before having 'checked out.'" *Id.* The searches were thus limited to "those vessels actively involved in the harvest of fish." *Id*. No similar limitation is apparent here.

Likewise, the issue in *Balelo v. Baldridge*, 724 F.2d 753 (9th Cir. 1984) was protection of dolphins from tuna fisherman. The government proposed placing occasional observers on tuna fishing vessels. There the regulatory scheme had an adequate substitute for a warrant because captains received advance notice of when observers would be placed on board. Vessel owners had the opportunity to seek judicial review of any particular observer trip. The observers were not "enforcement agents" and were limited to the collection of certain data as set forth on a form provided to the vessel owner. Indeed, the observers were prohibited from recording "extraneous comments, editorials, or personal opinions . . . or evaluat[ing] or interpret[ing] data." The rule at issue there also required a predeparture conference between the owner, master, observer, and an agency official to ensure a common understanding of the scope of observers' activities." *Balelo,* 724 F.2d at 766 (9th Cir.1984).

Continuous GPS monitoring, on the other hand, provides no similar limitations or safeguards. Rather, it requires that anytime the owner of vessel that engages in recreational charter fishing leaves port—for any reason, whether engaged

in charter fishing or not—he or she must provide the government with an hourly report of their whereabouts.

CONCLUSION

Hemingway wrote that "Somebody just back of you while you are fishing is as bad as someone looking over your shoulder while you write a letter to your girl." Hemingway, *Trout Fishing in Europe*, THE TORONTO STAR WEEKLY, November 17, 1923. Justice Sotomayor expressed the same disdain for having someone looking over her shoulder:

> Awareness that the government may be watching chills associational and expressive freedoms. And the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society."

United States v. Jones, 565 U.S. 400, 416, (2012), (Sotomayor, concurring). The GPS tracking requirement here is not subject to the closely regulated industry exception, fails the Burger test, and thus violates the Fourth Amendment. For all the foregoing reasons, the district court's decision should be REVERSED.

Respectfully submitted,

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May 9, 2022.

CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure
Appendix 6

1. This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

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May 9, 2022

CERTIFICATE OF CONFERENCE

Counsel for Appellees have filed a blanket consent for the filing of amicus briefs.

May 9, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 9th day of May, 2022.

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