CASE NO. 19-16066

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROLYN JEWEL, TASH HEPTING, ERIK KNUTZEN, YOUNG BOON HICKS (AS EXECUTRIX OF THE ESTATE OF GREGORY HICKS), AND JOICE WALTON,

PLAINTIFFS-APPELLANTS,

V.

NATIONAL SECURITY AGENCY, *ET AL.*,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NO. 08-CV-04373-JSW
THE HONORABLE JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE

APPELLANTS' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

The Court should grant rehearing or rehearing en banc. The panel's decision holding that plaintiffs lack standing does not address the public evidence of standing set out in this petition and the briefs, and does not adjudicate the district court's classified ruling on plaintiffs' standing or review the classified evidence on which the ruling was based. The panel's decision also fails to address the procedures for discovery and use of secret evidence in surveillance cases that Congress created in 50 U.S.C. § 1806(f) and that the district court used, and thereby conflicts with this Court's opinion in *Fazaga v. FBI*, 965 F.3d 1015, 1043-52 (9th Cir. 2020). The court's affirmance of the exclusion under the state-secrets privilege of publicly-available government documents separately conflicts with the Court's holding that the state-secrets privilege does not extend to publicly-available documents. *Husayn v. Mitchell*, 938 F.3d 1123 (9th Cir. 2019); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1090 (9th Cir. 2010) (en banc).

En banc review is necessary to resolve the conflict of the panel's decision with *Fazaga* and *Husayn*. En banc review is also necessary because of the exceptional importance of plaintiffs' challenge to the Government's unlawful mass surveillance, to which not only plaintiffs but millions of Americans are subjected. Moreover, *Fazaga* and *Husayn* are currently on review by the Supreme Court. Prudence and judicial efficiency

counsel that the Court should await the Supreme Court's guidance in those cases.

This case presents issues of exceptional national importance. It challenges the Government's domestic mass surveillance conducted over the past 20 years, in which it has collected the phone records and intercepted the Internet communications of hundreds of millions of Americans, including no doubt members of this Court. For many years, these surveillance programs were conducted without any warrants or court orders, in an extravagant and unlawful assertion of Executive authority to defy the limits and procedures imposed by the Constitution and by Congress in the Foreign Intelligence Surveillance Act (FISA), the Wiretap Act, and the Stored Communications Act (SCA). The legality of these programs has never been resolved in adversary litigation.

Plaintiffs seek to restore "'that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Carpenter v. U.S.*, 138 S.Ct. 2206, 2214 (2018). They likewise seek to vindicate their statutory rights Congress created under FISA, the Wiretap Act, and the SCA.

Plaintiffs' challenge is supported by an extensive evidentiary record, much of it undisputed. The evidence includes government admissions and documents; documents and admissions by plaintiffs' telecommunications carrier AT&T detailing its participation in the Government's surveillance; eyewitness testimony from AT&T employees; and expert testimony.

The district court issued a public order dismissing plaintiffs' claims on the ground that it was barred by the state-secrets privilege from adjudicating plaintiffs' standing or the merits. In a classified order that plaintiffs have never seen, however, it did adjudicate whether plaintiffs have standing, using both plaintiffs' public evidence and secret evidence it had ordered the government to produce pursuant to the discovery procedures for state-secrets evidence of 50 U.S.C. § 1806(f) of FISA. The panel affirmed the dismissal on the ground that plaintiffs' public evidence was insufficient to show they had been injured; it did not review the district court's classified order or address the classified evidence.

Central to this case are the litigation procedures that Congress mandated in section 1806(f) and in 18 U.S.C. § 2712(b)(4) for discovery and use of state-secrets evidence in surveillance cases like this one. When a litigant seeks discovery of surveillance-related evidence, as plaintiffs did, and the Government asserts in response, as it did, that disclosure of the evidence would harm national security, section 1806(f) provides, "notwithstanding any other law," that the court "shall" review the evidence *in camera* and *ex parte* and determine whether the surveillance was lawful. Section 2712(b)(4) provides section 1806(f)'s discovery procedures apply to plaintiffs' Wiretap Act and SCA claims. In *Fazaga*, 965 F.3d at 1043-52, this Court held that section 1806(f)'s procedures for discovery and use of state-secrets evidence displaced the state-secrets privilege and were

available to plaintiffs litigating electronic-surveillance claims. *Fazaga* is pending before the Supreme Court (No. 20-828, to be argued Nov. 8, 2021).

As *Fazaga* holds, plaintiffs were entitled to use section 1806(f) to discover and present evidence the Government asserted to be state secrets in support of their claims, including to prove their standing and the merits. The district court agreed and used section 1806(f) to compel the Government to produce the secret evidence relevant to plaintiffs' standing; it then used the secret evidence together with the public evidence and decided in a classified order whether plaintiffs had standing. The panel's decision conflicts with *Fazaga* because the panel refused to decide whether section 1806(f) entitles plaintiffs to use state-secrets evidence, refused to review the district court's classified order, and refused to consider whether the state-secrets evidence produced in this case supported plaintiffs' standing.

Also important to this case is the rule established by this Court that the state-secrets privilege does not extend to public information, even if not officially confirmed by the Government. *Husayn*, 938 F.3d at 1133; *Jeppesen*, 614 F.3d at 1090. *Husayn* is pending before the Supreme Court (*sub nom. U.S. v. Abu Zubaydah*, No. 20-827, to be argued Oct. 6, 2021). By affirming the exclusion of publicly-available evidence on state-secrets grounds, the panel decision conflicts with *Husayn*.

The Court should grant rehearing or rehearing en banc and reverse the district court's judgment.

BACKGROUND

Whenever a litigant makes "any motion or request … pursuant to any other statute or rule … to discover or obtain applications or orders or other materials relating to electronic surveillance" and the Government asserts that disclosure of the evidence would harm national security, section 1806(f) provides, "notwithstanding any other law," that the court "shall" review the evidence *in camera* and *ex parte* and determine whether the surveillance was lawful. § 1806(f). If it was unlawful, the court "shall" "grant the [discovery] motion," making the state-secrets evidence available for use in the case. 50 U.S.C. § 1806(g).

Fazaga held: "Congress's intent [was] to make the *in camera* and *ex parte* procedure the exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations. That mandatory procedure necessarily overrides… the state secrets evidentiary dismissal option" that the district court applied here to dismiss plaintiffs' lawsuit. *Fazaga*, 965 F.3d at 1045 (citation omitted).

A. District Court Proceedings

Plaintiffs bring claims against the government and official-capacity defendants under the Fourth Amendment, the Wiretap Act, and the SCA. ER 1115-49 (Counts I, IX, XII, XV). Plaintiffs bring their Fourth Amendment claims individually and as class representatives of an injunctive-relief-only class comprising AT&T's customers. ER 1112-15.

Plaintiffs bring claims against the individual-capacity defendants under the Fourth Amendment, FISA, the Wiretap Act, and the SCA. ER 1115-49 (Counts II, VI, VIII, XI, XIV).

After this Court's reversal of the district court's erroneous 2010 dismissal for lack of standing (*Jewel v. NSA*, 673 F.3d 902 (9th Cir. 2011)) the district court held that sections 1806(f) and 18 U.S.C. § 2712(b)(4) displaced the state-secrets privilege. ER 56; *Jewel v. NSA*, 965 F.Supp.2d 1090 (N.D. Cal. 2013). It accordingly required the Government to respond to plaintiffs' discovery requests and produce any state-secrets evidence *ex parte* and *in camera* to the Court. ER 36; 5/19/17 RT 49-54, 67-74. Independently, the district court ordered the government to marshal and present all of the classified evidence relevant to plaintiffs' standing, regardless of whether it fell within plaintiffs' requests. ER 36; 5/19/17 RT 49-54, 67-74.

The Government responded *ex parte* and *in camera* with a 193-page classified declaration from NSA Director Rogers, together with thousands of pages of classified documents. ECF Nos. 388, 389. None of this evidence was disclosed to plaintiffs. The district court denied plaintiffs' motion, pursuant to section 1806(f) and subject to security clearances, for access to the classified materials. ECF Nos. 393, 400, 401; ER 34.

The district court then ordered the Government to move for summary judgment on plaintiffs' standing. ER 31-32. It ordered the Government to

brief the public and secret evidence relating to plaintiffs' standing and limited plaintiffs to briefing the public evidence only. ER 32.

B. The District Court's Orders

The district court issued two orders, a public order and in addition a classified order which plaintiffs have never seen. ER 2, 3-28. The public order dismissed the action on state-secrets privilege grounds. It excluded some evidence but did not decide whether plaintiffs' evidence established their standing. Instead, it held that the state-secrets privilege made plaintiffs' claims nonjusticiable. ER 20-23 (At 20: "[T]he Court has determined that it cannot render a judgment either as to the merits or as to any defense on the issue of standing." At 21: "The Court cannot issue any determinative finding on the issue of whether or not Plaintiffs have standing …."), 27 (granting the Government summary judgment because "it cannot rule on whether or not Plaintiffs have standing and that the well-founded assertion of [the state-secrets] privilege mandates dismissal").

The district court's classified order adjudicates whether the public and classified evidence establishes plaintiffs' standing: "[T]he Court must review and adjudicate the effect of the classified evidence regarding Plaintiffs' standing to sue. That review and adjudication is contained in the Court's Classified Order filed herewith." ER 15. Plaintiffs do not know whether the court found they have standing.

C. The Panel's Decision

The panel summarily affirmed the judgment on the ground that plaintiffs had failed to establish their standing, even if all the public evidence excluded by the district court was considered. Mem. 3. It also held that the district court did not abuse its discretion in excluding public evidence and in denying plaintiffs access to the classified evidence. Mem. 3-4. It did not decide whether the district court properly applied section 1806(f) or whether it properly dismissed the case under the state-secrets privilege.

The panel did not present any examination or analysis of any item of evidence in plaintiffs' 1000-page evidentiary record supporting their standing. The panel did not present any analysis of the basis for admissibility and supporting authorities that plaintiffs presented for each item of excluded evidence, or offer any reasoning supporting its unexplained conclusion that there was no abuse of discretion in any of the district court's evidentiary exclusions.

The panel did not examine or adjudicate the district court's classified order. It did not examine the classified Rogers declaration responding to plaintiffs' discovery requests or any of the classified documents produced in discovery.

ARGUMENT

I. The Public Evidence Establishes Plaintiffs' Standing

The panel held that even if all of plaintiffs' evidence is considered, it is insufficient to demonstrate their standing. Mem. 3. This holding is

contrary to the record. Alternatively, it held that the district court did not abuse its discretion in excluding some of plaintiffs' evidence. *Id*. That holding is also erroneous.

"[T]hree requirements . . . must be met for Article III standing: (1) an injury in fact that (2) is fairly traceable to the challenged conduct and (3) has some likelihood of redressability." *Jewel*, 673 F.3d at 908. "[A]n identifiable trifle is enough for standing." *U.S. v. SCRAP*, 412 U.S. 669, 689 n.14 (1973).

It is law of the case that plaintiffs have legally protected privacy interests in their Internet communications and in their phone records and Internet records. *Jewel*, 673 F.3d at 908-09, 913.

To show injury-in-fact, plaintiffs only need to show that the government has interfered with their communications and communications records. They do not need to prove that the interference violated the Constitution, FISA, the Wiretap Act, or the SCA. Standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *accord Jewel*, 673 F.3d at 911 n.5.

Importantly, plaintiffs' evidence shows mass surveillance: the Government collected all of the phone records of their phone companies at a time when they were customers; it intercepted, copied, and diverted all of the Internet communications transiting an AT&T communications junction that their communications transited. They need not show that their phone

records or Internet communications were individually targeted, only that it is more likely than not at least one of their phone records and at least one of their Internet communications were included in the Government's dragnet. The Court recognized this in its 2011 decision, when it held that plaintiffs' allegations of mass, untargeted surveillance that indiscriminately swept up their communications and records in a dragnet sufficiently alleged their standing. *Jewel*, 673 F.3d at 905-06, 910.

Because this is summary judgment, plaintiffs need only produce sufficient evidence from which a reasonable factfinder could conclude it is more likely than not—and not any greater degree of certainty—that, over the many years of the government's surveillance, at least one of each plaintiff's Internet communications was intercepted, copied, or redirected, and that at least one of their phone records was collected. *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011); *Lujan Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A. Plaintiffs Have Standing For Their Phone Records Claims

Plaintiffs' phone records claims allege that the Government collected their phone records as part of a massive program, acknowledged by the Government, of collecting and searching all the phone records of major telephone companies. The Government admits plaintiffs' evidence shows that "during the relevant time periods Plaintiffs were active telephone customers of AT&T (and in some cases, too, of Verizon Wireless, and Sprint)." ER 421 at 3:10-16.

Plaintiffs presented extensive evidence regarding this program, including a Government document conclusively identifying AT&T, Verizon Wireless, and Sprint—plaintiffs' phone companies—as companies that provided their phone records to the Government. Appellants' Opening Brief (AOB) 26-33. That public evidence alone is sufficient to show plaintiffs' phone records were collected and thus establishes their standing.

The Foreign Intelligence Surveillance Court (FISC) in an Order described the phone records program as the "production by major telephone service providers of call detail records for *all* domestic, United States-to-foreign, and foreign-to-United States calls." ER 666 (italics added).

The Government disclosed to the *New York Times* a National Security Agency letter to the FISC identifying AT&T, Verizon, Verizon Wireless, and Sprint as participants in the phone records program. ER 896-97; *see also* ER 849-52; AOB 27-28. The Government disclosed the NSA letter to settle a FOIA lawsuit brought by the *Times*. ER 869. The *Times'* Deputy General Counsel authenticated the letter and the *Times* published it. ER 146-48.

From this evidence alone a reasonable factfinder could conclude that more likely than not plaintiffs' phone records were collected from their phone companies AT&T, Verizon Wireless, and Sprint. No other conclusion is possible from the fact that the Government collected from participating providers the records of all phone calls, that AT&T, Verizon Wireless, and Sprint were participating providers, and that plaintiffs are

AT&T, Verizon Wireless, and Sprint customers. Thus, the panel erred in holding that even when all the public evidence is considered plaintiffs have insufficient evidence of injury-in-fact for their phone records claim.

The panel also erred in affirming the district court's evidentiary exclusions, and in doing so created a conflict with *Husayn*. The district court excluded the NSA letter on state-secrets privilege grounds. ER 18-19. That was error, whether reviewed de novo as required by *Jeppesen*, 614 F.3d at 1077, or for an abuse of discretion as the panel did. AOB 33-35; Appellants' Reply Brief (ARB) 25-26. It is a publicly-available document, properly authenticated. AOB 27-28; ARB 25-26. A "claim of privilege does not extend to public documents." *Jeppesen*, 614 F.3d at 1090. "[I]n order to be a 'state secret,' a fact must first be a 'secret.'" *Husayn*, 938 F.3d at 1133. The panel's affirmance of the state-secrets exclusion of the public NSA letter thus is contrary to *Husayn*.

The district court also erred in excluding other phone records evidence for the reason explained in plaintiffs' briefs and never addressed by the panel. AOB 28-29, 35-36; ARB 26-29.

B. Plaintiffs Have Standing For Interception Of Their Internet Communications And Metadata

Plaintiffs allege their emails and other Internet communications and communications records (metadata) were intercepted, copied, and searched as part of an indiscriminate Government dragnet called "Upstream." The law of the case is that plaintiffs have standing if they can show that the

Government's "'dragnet'" "'indiscriminately'" intercepted, copied, and diverted their Internet communications into the SG3 Secure Room at AT&T's Folsom Street Facility, and that is exactly what the evidence shows. *Jewel*, 673 F.3d at 910.

Plaintiffs presented extensive evidence showing their Internet communications and metadata were intercepted, copied, and diverted into the secret SG3 Secure Room controlled by the NSA at AT&T's Folsom Street Facility in San Francisco. AOB 39-43, 79-88; ARB 32-38.

In district court, the Government conceded that plaintiffs' evidence was sufficient to show their Internet communications and metadata had been intercepted, copied by "splitters," and the copies diverted into the SG3 Secure Room. The Government admitted plaintiffs' evidence shows:

> "(iii) That online communications traffic crossing 'peering links' located at AT&T's Folsom Street, San Francisco, facility is electronically copied, using optical splitters, and the entire copied stream diverted to a room designated as the SG3 Secure Room, …; (iv) That since 2001 at least one of each Plaintiff's Internet communications has transited the 'peering links' located at Folsom Street, and the copy 'redirected' to the SG3 Secure Room.

ECF No. 421 at 13:2-13.

The undisputed interception, copying, and diversion of plaintiffs' Internet communications is an injury-in-fact. *See U.S. v. Szymuszkiewicz*, 622 F.3d 701, 705-07 (7th Cir. 2010) (copying and diverting emails violates the Wiretap Act); *Noel v. Hall*, 568 F.3d 743, 749 (9th Cir. 2009) (Wiretap Act interception "occurs 'when the contents of a wire communication are

captured or redirected in any way'"); *U.S. v. Councilman*, 418 F.3d 67, 79 (1st Cir. 2005) (en banc) (interception, copying, and diversion of emails violated the Wiretap Act); *U.S. v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992) ("when the contents of a wire communication are captured or redirected in any way, an interception occurs").

Thus, the question was not, as the panel erroneously believed (Mem. 2), whether plaintiffs had shown an injury-in-fact, but whether that injury was fairly traceable to the Government.

Plaintiffs have presented more than enough evidence from which a reasonable factfinder could conclude that more likely than not the interception, copying, and diversion of plaintiffs' communications is fairly traceable to the Government. First, the Government acknowledges that its "Upstream" surveillance program sits astride key Internet junctions connecting the Internet "backbone" cables of different Internet providers. "[T]he [NSA] intercepts communications directly from the Internet 'backbone'" using "NSA-designed upstream Internet collection devices [that] acquire transactions as they cross the Internet." ER 521, 436; *see* AOB 37-38.

The interceptions occur at the point where the Internet backbone circuits of different Internet providers connect, "in the flow of communications between communications service providers." ER 432. That is exactly where the AT&T splitters at the Folsom Street Facility that copy plaintiffs' communications are located. AOB 39-42, 79-80.

Plaintiffs presented eyewitness testimony of an AT&T employee showing the NSA's connection to the SG3 Secure Room. AOB 41, 80-81. The NSA paid repeated visits to AT&T's facilities to plan and supervise the SG3 Secure Room and the employees who worked in it. *Id*. Employees who were not cleared by the NSA were excluded from the room. *Id*. AT&T documents and testimony by AT&T's Director-Asset Protection show that the room contains surveillance devices capable of searching and filtering the intercepted communications. AOB 82-84. That evidence dovetails with the Government's admission that it searches and filters the communications it intercepts on the Internet backbone. AOB 38, 65-67. A draft NSA Office of Inspector General report also shows AT&T's participation in the Government's Internet interceptions. AOB 29, 38. And AT&T admits it performs FISA communications surveillance for the Government. AOB 39.

Considering the totality of the evidence without regard to the district court's evidentiary exclusions, as the panel did, a reasonable factfinder could find it more likely than not that the undisputed interception, copying, and diversion of plaintiffs' communications to the SG3 Secure Room is fairly traceable to the Government.

Additionally, for the reason explained in plaintiffs' briefs and never addressed by the panel, the district court also abused its discretion in excluding evidence supporting plaintiffs' Internet communications and metadata interception claims. AOB 45-54; ARB 31-38.

II. The Panel Erred In Failing To Review The Classified Order And Evidence, Contrary To *Fazaga*

The panel's treatment of the classified evidence conflicts with *Fazaga*. As *Fazaga* makes clear, section 1806(f) applies to civil actions like plaintiffs challenging unlawful surveillance and displaces the state-secrets privilege. 965 F.3d at 1043-53. Rather than excluding the evidence, courts must use state-secrets evidence to decide whether plaintiffs were subject to unlawful surveillance. *Id*.

In its classified order, the district court adjudicated plaintiffs' standing using all the evidence, both public and classified. The panel, however, did not review the classified order or the classified evidence. Its failure to do so conflicts with both section 1806(f) and *Fazaga*.

There is a glaring contradiction between the panel's refusal to apply section 1806(f) and *Fazaga* and the panel's conclusion that there is insufficient evidence of standing. The Court cannot decide whether the there is sufficient evidence of plaintiffs' standing without considering the classified evidence as *Fazaga* and section 1806(f) require it to do.

If the district court found that there was sufficient evidence of plaintiffs' standing, and if in fact the totality of the public and classified evidence *does* support plaintiffs' standing, then the panel's decision finding plaintiffs lack standing is a travesty of justice.

The panel erroneously held that it need not look at the classified evidence because plaintiffs had not identified specific facts within the

classified evidence supporting their standing. Mem. 3. But section 1806(f) provides otherwise. Congress mandated that the district court review state-secrets surveillance evidence "*in camera* and *ex parte*." § 1806(f). In the *in camera*, *ex parte* process, a plaintiff by definition is denied access to the state-secrets evidence and the court must review the evidence on its own unaided by the plaintiff. Only if the district court concludes that access "is necessary to make an accurate determination of the legality of the surveillance" may it grant access. § 1806(f). Plaintiffs moved for access to the classified evidence under secure procedures, but the district court denied their motion.

The panel left its job half-finished when it failed to review the classified order and the classified evidence. When a court of appeals reviews a district court's determination made using section 1806(f)'s *in camera*, *ex parte* process, the same *in camera*, *ex parte* process necessarily applies on appeal. Just as Congress assigned the district court initial responsibility for reviewing the classified evidence without the plaintiffs' assistance, so, too, the court of appeals has responsibility for reviewing the classified evidence on appeal when a plaintiff has been denied access to classified evidence.

The panel's twin decisions—affirming the denial of plaintiffs' access motion while holding that plaintiffs were required to identify specific items of classified evidence—are irreconcilable. The law does not require impossibilities. Congress did not hide a Catch-22 into section 1806(f) and

require plaintiffs to identify specific facts present in classified evidence to which the court denied them access.

Moreover, plaintiffs did provide a detailed list of specific facts supporting their standing that they expect are found within the classified evidence. AOB 59-60. The panel does not deny that the specific facts identified by plaintiffs are found in the classified evidence.

III. The Supreme Court's Pending Decisions In *Fazaga* And *Husayn* Will Likely Bear On This Appeal

The Supreme Court's decisions in *Fazaga* and *Husayn* (*Abu Zubaydah*) are very likely to bear on the proper resolution of this appeal. At issue in *Fazaga* is the application of section 1806(f) in civil suits like this one challenging unlawful surveillance. If the Supreme Court follows the ordinary public meaning of section 1806(f) and holds that it displaces the state-secrets privilege and provides for discovery and use of electronic-surveillance evidence, the proper course here is to reverse the district court's state-secrets dismissal and remand for further proceedings.

Likewise, if the Supreme Court adheres to its prior precedent addressing the state-secrets privilege, it will affirm this Court's decision in *Husayn* (*Abu Zubaydah*), under which the publicly-available government documents excluded by the district court must be considered.

The panel recognized that *Fazaga* and *Husayn* (*Abu Zubaydah*) bear on this appeal by postponing oral argument while the en banc petitions were pending in those cases. It is inexplicable that the panel rushed to issue its

decision while *Fazaga* and *Husayn* (*Abu Zubaydah*) are pending in the Supreme Court, instead of waiting for the Supreme Court's guidance on the section 1806(f) and state-secrets issues central to appellants' appeal. Prudence and judicial efficiency counsel otherwise.

CONCLUSION

The Court should grant rehearing or rehearing en banc and the district court's judgment should be reversed.

Dated: October 1, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

9th Cir. Case Number(s) 19-16066

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[X] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,162**.**

(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature *s/ Richard R. Wiebe* **Date** October 1, 2021