No. 21-15097

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN C., a minor, by FRANK C., guardian ad litem, *et al.*,

Plaintiffs-Appellants,

v.

BUREAU OF INDIAN EDUCATION, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

RESPONSE BRIEF FOR APPELLEES

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INTRODUCTION

Plaintiffs, current and former students at the Havasupai Elementary School in the Grand Canyon, brought this action against the Bureau of Indian Education (Bureau) and other defendants seeking broad reforms in the delivery of educational services at the school. They asserted claims for "failure to provide basic education" under § 706 of the Administrative Procedure Act (APA), 5 U.S.C. § 706, and claims for failing to provide adequate educational services for students with disabilities under the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court dismissed plaintiffs' APA claims on the ground that, taken as a whole, they constituted a request for broad, programmatic reform that is not cognizable under the APA. *See Norton v. Southern Utah Wilderness All.* (*SUWA*), 542 U.S. 55 (2004). The parties subsequently settled the Rehabilitation Act claims, entering an agreement providing for the development of a compliance plan for the school subject to the ongoing supervision of an independent monitor and the provision of "compensatory education" funds for each named student plaintiff who requested them. Notwithstanding the provision of this broad relief to *all* students (not merely those with disabilities) in the settlement, plaintiffs reserved the right to appeal the dismissal of their APA claims.

In this appeal, plaintiffs contend that (1) the district court erred in dismissing their claims for "failure to provide basic education" under § 706(1); and (2) students who have completed the eighth grade are entitled to compensatory education. Neither argument has merit. As the district court recognized, plaintiffs' sweeping attempt to

compel compliance with virtually all the regulations found at 25 C.F.R. Part 36 challenges nearly every aspect of how the Bureau administers the Havasupai Elementary School and constitutes precisely the sort of request for systemic reform that the Supreme Court and this Court have consistently held is not cognizable under § 706(1) of the APA. It is well-established that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*," *SUWA*, 542 U.S. at 64, and plaintiffs' reliance on various regulations that impose general obligations, leaving ample discretion in how they may be implemented, provides no basis for the sweeping relief they have requested.

Because the district court properly dismissed plaintiffs' claims under § 706(1), and they have not identified any other legal basis for their request for compensatory education, this Court need not address the dismissal on mootness grounds. If it reaches this question, however, the Court should affirm the dismissal of that claim because there is no longer a live case or controversy under Article III. Even assuming a student who has completed the eighth grade may continue to pursue a claim for compensatory educational services as a remedy for past failures to provide adequate educational services—a dubious proposition under the APA, which only allows courts to compel performance of specific required acts, not to award substitute remedies—plaintiffs' claim is now moot. Because defendants have already committed to provide compensatory education to all individual plaintiffs as part of the settlement

agreement, there is no longer a live case or controversy with respect to plaintiffs who have completed eighth grade.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. 4-ER-474. The district court entered an order on December 17, 2019, granting the government's motion for summary judgment and dismissing claims by certain plaintiffs for lack of subject matter jurisdiction. 1-ER-28. On May 8, 2020, the district court partially granted plaintiffs' motion for reconsideration, vacating summary judgment with regard to two counts of the complaint and setting those counts for trial. 1-ER-9-15. On November 20, 2020, in light of the parties' settlement of the two outstanding counts, the court entered its final judgment. 1-ER-5. On January 14, 2021, the plaintiffs filed a notice of appeal. 3-ER-335. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The questions presented are:

1) whether the district court properly concluded that plaintiffs' claim alleging a systemic "failure to provide basic education" constitutes a request for programmatic reform that is not cognizable under 5 U.S.C. § 706(1); and

2) whether, assuming plaintiffs have stated at least some cognizable claims under § 706(1), plaintiffs' request for "compensatory education" on behalf of students

who have completed eighth grade is moot in light of the settlement agreement providing such relief.

STATEMENT OF THE CASE

A. Regulatory Background

The Indian Education Act, 25 U.S.C. § 2000 *et seq.*, was enacted to address the needs of American Indian and Alaska Native students of all ages. The statute, and its implementing regulations (25 C.F.R. pt. 32), govern the Bureau of Indian Education's operation of programs providing education to American Indian and Native Alaskan students and set forth formulas used to allocate appropriated funds for schools. The statute and regulations provide "for the operation and financial support of the Bureau of Indian Affairs-funded school system to work in full cooperation with tribes." 25 U.S.C. § 2000. By regulation, the Bureau has provided additional "policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs." 25 C.F.R. § 32.1.

These regulations provide general guidance for the administrative and academic operation of the Bureau-operated schools. For example, they provide that "[t]he Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical[,] and cultural aspects of the person within family and Tribal . . . contexts." 25 C.F.R. § 32.3. The regulations also provide guidance on wide-ranging aspects of education such as staffing ratios, enrollment and attendance policies, promotion and grading policies, as well as curricula. For example, § 36.20

provides that "[t]he educational program shall include multi-culture and multi-ethnic dimensions designed to enable students to function effectively in a pluralistic society." *Id.* § 36.20(b). Sections 36.21, 36.22, and 36.23 provide guidance on the subjects that should be included in kindergarten, elementary, and junior high/middle school curricula respectively. *Id.* §§ 36.21-.23. Section 36.43 provides that "[a]ll schools shall provide and maintain a well-balanced student activities program based on assessment of both student and program needs," *id.* § 36.43, and § 36.41 provides that each school's "textbook review committee shall establish a procedure and criteria for the annual review of textbooks and other materials used to complement instruction" which evaluates, among other criteria, whether the textbooks "meet the course objectives" and "reflect cultures accurately," *id.* § 36.41(b)(1)-(2).

B. Factual Background

The Havasupai Tribe is a federally recognized tribe whose reservation is located at the bottom of the Grand Canyon. 4-ER-480. Havasupai Elementary School is the only school on the Havasupai Indian Reservation and it serves approximately 70 students between kindergarten and eighth grade. *Id.* The school is both funded and operated by the Bureau of Indian Education, a component of the Department of the Interior.[1] *Id.* The school is accessible only via eight-mile hike or mule ride, or

[1] In 2006, the Bureau of Indian Education assumed responsibility from the Bureau of Indian Affairs for all regulatory functions and requirements of Indian Education. *See* Bureau of Indian Education, *About Us*, https://www.bie.edu/topic-page/bureau-indian-education (last visited Sept. 24, 2021).

helicopter. 3-ER-228. The extremely remote location poses a number of obstacles to the Bureau's efforts to recruit, hire, and retain staff necessary for providing adequate educational services. *Id.* Moreover, while the school has 17 staff positions, its residential facilities only have 12 available beds for staff members, double occupancy apartments must be shared, and there is no space for staff members to house their families. *Id.* In light of these difficulties, the Bureau offers a variety of monetary and nonmonetary incentives to recruit and retain staff at Havasupai Elementary School. *Id.*

Plaintiffs are 12 current and former students of Havasupai Elementary School and the Native American Disability Law Center (NADLC). *See* 4-ER-474-78.

C. Prior Proceedings

On January 12, 2017, plaintiffs filed this suit in the United States District Court for the District of Arizona against the Bureau and several individual defendants in their official capacities. *See* 3-ER-378. Plaintiffs alleged various failures by the defendants related to the provision of adequate education for the students at Havasupai Elementary School. On June 2, 2017, plaintiffs filed a First Amended Complaint, 3-ER-382, and later filed a Second Amended Complaint, 3-ER-383. The complaint listed six causes of action: Counts I and II were brought under 5 U.S.C. § 706(1) and § 706(2), respectively, broadly alleging a "failure to provide basic education"; Counts III and IV were each brought by only some of the plaintiffs under 29 U.S.C. § 794 for failure to provide a system enabling students with disabilities to access public education and failure to provide a system enabling students impacted by

childhood adversity to access public education, respectively; and Counts V and VI were brought by only some of the plaintiffs under 34 C.F.R. § 104.32 and § 104.36, respectively, for violations of Department of Education regulations implementing 29 U.S.C. § 794. 1-ER-32; *see also* 4-ER-526-40.

The district court granted in part the government's second partial motion to dismiss. *See* 1-ER-30. As relevant here, the court found that students who no longer attended the school did not have standing to bring claims seeking improvements to the school and, in addition, found that for Counts III through VI, the Secretary of the Interior was the only proper defendant for those claims. *See* 1-ER-34; 1-ER-42. Plaintiffs subsequently filed a Third Amended Complaint, raising substantively similar claims to that in the prior complaint. *See* 4-ER-471. Following discovery, the parties cross-moved for summary judgment. *See* 1-ER-17.

On December 17, 2019, the district court granted the government's motion for partial summary judgment. *See* 1-ER-17. On Count I, the court found that it could not "compel agency action unlawfully withheld or unreasonably delayed," 1-ER-20 (quoting 5 U.S.C. § 706(1)), because plaintiffs "failed to identify a final, discrete agency action that is reviewable by the Court," 1-ER-21. Instead, the allegations amounted to a "broad programmatic attack[]" on the administration of the school which is impermissible under § 706(1). 1-ER-20 (citing *SUWA*, 542 U.S. at 64). The court also granted summary judgment for the defendants on Count II for similar reasons. *See* 1-ER-22. On Counts III and IV, which raised claims under § 504 of the

Rehabilitation Act, the district court granted summary judgment for the defendants on the ground that the defendants were not subject to § 504 claims. 1-ER-22-23. Similarly, the court reasoned that the defendants were not subject to the Department of Education regulations under which Counts V and VI arose and thus granted summary judgment for the defendants on those counts as well. *See* 1-ER-24-26. Finally, the court found that plaintiffs Stephen C's and Durrell P.'s claims were moot in light of the fact that they are no longer students at Havasupai Elementary School and have completed the eighth grade so they would not be eligible to return. *See* 1-ER-27.

On May 8, 2020, the district court issued an order vacating its prior grant of summary judgment for defendants solely with respect to Counts III and IV, recognizing that it was "manifest error" to conclude that § 504 did not apply to the Executive Branch defendants. 1-ER-11. Instead, the court set Counts III and IV for trial. The court did not reconsider its prior grant of summary judgment with respect to the APA claims asserted in Counts I and II and it also noted that summary judgment for the defendants remained appropriate with regard to Counts V and VI because the Department of Education regulations relevant to those counts do not apply to the Bureau of Indian Education. 1-ER-13; 1-ER-15.

Prior to trial, the parties entered into an agreement to settle the claims asserted in Counts III and IV. *See* SER-3-13 (Executed Settlement Agreement). The Bureau agreed to develop and implement a compliance plan for Havasupai Elementary

School with regard to § 504 of the Rehabilitation Act, and the Department of the Interior's implementing regulations, subject to the supervision of a neutral, independent monitor. In addition, separate from the § 504 compliance plans, the defendants agreed to make available up to $20,000 in compensatory education services for each named student plaintiff. The compensatory education is available to all individual plaintiffs, even those who did not bring claims under § 504 or whose claims were dismissed for lack of subject matter jurisdiction. In light of the settlement of the outstanding counts, the district court entered its final judgment and the plaintiffs filed a timely notice of appeal.

On July 23, 2021, the independent monitor completed its first report of the § 504 compliance plan and implementation at Havasupai Elementary School, pursuant to the Executed Settlement Agreement. *See* Bureau of Indian Education, U.S. Dep't of the Interior, *Havasupai Elementary School 504 Compliance Plan* (July 23, 2021), https://perma.cc/FK5E-B5JR. The report acknowledged difficulties related to the closing of the community in light of the Covid-19 pandemic, *see id.* at 1 ("[I]t was impossible for the monitor to interview the teachers and parents . . . ." (emphasis omitted)), but noted that a § 504 coordinator had been appointed and § 504 training had been provided to all staff at Havasupai Elementary School, *see id.* at 5-6. In sum, the report detailed some suggestions for improvement with regard to the form of the materials but concluded that "[t]he [s]chool has met all of the deadlines required for training, notices[,] and the distribution of reports." *Id.* at 9.

SUMMARY OF ARGUMENT

1. The district court correctly dismissed Counts I and II, finding that the plaintiffs had not brought a cognizable claim under the APA. Under § 706(1), a "reviewing court" may "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), but only where a regulation provides a "specific, unequivocal command" to take "discrete agency action," *SUWA*, 542 U.S. 55, 63-64 (2004). Plaintiffs here have mounted precisely the kind of "broad programmatic attack" that the Supreme Court has made clear is not cognizable under § 706(1). *Id.* Plaintiffs seek to challenge nearly every aspect of how the Bureau administers Havasupai Elementary School. Their complaint reveals that they want the district court, through the mechanism of an independent monitor, to direct and supervise a massive overhaul of school operations. The district court correctly rejected plaintiffs' attempt to level an "impermissible, system[ic] challenge under the APA." 1-ER-21.

On appeal, plaintiffs seek to rely on the regulations at 25 C.F.R. Part 36, arguing that these regulations provide discrete commands that would give rise to claims under § 706(1). But plaintiffs cannot use these regulations to disguise the breadth of their claim that the Bureau "fail[ed] to . . . provide basic education" at Havasupai Elementary School, 4-ER-526, which is precisely the sort of systemic challenge to "[g]eneral deficiencies in compliance" that are not cognizable under § 706(1), *see SUWA*, 542 U.S. at 66, 67 (rejecting challenge based on failure to

"manage the public lands . . . in accordance with the land use plans" (alteration in original) (quotation marks omitted)).

Even assuming that some of the regulations plaintiffs invoke contain commands that are sufficiently unequivocal and discrete so as to permit some relief under § 706(1), those regulations provide no basis for the sort of broad, programmatic relief plaintiffs seek. And even a more limited injunction directing the Bureau, for example, to "teach science" as required under 25 C.F.R. § 36.22(a)(4) would necessarily entangle the district court in the day-to-day management of the school because it would require the court to resolve subjective, policy-based, and pedagogical questions, such as whether science lessons incorporated into general education classes are sufficient. As the Supreme Court summarized in *SUWA*, the process of "determin[ing] whether compliance was achieved" would impermissibly "inject[] the judge into day-to-day [school] management." *SUWA*, 542 U.S. at 66-67.

2. Because the district properly dismissed plaintiffs' claims under § 706(1), and they have not identified any other legal basis for their request for compensatory education, this Court need not address the dismissal of that claim on mootness grounds. But if the Court reaches this question, it should affirm the dismissal of plaintiffs' claims for compensatory education on behalf of students who have completed eighth grade because there is no longer a live case or controversy under Article III.

Plaintiffs' only argument before this Court is that student plaintiffs who have completed the eighth grade may continue to litigate their claims because they would be entitled to compensatory education if they were to prevail. But defendants have already committed to provide compensatory education to all individual plaintiffs as part of the settlement agreement executed in district court. *See* SER-7. Where a plaintiff has "already gotten the relief he sought," there is no longer a live case or controversy. *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Animal Legal Def. Fund v. U.S. FDA*, 836 F.3d 987, 990 (9th Cir. 2016) (en banc) (per curiam).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT COUNTS I AND II ARE NOT ACTIONABLE UNDER THE APA.

In two separate claims under the APA, plaintiffs alleged that the Bureau failed to provide "basic education" as required by applicable regulations. 4-ER-526; 4-ER-529. Count I of the Third Amended Complaint alleges a violation of 5 U.S.C. § 706(1), which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," and Count II alleges a violation of 5 U.S.C. § 706(2), which authorizes a court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The district court dismissed both counts, and plaintiffs have not challenged the dismissal

of Count II on appeal. Because plaintiffs have alleged a pervasive *failure* to act, and have not identified any final agency action that could properly be "set aside" under 5 U.S.C. § 706(2), the district court properly dismissed Count II. *See John v. United States*, 720 F.3d 1214, 1228 n.86 (9th Cir. 2013) (explaining that § 706(1) is the proper mechanism for challenging an "agency's alleged failure to act"). Plaintiffs have raised no arguments in their opening brief that the dismissal of Count II was improper and instead have focused exclusively on reviving their § 706(1) claim. Because plaintiffs have forfeited any argument that the district court erred in dismissing Count II, *see Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999), this brief responds only to plaintiffs' contentions that the district court erred in dismissing Count I.

A. The District Court Correctly Dismissed Plaintiffs' Claim Under § 706(1) on the Ground that It Is an Impermissible Request for Systemic Reform.

Plaintiffs broadly attack years of alleged failures to properly administer Havasupai Elementary School: what they loosely describe as the Bureau's "failure to take action required to provide basic education" (Count I) and "failure to provide basic education" (Count II). *See* 4-ER-526; 4-ER-529; *see also* 4-ER-484-515, 4-ER-519-30. But the Supreme Court has stressed that § 706(1) does not allow plaintiffs to challenge an agency's "compliance with broad statutory mandates." *SUWA*, 542 U.S. 55, 66 (2004). The Court explained in *SUWA* that judicial review to compel agency action is carefully circumscribed "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy

disagreements which courts lack both expertise and information to resolve." *Id.* The Court thus held that "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Id.* at 64 (emphases omitted).

In light of the separation of powers concerns identified in *SUWA*, this Court has frequently stressed the "limited application of § 706(1)," emphasizing that courts may only compel agency action specifically prescribed, "[e]ven if a court believes that the agency is withholding or delaying an action the court believes it should take." *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1221 (9th Cir. 2011). A court may enforce a regulatory requirement "only if the text of the regulation is a 'specific, unequivocal command' to take 'discrete agency action.'" *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1078 (9th Cir. 2016) (quoting *SUWA*, 542 U.S. at 63-64).

This Court has also recognized that it has "no authority to compel agency action merely because the agency is not doing something [the Court] may think it should do." *Zixiang Li v. Kerry*, 710 F.3d 995, 1004 (9th Cir. 2013). Instead, the action allegedly withheld or delayed must be both "discrete" and "'legally required'—in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) (emphasis and quotation marks omitted). Indeed, even before the Supreme Court clarified the limited nature of judicial review under § 706(1) in *SUWA*, this Court had "refused to allow plaintiffs to evade the

finality requirement [of the APA] with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) (quotation marks omitted).

Plaintiffs here have mounted precisely the sort of "broad programmatic attack" that is impermissible under the APA. *SUWA*, 542 U.S. at 64; *see* Br. 42 (characterizing the allegations as "a pattern of longstanding, comprehensive deficiencies that have deprived Student Plaintiffs and other children of a basic education"). The Supreme Court and lower courts have long recognized that the APA is not an appropriate vehicle to seek "general orders compelling compliance with broad statutory mandates." *SUWA*, 542 U.S. at 66; *see also Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."); *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000) (en banc) (explaining that the APA does not support claims by plaintiff seeking to "challenge an entire program" "by simply identifying specific allegedly-improper final agency actions within that program"); *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 433 (4th Cir. 2019) (rejecting APA suit consisting of "an aggregation of many small claims" relating to agency's conceded failure to comply with reporting obligations); *Ecology Ctr.*, 192 F.3d at 926 ("This court has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" (quoting

Nevada v. Watkins, 939 F.2d 710, 714 n.11 (9th Cir. 1991) (rejecting jurisdiction on basis that agency had failed to act when there were merely deficiencies in energy guidelines rather than actual failure by Secretary to act)).

Plaintiffs' complaint makes clear that they seek a court order compelling the Bureau to fundamentally change how it administers Havasupai Elementary School across almost all operational programs. For example, plaintiffs seek a declaration "setting forth the duties and obligations of [the Bureau] with respect to the delivery of education to students at Havasupai Elementary School," and an injunction requiring the agency (and even "successors in office and assigns/assignees") to provide, among other things, "access to": (1) "an adequate public education"; (2) "education provided by sufficient numbers of qualified teachers and related services providers"; (3) "education that is culturally relevant based on the unique culture and tradition of the Havasupai tribe"; (4) "instruction appropriate to students' native language"; (5) "education that is properly governed by a school board appointed by the Tribal Council"; and (6) "appropriate assessment of student achievement." 4-ER-538-39. Plaintiffs also want a declaration that the Bureau has violated its own regulations, the "[a]ppointment of an independent third party to receive and respond to complaints from parents or tribal officials" and a "permanent injunction" prohibiting future unlawful conduct—including "policies[] and practices." 4-ER-540. Their request for the Court to enter broad relief measured in qualitative terms such as "sufficient" or "appropriate" underscores the sweeping nature of their claims: they do not merely

seek to compel discrete agency actions required by law, but rather wholesale reform of the school. *See City of New York*, 913 F.3d at 434 ("If there were any doubt about the nature of the cities' claim, the requested remedy tells the real story.").

On appeal, plaintiffs point to various regulations in 25 C.F.R. Part 36 that they allege provide specific directives that the government has failed to implement. But it makes no difference that plaintiffs frame their complaint as a challenge to defendants' compliance with a multitude of specific regulatory provisions. The APA does not allow for "*wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891. The Supreme Court has made clear that even if "violation[s] of the law [were] rampant" within a program, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm." *Id.* Nor can a court simply enter an order directing defendants to take whatever actions are necessary to comply with the regulations. As the Supreme Court has cautioned, courts cannot "simply enter a general order compelling compliance with [a statutory] mandate" and then "determine whether compliance was achieved." *SUWA*, 542 U.S. at 66.

In any event, these regulations do not provide the "'specific, unequivocal command' to take 'discrete agency action'" necessary to state a claim for agency action unlawfully withheld under § 706(1). *Vietnam Veterans of Am.*, 811 F.3d at 1078 (quoting *SUWA*, 542 U.S. at 63-64). Instead, these regulations are framed in broad terms,

leaving enormous discretion in their implementation and making them ill-suited for judicial enforcement.

For example, 25 C.F.R. § 36.20 provides that "[t]he educational program shall include multi-culture and multi-ethnic dimensions designed to enable students to function effectively in a pluralistic society," in part by "includ[ing] aspects of the native culture in all curriculum areas." *Id.* § 36.20(b), (b)(2). The regulations also provide guidance on wide-ranging aspects of education such as staffing ratios, enrollment and attendance policies, promotion and grading policies, as well as curricula. Sections 36.21, 36.22, and 36.23 provide guidance on the subjects that form the kindergarten, elementary, and junior high/middle school curricula respectively. *Id.* §§ 36.21-.23. Even the most specific of these provisions, which outline courses of study, simply provide that the curriculum shall include instruction in "[l]anguage arts," "[m]athematics," "[s]ocial studies," and "[f]ine arts." *Id.* § 36.22(a); *see also id.* § 36.23(b). And for junior high/middle school students, the regulations state that certain "content areas shall be integrated into the curriculum" including "[c]areer exploration," "[e]nvironmental and safety education," and "[h]ealth education." *Id.* § 36.23(c)(1)-(5).

Other regulations similarly address specific topics but are framed in broad terms allowing wide latitude in their implementation. For example, § 36.40 provides that "[e]ach school shall provide a library/media program which . . . shall include . . . [a] written set of instructional and service objectives . . . that is integrated and

consistent with the school's educational goals and philosophy." 25 C.F.R. § 36.40(a). Section 36.43 provides that "[a]ll schools shall provide and maintain a well-balanced student activities program based on assessment of both student and program needs." *Id.* § 36.43. And § 36.41 provides that each school's "textbook review committee shall establish a procedure and criteria for the annual review of textbooks and other materials used to complement instruction" which evaluates, among other criteria, whether the textbooks "meet the course objectives" and "reflect cultures accurately." *Id.* § 36.41(b).[2]

As the district court recognized, plaintiffs are seeking an injunction that would require the court to supervise the management of Havasupai Elementary School, over which the Bureau has a "great deal of discretion." 1-ER-20. The district court correctly recognized that it lacked authority under the APA to oversee via injunction the Bureau's ongoing compliance with these regulations. Far from enforcing discrete, mandatory directives, plaintiffs' claims would require the court to evaluate whether, for example, the "educational program" at Havasupai Elementary School sufficiently

[2] Although plaintiffs emphasize (Br. 22) that the regulations in Part 36 are framed in mandatory terms (*e.g.*, by using the word "shall"), this alone does not make them enforceable under § 706(1). As the Supreme Court explained in *SUWA*, the statutory provision at issue in that case was also "mandatory as to the object to be achieved, but it [left] [Bureau of Land Management] a great deal of discretion in deciding how to achieve it." 542 U.S. at 66; *see also id.* ("It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of [off-road vehicle] use."). Similarly, the regulations at issue here leave "a great deal of discretion" to the Bureau and are generally framed in broad terms that are not amenable to judicial enforcement under § 706(1). *Id.*

"include[s] multi-culture and multi-ethnic dimensions," 25 C.F.R. § 36.20(b), or whether the "student activities program" is appropriately "well-balanced" and "based on assessment of both student and program needs," *id.* § 36.43. That is precisely the sort of judicial entanglement in abstract policy issues, "injecting the judge into day-to-day agency management," that the Supreme Court has made clear is improper under § 706(1). *SUWA*, 542 U.S. at 67.

Contrary to plaintiffs' contention (Br. 21-24), this case is unlike *Vietnam Veterans of America*, where the Court interpreted an Army regulation to "unequivocally command[] the Army to provide former test subjects with current information about their health, and to provide medical care for harm and diseases caused by the experiments." 811 F.3d at 1076. Instead, this case involves claims much closer to the "[g]eneral deficiencies in compliance" the Supreme Court considered and rejected in *SUWA*. *See id.* at 1079 (alteration in original) (quotation marks omitted). As this Court recognized in *Vietnam Veterans of America*, the plaintiffs in *SUWA* alleged that the Bureau of Land Management had "failed to manage wilderness study areas 'in a manner so as not to impair the suitability of such areas for preservation as wilderness,'" and "had failed to 'manage the public lands . . . in accordance with the land use plans.'" *Id.* (ellipsis in original) (quoting *SUWA*, 542 U.S. at 65, 67). Similarly, plaintiffs' main complaint here is that the Bureau has failed to manage Havasupai Elementary School in accordance with a variety of regulations imposing mandatory

but broad obligations. Such general deficiencies in compliance are not cognizable under § 706(1).

The kind of ongoing judicial supervision of the day-to-day operation of the school plaintiffs are seeking is exactly the kind of relief the Supreme Court in *SUWA* warned would "necessarily" embroil the court in "determin[ing] whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *SUWA*, 542 U.S. at 66-67. The district court therefore appropriately declined plaintiffs' invitation "to take on potentially extensive supervision of [Havasupai Elementary School]." *See Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992).

B. The Regulations Plaintiffs Have Identified Provide No Basis for the Broad, Programmatic Reforms They Seek.

Even assuming this Court were to disagree and conclude that some of the regulations in question are sufficiently discrete and mandatory to be enforceable under § 706(1), plaintiffs would not be entitled to the broad injunction or extensive district court supervision they seek. Section 706(1) does not allow plaintiffs to allege violations of a few specific regulations to support a request for much broader relief from the district court. *See Vietnam Veterans of Am.*, 811 F.3d at 1079 ("[W]hen an agency is compelled by law to act . . . but the manner of its action is left to the

agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." (alteration in original) (quoting *SUWA*, 542 U.S. at 65)).

Plaintiffs make no real effort to link alleged violations of the few regulations they actually cite, *see* Br. 26, with the broad relief they seek. Notably, before the district court plaintiffs also did not identify any single specific agency action they believe the court should compel, focusing instead on broad, school-wide relief. Even assuming violations of specific directives in some of these regulations were shown, this would not provide a basis for the sort of sweeping claim plaintiffs have brought. To be cognizable under § 706(1), each regulation must contain the kind of discrete mandatory directive for which a writ of mandamus would lie. Plaintiffs have not explained how even their aggregated allegations of specific regulatory violations provide any proper basis for a systemic challenge to the Bureau's administration of Havasupai Elementary School across almost all operational programs. Plaintiffs cannot evade the limited scope of permissible claims under § 706(1) merely by arguing generally that the Bureau's "violations of multiple regulations are pervasive." Br. 30. Because plaintiffs have not identified violations of discrete, mandatory directives tied to the broad relief they sought, the district court properly dismissed their claim under § 706(1) on the ground that it was an impermissible systemic challenge to the Bureau's operations.

At most, a complete failure to act where a regulation unambiguously mandates specific action could provide a basis for a much narrower sort of claim. For example,

if this Court were to conclude that the regulatory requirement to teach science were sufficiently discrete to be cognizable under § 706(1), *and* the district court were to find on remand that the Bureau had failed to teach *any* science at Havasupai Elementary School, *see* 25 C.F.R. § 36.22(a)(4), plaintiffs would, at most, be entitled to an injunction requiring the Bureau to teach science. "[Section] 706(1) empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" *SUWA*, 542 U.S. at 64 (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (emphasis omitted)). Section 706(1) does not allow the district court to evaluate whether the science curriculum at the school is sufficient, appropriate, or reasonable, whether the incorporation of lessons of science into other classes satisfied the injunction, or whether those lessons met the needs of students or "include[d] multi-culture and multi-ethnic dimensions," 25 C.F.R. § 36.20(b).

Unlike in *Vietnam Veterans of America*, the Bureau has not disputed that the regulations in question apply to its operation of Havasupai Elementary School. The record here demonstrates instead that where there are deficiencies in compliance with the regulations, they are often related to administrative and resource limitations and to circumstances beyond the Bureau's control that make operating an elementary school at the bottom of the Grand Canyon difficult. *See* SER-54-65. Under these circumstances, even a general 'obey the law' injunction for a few specific regulations would be inappropriate because, as the district court recognized, it would almost

certainly entangle the court in the day-to-day operations of the school. *See SUWA*, 542 U.S. at 66-67 (noting that even a broad, 'obey-the-law' injunction would require the court "to determine whether compliance was achieved" and "would mean that it would ultimately become the task of the supervising court, rather than the agency to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management").[3]

C. Plaintiffs Challenge the Sufficiency of the Agency's Compliance, Not a Complete Failure to Act.

This is not a case like *Vietnam Veterans*, where the agency has wholly refused to undertake the legal duty in question. Although the Bureau has admitted to difficulties at Havasupai Elementary School, it has documented its significant efforts to comply with all applicable regulations as well as the extensive obstacles to full compliance. A claim under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *SUWA*, 542 U.S. at 64 (emphases omitted). Unless the record supports an agency's complete failure to act, § 706(1) provides no basis for a court to intervene. *See Ecology Ctr.*, 192 F.3d at 926

[3] Although this Court has "not adopted a rule against 'obey the law' injunctions per se," *FTC v. EDebitPay, LLC*, 695 F.3d 938, 944 (9th Cir. 2012), it has recognized that injunctions broader than necessary to remedy the violation are disfavored. *Cf. Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). And as the Supreme Court has explained, federal courts are "not mechanically obligated to grant an injunction for every violation of law." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

(stressing that plaintiffs cannot "evade the finality requirement [of the APA] with complaints about the sufficiency of an agency action dressed up as an agency's failure to act" (quotation marks omitted)).

In *Vietnam Veterans of America,* this Court found that the plaintiffs had alleged "both a legal duty to perform a discrete agency action" and that the Army "ha[d] refused to perform that duty." 811 F.3d at 1079. Citing only to their own statement of material facts (Br. 18-20), plaintiffs suggest that the Bureau has likewise admitted a complete failure to implement all of the relevant regulations in 25 C.F.R. Part 36. That assertion is incorrect, and it fundamentally distorts the record detailing the past and present circumstances at Havasupai Elementary School. While the government candidly admitted to the district court that it has "fallen short" at Havasupai Elementary School, 2-ER-74, and that it has not "consistently complied," 2-ER-85, with all aspects of Part 36, the record does not support plaintiffs' contention that the Bureau has wholly failed to perform the regulatory duties at issue. *See, e.g.*, SER-14-65 (Defendant's Responses to Plaintiffs' Separate Statement of Material Facts). Instead, the record as a whole paints a significantly more nuanced picture, reflecting difficulties and varying degrees of success in compliance rather than outright refusals or failures to act. *See* SER-77 (compiling citations to factual disputes for legal issues presented by each regulation).

For example, plaintiffs alleged that the Bureau "does not assess the native language abilities of students," and "has not consistently employed a native language

and culture instructor." 4-ER-426. But the Bureau contested these allegations, countering that "[a] home survey is given to students to determine the language spoken at home and the student's first language," SER-15, and explaining that the Bureau did "employ[] a native language and culture instructor" for at least part of the 2018 and 2019 school years, noting the "ability to provide Native language instruction is limited by the number of available, qualified Native language speakers," SER-16. The Bureau also disputed the allegation that the then-current native language and culture instructor "is frequently called upon to cover general education classes," 4-ER-427; *see* SER-17 (explaining that native language and culture instruction was provided separate from general education and that instances of the teacher covering for other teachers were "very rare" and "unusual" (quotation marks omitted)). These disputes confirm that plaintiffs really challenge the *sufficiency* of the agency's actions not its failure to act.

Additional examples include allegations that the school "does not provide instruction in fine arts" or "in physical education," 4-ER-427, and has not consistently employed a "1/5 time librarian," 4-ER-428. While the Bureau acknowledged that there "have been periods in which [the school] has not provided instruction in fine arts," the record also indicates that "fine arts has been integrated into the activities that teachers perform with students." SER-20. Third and fourth graders "have received instruction in art, and in music," and have completed "art projects with papier mâché, crafts, and drawing." *Id.* The Bureau also pointed to testimony that the

school was "recruit[ing] community volunteers to teach art, dance, and music." *Id.* Similarly, the Bureau disputed that it did not provide instruction in physical education, noting that while it "does not have a physical education instructor, physical education lessons have been provided to . . . students" and "teachers have incorporated aspects of physical education into their classes." SER-20-21.

To be sure, the operation of Havasupai Elementary School has not been without difficulties. For example, the Bureau admitted below that the school did not have a 1/5 time librarian and that the librarian detailed for 2019 had not arrived for the detail. *See* SER-22. But the record as a whole shows that the Bureau has not completely failed or refused to comply with the regulatory requirements at Part 36. Instead there have been some periods of insufficient compliance in some areas often exacerbated by the unique challenges associated with operating a school at the bottom of the Grand Canyon.[4] This record of imperfect compliance provides no basis for a cognizable claim under § 706(1) for agency action unlawfully withheld. Section 706(1)

[4] Before the district court, the Bureau detailed extensive "obstacles to recruitment and retention of [Havasupai Elementary School] staff" and the challenges posed by operating a school only accessible by helicopter or mule. *See, e.g.*, SER-54-65; SER-54 ("The extremely remote location of [the school] poses obstacles to [the Bureau's] attempts to recruit and retain staff . . . [Havasupai Elementary School] is so isolated that it is the only school in [the Bureau's] school system that receives an 'isolation factor' payment."); SER-56 ("The remoteness of the Canyon creates logistical challenges for obtaining school supplies [which are often transported by mule.] . . . On one such trip, an entire load of paper was ruined by a heavy rainstorm.").

of the APA does not allow plaintiffs to "seek *wholesale* improvement of this program by court decree." *Lujan*, 497 U.S. at 891.

D. If the District Court Erred, This Court Should Remand the Case for Additional Proceedings.

If this Court were to conclude that the district court erred in dismissing plaintiffs' claim under § 706(1), the appropriate remedy would be to remand to the district court for additional consideration of whether the Bureau failed to perform any specific mandatory duty and, if so, whether any equitable relief would be appropriate. As outlined above, assuming some of the regulations plaintiffs have identified might give rise to a cognizable claim under § 706(1), there are material, unresolved factual issues concerning the Bureau's alleged noncompliance with the regulations. In evaluating any request for prospective injunctive relief, the district court would, at a minimum, have to determine what specific, discrete relief should be ordered, taking account of both the facts as developed and any changed circumstances since the time of its initial rulings, including the settlement agreement and the independent monitor's reports detailing the current state of the Bureau's compliance with various regulatory obligations. Because this inquiry would likely be extensive and largely fact-bound, it would be appropriate for the district court to undertake it in the first instance.

Plaintiffs are incorrect to suggest that the defendants "have admitted that they have failed to implement at [Havasupai Elementary School] the specific regulations in 25 C.F.R. Part 36 that [p]laintiffs challenge." Br. 18; *see* SER-14-65. Prior, general

admissions that the Bureau had "fallen short" or that efforts have been "unsatisfactory" are not, standing alone, enough to compel agency action under § 706(1), especially given that the record reveals a complex situation at Havasupai Elementary School made more difficult by the unique circumstances and limitations the Bureau faces in operating the school. In addition, the district court would need to consider whether the Bureau remains out of compliance with the regulations, including any developments at the school that have occurred since its original consideration, including the ongoing Covid-19 pandemic.

Plaintiffs' reliance on the district court's statement that "there is no genuine dispute as to the facts of this case" is likewise misplaced. *See* Br. 19 (quotation marks omitted); *see also* 1-ER-19. The court was clearly not focused on whether the Bureau had sufficiently complied with each individual regulation in 25 C.F.R. Part 36 because it found that plaintiffs' claims were not cognizable on the ground that they were seeking programmatic relief. This statement by the district court is thus best read as an assumption in light of the court's intention to rule for the defendants as a legal matter. To grant any injunctive relief, the court would need to parse in significantly more detail the various factual disputes to determine whether there are ongoing violations of any discrete, mandatory directives. And because plaintiffs' claims are for agency action unlawfully withheld or unreasonably delayed, the court would have to make these determinations based on a current record, not merely allegations from the

time the complaint was filed. As such, if this Court holds that the district court erred in dismissing the § 706(1) claims, remand is the appropriate remedy.

II. THE DISTRICT COURT CORRECTLY DISMISSED CLAIMS BROUGHT BY STUDENTS WHO HAVE COMPLETED EIGHTH GRADE.

If this Court affirms the dismissal of plaintiffs' sweeping claim alleging a "failure to provide basic education" under § 706(1), this Court need not address plaintiffs' additional contention that students who have completed the eighth grade have standing to seek compensatory education benefits. Plaintiffs settled their claims under § 504 of the Rehabilitation Act and they identify no source of law other than § 706(1) as the basis for their claim for compensatory education. Thus, if plaintiffs have no cognizable claim under § 706(1), they have no claim for compensatory education.

In any event, the district court properly dismissed the claims of the student plaintiffs who had completed the eighth grade. Whether this Court considers the question as one of mootness or one of standing,[5] the district court correctly

[5] The Supreme Court has repeatedly described "mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Friends of the Earth*, 528 U.S. at 170 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). Although the Court has clarified that this "description of mootness is not comprehensive," *id.*, the doctrines of mootness and standing are overlapping for purposes of this Court's analysis here.

concluded that it lacked Article III jurisdiction to order any relief for plaintiffs who have completed the eighth grade.

Article III requires that there be "a live case or controversy . . . at all stages of review. Otherwise, the case is moot and must be dismissed." *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007) (citations and quotation marks omitted). "The Constitution's case-or-controversy limitation on federal judicial authority, [U.S. Const.] [a]rt. III, § 2, underpins both [the Court's] standing and [its] mootness jurisprudence." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

For those plaintiffs who have completed the eighth grade, the court properly concluded that no live case or controversy existed within the meaning of Article III. *See In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005) ("A case is moot if the issues presented are no longer live and there fails to be a 'case or controversy' under Article III of the Constitution."). The "test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *Id.* (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986)).

Here, plaintiffs do not contest that students who are past the eighth grade may no longer "seek injunctive or declaratory relief because they 'would not stand to benefit from' such relief." *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047-48 (9th Cir. 2014); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645,

1650 (2017) (holding that "standing is not dispensed in gross," and the plaintiff must establish standing "separately for each form of relief sought." (quotation marks omitted)); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975). Those plaintiffs will not stand to benefit from any declaratory or injunctive relief concerning the future operation of Havasupai Elementary School.

Indeed, plaintiffs' only contention (Br. 42-56) before this Court is that students who have completed eighth grade remain eligible for compensatory education, and the availability of that equitable relief thus prevents their claims from becoming moot. This argument is unavailing, however, because the defendants have already committed to provide compensatory education to all of the individual plaintiffs as part of the settlement agreement executed in district court. *See* SER-7 ("Defendants will provide compensatory educational services to each of the original named student Plaintiffs."). Where a plaintiff has "already gotten the relief he sought," the case is moot. *Burrell*, 415 F.3d at 998.

Although the settlement concerns plaintiffs' claims under § 504 of the Rehabilitation Act and its implementing regulations, the agreement to provide compensatory education services is not limited to those plaintiffs who brought claims under § 504. *See* SER-7. While only certain plaintiffs alleged § 504 claims, *see* 4-ER-530-36, defendants agreed to make compensatory education available to all of the individual plaintiffs as part of the settlement. And plaintiffs have made no argument

that the available compensatory education is insufficient to address the needs of those plaintiffs who have completed eighth grade.

In any event, it is far from clear that compensatory education is an available remedy under the Administrative Procedure Act.[6] As explained above, the only claims remaining in the case arise under § 706(1) of the APA, which only authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). On appeal, plaintiffs argue that compensatory education is an equitable remedy, rather than an award of money damages, citing a number of cases from this Court and others. *See* Br. 48 (citing cases). They therefore argue that because compensatory education is "equitable" relief it must be available under the APA, citing *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988).

This is the very syllogism that the Supreme Court rejected in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999). As the Court explained in that case, "*Bowen*'s analysis of § 702, however, did not turn on distinctions between 'equitable' actions and other actions, nor could such a distinction have driven the Court's analysis in light of § 702's language." *Id.* at 261. Instead, the Court recognized that "the crucial question under § 702 is not whether a particular claim for relief is 'equitable' (a term

[6] The district court concluded that compensatory education was not available to plaintiffs outside the context of the Individuals with Disabilities Education Act (IDEA). *See* 1-ER-34. Although compensatory education may be available in cases outside of the IDEA context, this Court need not decide that issue to conclude that it is not available to plaintiffs seeking redress under the APA.

found nowhere in § 702), but rather what Congress meant by 'other than money damages' (the precise terms of § 702)." *Id.* The Court explained that in *Bowen* it had "held that Congress employed this language to distinguish between specific relief and compensatory, or substitute, relief." *Id.* And the Court in *Blue Fox* concluded that an equitable lien was not available relief under the APA because it did not "give the plaintiff the very thing to which he was entitled." *Id.* at 262-63 (quoting *Bowen*, 487 U.S. at 895). Similarly, compensatory education, as the very name suggests, is "compensatory, or substitute, relief," not "the very thing to which [plaintiffs] are entitled," and is therefore not available under the APA. *Id.* (quotation marks omitted).

Contrary to plaintiffs' suggestion (Br. 47), an award of compensatory education would not "require[] Defendants to . . . perform duties" they should have performed in the operation of Havasupai Elementary School. There is no suggestion that plaintiffs who have completed the eighth grade would return to Havasupai Elementary School or that the Bureau could provide them with the exact services they would have received had the Bureau operated the school differently. Instead, as plaintiffs describe it, compensatory education includes "additional assistance such as 'tutoring, counseling, or other support services,'" often in the form of "the establishment of a fund to be spent on the child's education." Br. 47 (quoting *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 498-99 (3d Cir. 2012)). A comparison to the specific relief at issue in *School Committee of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985), is illustrative. In that case, the court-ordered relief

"require[d] the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it [followed the law.]" *Id.* at 370-71. Here, students would be getting monetary compensation for additional, outside services to compensate them for previous educational failings. That is not the kind of specific relief the Supreme Court has said is available under the APA.

Ultimately, however, this Court need not decide whether compensatory education is an available equitable remedy under § 706(1) of the APA, because defendants have already agreed to provide compensatory education for all plaintiffs as part of the settlement of Counts III and IV. There is no remaining effective relief the Court could order that plaintiffs have not already received. *See Burrell*, 415 F.3d at 998.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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September 2021

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellees state that they know of no related case pending in this Court.

s/ Laura E. Myron
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,940 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/Laura E. Myron
LAURA E. MYRON

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Laura E. Myron
LAURA E. MYRON