No. 20-55666

IN THE

United States Court of Appeals for the Ninth Circuit

PHILLIP KILLGORE,
Plaintiff-Appellant,
v.

CITY OF SOUTH EL MONTE, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:19-cv-00442-SVW-JEM
Hon. Stephen V. Wilson

BRIEF OF AMICUS CURIAE POLICING PROJECT IN SUPPORT OF NEITHER PARTY AND IN SUPPORT OF PANEL REHEARING OR REHEARING EN BANC

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure (FRAP), *Amicus Curiae* is a nongovernmental corporate party at New York University School of Law. It has no parent corporations and no publicly held corporation owns ten percent or more of its stock.

Date: September 30, 2021 POLICING PROJECT

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INTEREST OF AMICUS CURIAE

The mission of the Policing Project at New York University School of Law is to partner with communities and police to promote public safety through transparency, equity, and democratic engagement. To that end, the Project facilitates public input and engagement on policing policies and practices, with the twin goals of giving communities a voice in how they are policed and developing greater mutual trust between law enforcement and the communities they serve. In its many endeavors, the Policing Project works closely with policing agencies and communities. It authors policies, model legislation, and best practices for policing agencies.

The Project has a critical interest in the judicial interpretation of the Fourth Amendment, given the impact of these interpretations on public safety and community-police relations. The Project takes the position that the panel misapplied controlling Supreme Court precedent, which resulted in a reading of the Fourth Amendment that is inconsistent with its text, history, and purpose, and that will invite

arbitrary and selective enforcement. The Project takes no position on the merits of plaintiff's Fourth Amendment claim.[1]

INTRODUCTION

Guns, liquor, mining, and chop shops. The conspicuous danger of these lines of business—coupled with their lengthy history of warrantless inspection and comprehensive regulation—have landed them on the Supreme Court's exclusive list of "pervasively-regulated" industries that may be subjected to warrantless searches. To this list, the panel has added massage parlors. But as intuition might suggest, massage parlors share little in common with the other four. Namely, they fail to satisfy every factor relevant to determining whether a business is pervasively regulated: They are not inherently dangerous, and have been subjected to neither a centuries-long history of warrantless searches nor a comprehensive scheme of industry-specific regulation. Under controlling Supreme Court precedent, this should settle the matter easily.

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[1] Pursuant to FRAP 29(a)(4)(E), Amicus states that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and its counsel contributed money that was intended to fund the preparing or submitting of the brief. Amicus files this brief with the consent of both parties under Ninth Circuit Rule 29-2(a).

By concluding otherwise, the panel misapplied this precedent. It failed even to address whether massage parlors are inherently dangerous—a critical factor in the analysis. It also held that a handful of generic laws of relatively recent vintage were sufficient to show a protracted history of warrantless searches and industry-specific regulation.

This erroneous reasoning will have effects well beyond the question presented. If thirty-odd years of generic regulation is all that is required to trigger the exception, it is difficult to imagine any business in today's economy that could avoid being ensnared by its expansive reach. This is precisely the result that the Supreme Court warned against when it repeatedly admonished that this "narrow exception"—applied to only four industries in the 50-year history of the doctrine—should not be allowed to "swallow the rule." And it is easy to see why: This troubling result would effectively strip nearly every business of core Fourth Amendment protections (namely, a warrant and a neutral arbiter), and expose them to the very sort of arbitrary government intrusion that the Framers reviled.

But even if massage parlors could be deemed pervasively regulated, the Court still should grant the petition because, in two important ways, the panel misapplied the legal test for assessing whether the warrantless inspections were "reasonable." First, it failed to address whether the challenged laws provide adequate protection against arbitrary selection of search targets. And second, it relied on a rationale explicitly rejected by the Supreme Court in concluding that a regime of warrantless searches was "necessary" to further the government's interest in regulation.

ARGUMENT

I. Massage Parlors Are Not a Pervasively-Regulated Industry

The Supreme Court has recognized only four pervasively-regulated industries. *City of L.A. v. Patel*, 576 U.S. 409, 424 (2015). These industries represent the "exception[ally] … unique circumstances" in which there is "such a history of government oversight that no reasonable expectation of privacy could exist for [the owner] of such an enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (internal citations omitted). Courts must take great care to ensure that this "narrow exception" to the warrant requirement does not "swallow the rule." *Patel*,

576 U.S. at 424-25. Yet the panel opinion would do just that. Its reasoning would lead to large swaths of the modern economy being tagged as pervasively regulated—an untenable result that is irreconcilable with Supreme Court precedent. In fact, massage parlors do not satisfy *any* of the factors relevant to the analysis: (1) they are not inherently dangerous, and they have not been subjected to (2) a long history of either warrantless searches, or (3) comprehensive industry-specific regulation. *See Patel*, 576 U.S. at 424-26.

In *Patel*, the Supreme Court's latest elucidation of this three-part test, it held that hotels are not pervasively-regulated. It remarked that "[s]imply listing the[] [only four] industries [to qualify for the exception—gun dealers, liquor sales, auto junkyards, and mining—] refutes [the] argument that hotels should be counted among them." *Patel*, 576 U.S. at 424. Unlike the other four, the Court emphasized, hotels do not pose an "inherent" danger to the public. *Id.* This factor—the lack of inherent danger—was central to its holding.

Yet the panel failed even to address this critical factor in its own analysis. If it had, it could only have concluded that "nothing inherent in the operation of [massage parlors] poses a clear and significant risk to

the public welfare." *Patel*, 576 U.S. at 424. Many industries may lend themselves to dangerous activity, but even where these dangers are concrete and well-documented, they do not render a business closely regulated unless they are "inherent in the [business's very] operation." *Id.*; *e.g. Donovan v. Dewey*, 452 U.S. 594, 602 (1981) ("the mining industry is among the most hazardous in the country"); *New York v. Burger*, 482 U.S. 691, 709 (1987) ("[a]utomobile junkyards … provide *the major market* for stolen vehicles") (emphasis added). Even assuming that massage parlors are "particularly attractive site[s] for criminal activity ranging from drug dealing and prostitution to human trafficking," *Patel*, 576 U.S. at 428-29 (Scalia, J., dissenting), that fact did not militate in favor of holding that hotels are pervasively regulated, and there is no reason to reach a different result here. *Id.* at 424-26 & n.5; *see also Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 170 (3d Cir. 2016) (producers of pornographic images not closely regulated even though participating in such an industry "enhances the chance that [a business] might run afoul of" child pornography laws). Unlike guns, mining, or alcohol, the day-to-day operation of massage parlors simply does not threaten the public welfare.

Massage parlors also have not been subjected "to a 'centuries-old tradition' of warrantless searches." *Patel*, 576 U.S. at 425. The liquor industry, for example, was deemed to be closely regulated in large part because of an unbroken line of laws—traceable from 17th century England, to the Colonies, to the first Congress, all the way to the present-day—permitting warrantless inspections. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). Massage parlors lack any such regulatory pedigree.

In arriving at a contrary result, the panel pointed to a local ordinance and a state law passed only six and seven years prior, respectively, and a cluster of regulations that have been on the books for thirty-odd years. Op. 4, 8-10. But this hardly constitutes the type of centuries-long tradition of warrantless inspection that the Supreme Court has said triggers the closely-regulated exception. In *Burger*, for example, the Court stressed that New York City's regulation of the junk industry stretched back 140 years. 482 U.S. at 707. *Accord United States v. Raub*, 637 F.2d 1205, 1209 n.5 (9th Cir. 1980) (federal regulation of fishing industry began in 1793).

Burger does not, as the panel reasons, support the notion that an industry may be closely regulated even where the regulatory regime is "less than five years old." Op. 9. Rather, *Burger* held that auto junkyards—while not historically the subject of intense regulation because "widespread use" of cars "is a relatively new phenomenon in our society"—are "simply a new branch of an industry that has existed [(the "general junkyard")], and has been closely regulated, for" centuries. *Burger*, 482 U.S. at 705-06. Massage parlors, conversely, are not recent inventions and have no lineage to a legacy industry that has long been subjected to warrantless inspection. And as the California Court of Appeal decision that the panel cites in support acknowledges (Op. 7-8), the history of California's regulation of massage parlors is simply "not as extensive as the" track records of warrantless inspection that the Supreme Court relied upon to justify applying the exception to other industries. *Kim v. Dolch*, 173 Cal. App. 3d 736, 743 (1985); Ans. Br. 38 (same).[2]

[2] The opinion also cites *Pollard v. Cockrell* (Op.10) which spends only a sentence concluding that massage parlors in Texas are pervasively regulated. 578 F.2d 1002, 1014 (5th Cir. 1978). This cursory analysis—which predates *Burger*—is unpersuasive and cannot be reconciled with the test that *Patel* sets out.

Moreover, the laws that have existed in California do not "establish a comprehensive scheme of regulation that distinguishes [massage parlors] from numerous other businesses." *Patel*, 576 U.S. at 425. These laws—which cover licensing and other "facility and operational requirements" (*Kim*, 173 Cal. App. 3d at 744; *see also* Op. 8 & n.5)—are precisely the "hodgepodge" of generic laws that the Supreme Court held did not trigger the exception in *Patel*. *Patel*, 576 U.S. at 425-26; *see also id.* at 425 ("All businesses in Los Angeles need a license to operate."); *Barlow's*, 436 U.S. at 314.[3] *Patel* clarified that even laws directed specifically at the hotel industry still were fundamentally generic in nature because they were the types of commonplace regulations that apply to most businesses. *Patel*, 576 U.S. at 425 (discussing linen changing requirements). The same is true as to massage parlors. In fact, numerous other businesses in South El Monte are subject to laws that

[3] The panel also relies on conditions set forth in plaintiff's conditional use permit (CUP), but the Supreme Court has focused on laws of general applicability in determining whether an industry is comprehensively regulated. Even assuming the CUP conditions are relevant, they include requirements applicable to almost every business, and are therefore not sufficiently industry-specific to trigger the exception. Op. 9 (noting that permit covers "hours of operation," "cleanliness" and "hygiene" standards, and "advertising requirements").

are substantially similar to the hygiene, licensing, advertising, and hours-of-operation regulations (Op. 9) that the panel relied on here. *See, e.g.*, Cal. Health & Safety Code § 114095 (cleaning standards for restaurant utensils); Cal. Code Regs. tit. 16, § 979 (equipment disinfection requirements for barbers); Cal. Bus. & Prof. Code § 16002.5 (cities may impose licensing fees on vending machines); *id.* § 17361 (advertising requirements for sellers of telephone handsets); Cal. Code Regs. tit. 16, § 1211 (advertising requirements for funeral homes).

The panel attempted to distinguish *Patel* only by observing that hotels implicate a greater privacy interest than massage parlors. In service of this conclusion, it cites a string of cases to support the proposition that "the Supreme Court has repeatedly recognized [that hotels] enjoy[] core Fourth Amendment protections." Op. 10. But *Patel* never adopted this rationale, and for good reason: The cases cited by the panel address the unrelated question of whether hotel *guests* enjoy an expectation of privacy in their hotel rooms that is commensurate with that of the home. Op. 10-11. These cases cast little light on the distinct question of the expectation of privacy that a hotel *owner* has in her corporate records or premises. *See Burger*, 482 U.S. at 700 ("An

expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."). Simply put, the owner of a hotel has no greater expectation of privacy than the owner of a massage parlor. *Patel* therefore applies with full force to this case.

The panel also notes that its holding is buoyed by other circuits that likewise have applied the exception in the wake of *Patel*. Op. 11; *but see, e.g.*, *Free Speech Coal.*, 825 F.3d at 169-71 (producers of pornographic images not pervasively regulated); *Zadeh v. Robinson*, 928 F.3d 457, 464-66 (5th Cir. 2019) *cert. denied*, 141 S. Ct. 110 (2020) (medical profession not pervasively regulated). But these cases provide no support for the panel's holding. Each involves starkly different facts (different industries, different States, different regulatory regimes), and is entirely inapposite. Take *Liberty Coins, LLC v. Goodman*, in which the Sixth Circuit held that precious metals dealers were pervasively regulated under circumstances that closely tracked the facts in *Burger*. 880 F.3d 274, 283-84 (6th Cir. 2018). Among other things, the precious metals regulations were "nearly identical" to those in *Burger* and the "history of regulation governing precious metals dealers and automobile junkyards

stems from a common origin." *Id.* at 283. No similar claim can be made as to massage parlors.

Rivera-Corraliza v. Morales, is even further afield. 794 F.3d 208 (1st Cir. 2015). There, the court did not even consider *Patel* because it had to determine whether officers were entitled to qualified immunity in light of facts that occurred before *Patel* was handed down. *Id.* at 217 n.12, 223. Finally, *Calzone v. Olson*, 931 F.3d 722 (8th Cir. 2019) and *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 840 F.3d 879 (7th Cir. 2016) (*OOIDA*) both dealt with the unrelated industry of commercial trucking, and involve dissimilar facts and regulatory regimes.[4]

Although the panel is surely correct that these out-of-circuit opinions are proof that *Patel* did not "detonate[]" (Op. 11) the closely-regulated industry doctrine, *Patel* did unequivocally cabin the exception

[4] The panel notably does not suggest that this Court's own pre-*Patel* line of cases (many of which are also pre-*Burger*) require holding that massage parlors are pervasively regulated. *See* Op. 7 n.4. Like the out-of-circuit cases upon which the opinion relies, this Court's pre-*Patel* decisions identifying closely-regulated industries all are factually distinct. *E.g. Raub*, 637 F.2d 1205 (involving the interplay of salmon fishing regulations and the federal government's unique powers to regulate Indian lands).

to businesses that are inherently dangerous, and that have been subjected to a long-standing history of warrantless searches and comprehensive industry-specific regulation. Because massage parlors do not meet any of these criteria, they are not closely regulated.

Allowing the panel's contrary opinion to stand will lead us down a path that is wholly inconsistent with Fourth Amendment values. If a smattering of recently-passed, commonplace regulations is all that is needed to apply the exception, it will become the default rule, no longer reserved for "unique" and "exceptional" circumstances. Governments—federal, state, and local—will be free to legislate around the Fourth Amendment's requirement of a warrant and judicial review by a detached, neutral arbiter. *See Patel*, 576 U.S. at 425 ("The City wisely refrains from arguing that [the record-keeping regulation] itself renders hotels closely regulated."). Yet these are the principal constitutional protections against invasions of privacy and property rights. Without them, the businessperson's "constitutional right to go about his business free from unreasonable official entries upon his private commercial property" will be reduced to a mere privilege left to the whim of the "inspector in the field." *See v. City of Seattle*, 387 U.S. 541, 543 (1967).

This result cannot be reconciled with Supreme Court precedent or Fourth Amendment principles.

II. Even Assuming That Massage Parlors Are Pervasively Regulated, the Panel Misapplied the Test For Determining Whether The Warrantless Searches Were Reasonable

The panel misapplied the Fourth Amendment test governing whether warrantless searches of pervasively-regulated businesses are "reasonable" in two critical ways. First, it failed to consider whether the statute adequately cabins the government's discretion in selecting which massage parlors to search. Second, it concluded that a regime of warrantless inspection is "necessary" based on a rationale that has been rejected repeatedly by the Supreme Court.

A. To be "reasonable" under the Fourth Amendment, statutes authorizing warrantless administrative searches of closely-regulated businesses must constrain government discretion in two ways. First, the statute "must limit the discretion of the inspecting officers," by "properly defin[ing] [the] scope" of the search. *Burger*, 482 U.S. at 703. In practice, limitations on scope generally take the form of defining when searches may take place, what areas of the business premises inspectors may enter, and what types of documents and property may be inspected or

seized. *E.g. United States v. Biswell*, 406 U.S. 311, 312 n.1 (1972); *Colonnade Catering*, 397 U.S. at 73 n.2. Second, the statute must "constrain… officers' discretion as to which [businesses] to search and under what circumstances." *Patel*, 576 U.S. at 427.

Although plaintiff argued that the statute failed to satisfy both of these prongs, the opinion addresses only the first. Op. 13. The panel entirely neglected to address whether the statute adequately constrains the government's discretion in selecting which massage parlors to search. *Id.*[5]

This omission goes to the heart of what the Fourth Amendment protects. The Fourth Amendment is violated whenever a warrantless search law affords inspectors "almost unbridled discretion … as to … whom to search." *Barlow's,* 436 U.S. at 323; *accord Dewey*, 452 U.S. at 604 n.9 (statute unconstitutional where it leaves "the decision to inspect within the broad discretion of agency officials"). In *Barlow's*, for example,

[5] The opinion notes that the statute allows "2 inspections a year" and that "[a]lthough the City here conducted more than two inspections of Lavender Massage, there is nothing in the Ordinance or CUP that forbids the City from conducting necessary investigations to ensure compliance with the law." Op. 13. But this observation completely fails to address whether officials were guided by any neutral criteria in selecting which massage parlors to search.

the Supreme Court held that a statute permitting inspections at "reasonable times, and within reasonable limits and in a reasonable manner" violated the Fourth Amendment because that standard failed to provide "specific neutral criteria" to constrain officers in selecting which businesses to search. *Barlow's*, 436 U.S. at 309 n.1, 321, 323; *see also Dewey*, 452 U.S. at 600-01, 604 n.9 (*Barlow's* statute unconstitutional because it "does not provide any standards to guide inspectors … in their selection of establishments to be searched").

In *Dewey*, by contrast, the Court held that a statute authorizing warrantless searches of mines was constitutional because the "discretion of Government officials to determine what facilities to search" was "directly curtailed by the regulatory scheme," which set forth "specific neutral criteria" for selecting which mines to inspect and how frequently to inspect them. *Dewey*, 452 U.S. at 601, 604-05 (quotation marks omitted). The statute "require[d] inspection of *all* mines and specifically define[d] the frequency of inspection." *Id.* at 603-04. It also set forth the

specific circumstances under which officers were authorized to conduct follow-up inspections. *Id.* [6]

Adhering to Supreme Court precedent, this circuit has held that regulations authorizing warrantless inspections of closely-regulated businesses must lay out specific, neutral standards for selecting whom to search and under what circumstances. *See Tarabochia v. Adkins*, 766 F.3d 1115, 1123-24 (9th Cir. 2014) (administrative search exception not satisfied where the regulation "does not provide any standards to guide inspectors either in their selection of [entities] to be searched or in the exercise of their authority to search") (quoting *Dewey*, 452 U.S. at 601); *accord Rush v. Obledo*, 756 F.2d 713, 721 (9th Cir. 1985); *Raub*, 637 F.2d at 1210-11 (upholding warrantless searches where statute limits them to cases where there is "reasonable cause").

The requirement of specific, neutral criteria "serves as a check against harassment and other arbitrary action." Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.2(h) (6th ed., Sept.

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[6] The statute required inspection twice annually for all surface mines and at least four times annually for all underground mines. *Dewey*, 452 U.S. at 604. It authorized follow-up inspections where "violations of the Act ha[d] previously been discovered" or "if notified by a miner … that a violation of the Act or an imminently dangerous condition exists." *Id.*

2020 update). Without such limits on officer discretion, closely-regulated businesses may suffer harassment by either excessive inspection or selective enforcement. *Cf. Patel*, 576 U.S. at 421. Also heightened is the temptation to engage in searches motivated by "personal vendetta[s]," *Tarabochia*, 766 F.3d at 1118, or to use administrative searches as a pretext to engage in ordinary crime-fighting operations, *see United States v. Orozco*, 858 F.3d 1204, 1212-14 (9th Cir. 2017).[7]

These ills lie at heart of what motivated the adoption of the Fourth Amendment. For example, the pre-revolutionary practice of issuing "writs of assistance," which gave "revenue officers" unlimited discretion "to search suspected places for smuggled goods," was considered "'the worst instrument of arbitrary power' … since [it] placed 'the liberty of every man in the hands of every petty officer.'" *Boyd v. United States*, 116 U.S. 616, 625 (1886). In light of this history, the "basic purpose" of the Fourth Amendment "is to safeguard … against arbitrary invasions by

[7] *See also* LaFave § 10.2(h), *supra* (a mine operator may not "be subjected to, say, ten times as many inspections as his competitors without the government at any point being required to justify this degree of attention"); *cf. Samson v. California*, 547 U.S. 843, 856 (2006) (Even parolees, whose expectation of privacy is severely curtailed, may not be selected for searches based on the "unbridled discretion" of officers in the field.).

governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Muni. Ct. of S.F.*, 387 U.S. 523, 528 (1967)). The requirement that the government use specific, neutral criteria to select search targets gives this "basic purpose" effect. Accordingly, the panel's failure to address this issue was error.

B. In addition to imposing constraints on officer discretion, to be reasonable under the Fourth Amendment, warrantless inspections of closely-regulated businesses also must be "necessary to further [the] regulatory scheme." *Dewey*, 452 U.S. at 600. The panel committed another error in reasoning that warrantless inspections of massage parlors meet this standard. Op. 12-13. This conclusion was motivated by a concern that requiring a warrant would frustrate the regulatory scheme because of the "*potential* ease of concealing violations." Op. 12 (emphasis added). But the Supreme Court repeatedly has "rejected this exact argument, which could be made regarding any" inspection scheme. *Patel*, 576 U.S. at 427; *Barlow's*, 436 U.S. at 316-20.

Conversely, in *Dewey*, the Court relied on this concealment rationale to justify necessity only because congressional findings explicitly noted the "'notorious ease with which many safety or health

hazards may be concealed if advance warning of inspection is obtained.'" *Dewey*, 452 U.S. at 603; *see also United States v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004) (because trucking "industry is so mobile, surprise is an important component of" search program). And the consequences of such concealment were likely to be grave given the "extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries." *Dewey*, 452 U.S. 594, 602 n.7; *see also Biswell*, 406 U.S. at 315 ("close scrutiny of this traffic is" necessary "to prevent violent crime").

The mere hypothetical "potential" (Op. 12) for concealment has never been a valid justification to forgo a warrant. Indeed, the Supreme Court has upheld the warrant requirement even where regulatory violations are "amenable to speedy alteration or disguise." *Barlow's*, 436 U.S. at 316. Absent some concrete evidence suggesting that massage parlors are uniquely well-positioned to conceal violations (and the opinion cites none), the panel's rationale is foreclosed by *Patel* and *Barlow's*. *Cf. Riley v. California*, 573 U.S. 373, 387, 389 (2014) (declining to expand exception to warrant requirement based on concerns supported by "a couple of anecdotes" or that lacked "evidence to suggest" they were

"based on actual experience"). Moreover, the possibility of concealment only arises when the inspector arrives without a warrant and is turned away by the business owner. Yet the "great majority" of businesses will consent to such inspections, and in any case, administrative warrants may be obtained *ex parte*, thereby preserving the element of surprise. *Barlow's*, 436 U.S. at 316, 319-320; *see Patel*, 576 U.S. at 422, 427.

The relative ease with which administrative warrants may be obtained further cuts against the panel's reasoning. *See Patel*, 576 U.S. at 422-23, 427; *Barlow's*, 436 U.S. at 316-20. Even criminal search warrants that must meet the more demanding probable cause standard may be obtained with dispatch by officers in the field. *Missouri v. McNeely*, 569 U.S. 141, 154 (2013). Indeed, defendants were able to obtain precisely such a warrant in this very case. Op. 5. The opinion never explains why discarding the warrant requirement is necessary given that defendants successfully—and without any apparent difficulty—availed themselves of the warrant process here. *See Barlow's*, 436 U.S. at 317-19 (agency's own regulations undermined case for necessity).

CONCLUSION

The Court should grant the petition for rehearing en banc, or in the alternative, panel rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 29-2(c)(2) and FRAP 32(a)(5)(A), the foregoing Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 4,196 words.

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