

24-2649

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nathen Barton,

Plaintiff-Appellant,

v.

Walmart, Inc., et al

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 3:23-cv-05063-DGE
Hon. Robert J. Bryan

APPELLANT’S REPLY BRIEF

Nathen Barton
4618 NW 11th Cir
Camas WA 98607
(469) 347-2139
farmersbranch2014@gmail.com

pro-se

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
WALMART DOES NOT BELIEVE IN ITS CASE.....	5
WALMART IS BEING DECEPTIVE	7
REPLY TO WALMARTS RESPONSE.....	9
I. REPLY TO THEIR ARGUMENT I ON PAGE 24.....	9
II. REPLY TO THEIR ARGUMENT II - "A" ON PAGE 55	12
III. REPLY TO "B" ON PAGE 57.....	13
IV. REPLY TO THEIR ARGUMENT III (PAGE 59).....	15
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	
ADDENDUM	

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Abboud v. Circle K Stores Inc., No. CV-23-01683-PHX-DWL</i> , (D. Ariz. Apr. 24, 2024)	10, 11
<i>Barton v. LeadPoint, Inc.</i> , No. 22-35130, (9th Cir. Jul. 20, 2023)	13
<i>Chesbro v. Best Buy Stores, L.P.</i> , 705 F.3d 913, (9th Cir. 2012)	10
<i>Faucett v. Move, Inc.</i> , 2:22-cv-04948-ODW (ASx), 8 (C.D. Cal. Mar. 17, 2023)	4
<i>Fiorarancio v. Weare Health Plans, Inc., Civil Action 21-14614 (SRC)</i> (D.N.J. Jan. 11, 2022)	11
<i>MacKinnon v. Hof's Hut Rests., Inc., No. 2:17-cv-01456-JAM-DB</i> , (E.D. Cal. Nov. 28, 2017)	8, 9, 11, 12
<i>N. L. v. Credit One Bank</i> , 960 F.3d 1164, 1169 (9th Cir. 2020)	12, 16
<i>Phan v. Agoda Co. Pte. Ltd.</i> , 798 F. App'x 157 (9th Cir. 2020)	8, 9
<i>Van Patten v. Vertical Fitness Grp., LLC</i> , 847 F.3d 1037, 1047 (9th Cir. 2017)	9, 11, 14, 16
<i>Wick v. Twilio Inc., Case No. C16-00914RSL</i> , (W.D. Wash. Jul. 12, 2017)	8, 9, 11, 12
REGULATIONS	
47 C.F.R. § 64.1200(c)(2)	11
47 C.F.R. § 64.1200(f)(15)	1, 11, 15
<i>In re Rules & Re's. Implementing the Tel. Consumer Prot. Act of 1991</i> , (Apr. 6, 2006) https://docs.fcc.gov/public/attachments/FCC-06-42A1.pdf	2, 10

INTRODUCTION

This is a simple case. Walmart only profits from picked up orders. They made a logical, *profitable* choice – use text messages to encourage those orders to be picked up, and benefit from more store traffic and more in-store sales. Your decision in this case will heavily influence privacy in the ninth circuit. Are companies using text messages as part of their routine income-producing process still subject to telemarketing restrictions? Or is it too bad, so sad for people like me who mistakenly get someone else’s transaction adjacent calls, and Walmart won’t cease despite repeated requests to stop? Walmart cries *looking through Plaintiffs wider lens* “*would transform practically all communication from any entity that is financially motivated and exchanges goods or services for money into [a telephone solicitation]*”, omitting that § 64.1200(f)(15)’s *telephone solicitation* excludes (i) persons who invited or consented to the calls, and (ii) persons with whom the caller has an established business relationship.

You should grant my appeal for two reasons. Walmart admitted they sent 10 text messages that weren’t part of ongoing transactions. In their Answer (Starting at ER 201), Walmart admitted they sent all the texts alleged in the Amended Complaint (starting at ER 260). And they said *Customers indicate their substitution preferences when they place their orders*. DktEntry 13:1, 51, and testified *Walmart prompts its customers to choose their substitution preferences at*

the time the order is placed. ER 95 ¶13, emphasis added. Yet I received ten text messages asking for substitution preferences: Some items may be low in stock. Pick substitution preferences for your *upcoming* Walmart order: [hyperlink to Walmart].

ER 271 ¶86. Walmart admitted it at ER 222 line 21.

ER 272 ¶97. Walmart admitted it at ER 225 line 3.

ER 272 ¶101. Walmart admitted it at ER 226 line 1.

ER 274 ¶118. Walmart admitted it at ER 229 line 22.

ER 275 ¶124. Walmart admitted it at ER 231 line 6.

ER 276 ¶134. Walmart admitted it at ER 233 line 14.

ER 280 ¶173. Walmart admitted it at ER 242 line 11.

ER 280 ¶175. Walmart admitted it at ER 242 line 23.

ER 280 ¶177. Walmart admitted it at ER 243 line 9.

ER 281 ¶183. Walmart admitted it at ER 244 line 16.

Unless I.M. had a time machine, these ten text messages could only have been sent *prior* to I.M. placing an order so they don't square with Walmart's claim "Each purchase occurred when the order was placed, and each text message was sent not to encourage a purchase but to facilitate the fulfillment of a purchase that had already occurred". DktEntry 13:1, 12.

The FCC said: *Messages regarding new or additional business would advertise "the commercial availability or quality of any property, goods, or services..." and therefore would be covered by the prohibition.*¹

¹ <https://docs.fcc.gov/public/attachments/FCC-06-42A1.pdf> ¶50

Second, Walmart unwittingly highlighted why texts like *Your Walmart curbside pickup is ready* are telephone solicitation. “If Congress had intended to prohibit *all* nonconsensual communications from for-profit corporations to phone numbers on the do-not-call list, it would have done so”. DktEntry 13:1, 37. Congress explained its delineation² *To come within the definition [telephone solicitation], a caller must encourage a commercial transaction.* What didn’t Congress say? – that a caller must encourage a *new* commercial transaction. These *ongoing business transactions* (to quote the District Court at ER 33 line 15) were fraught with the possibility of Walmart not profiting unless I.M. showed up and took delivery of the goods:

“For store pickup orders, when a customer pays with a credit card or debit card, **Walmart does not charge the credit or debit card until the customer picks up the order.** When a customer pays with an electronic benefit transfer (“EBT”) or gift card, Walmart charges the EBT or gift card at the time of purchase and refunds it if the order is not picked up.

. . . sometimes customers cannot pick up the orders they placed. When this happens, Walmart chooses to effectively “return” the orders by restocking the item(s) and either not charging or refunding the payment card, depending on the type of card used.” ER 41 (ECF 83-1) ¶6-¶7

² [H.R. Rep. 102-317](#) 102nd Cong. (1st Sess. 1991), page 13.

Walmart initiated most of the calls at issue to directly encourage the final resolution of the ongoing transactions in Walmart's favor – money going into and staying in – Walmart's bank account. That's Congress's *telephone solicitation*.

Walmart argued that some of their text messages are not as closely related to motivating I.M. to come to a Walmart store and pick up her order so definitely aren't telephone solicitation. Not to re-argue DktEntry 3.1 section IV on page 32, but text messages can have a dual purpose – informational and telemarketing. *[T]o engage in 'telephone solicitation,' a caller does not need to directly offer property or services for sale but may merely encourage the future purchase of property or services. Faucett v. Move, Inc.*³ All of Walmart's text messages were routine both in the sense that I.M. was a frequent customer and the text messages were triggered by routine events in their sales flow. Walmart had every expectation that in sending these texts, they were on the path to future I.M. orders just as they had received many past I.M. orders. Walmart cites *Smith v. Blue Shield of Cal. Life & Health Ins. Co.* but both Walmart and the district court failed to distinguish it from the case at bar – *Smith* is another *calls-stemming-from-a-transaction-initiated-by-the-call-recipient-aren't-advertising* lawsuit.

Had I (not a Blue Sheild customer for over a decade) received their call informing me that it was time to review my health insurance and see what's new

³ [Faucett v. Move, Inc.](#), 2:22-cv-04948-ODW (ASx), 8 (C.D. Cal. Mar. 17, 2023)

and directing me to call them or visit their website to find out more, the call would be advertising. Not every call Walmart could initiate must be telemarketing, but Walmart didn't cite any text messages I received that were not part of its routine profit-making sales flow, conceding my point. There is a significant difference between the informational value and future sales impact of a text message *ground beef you purchased yesterday is contaminated with e coli don't eat it*, and the ten text messages I received *Some items may be low in stock. Pick substitution preferences for your upcoming Walmart order: [hyperlink to Walmart]*. The second type is strongly intended to prompt a visit to *Walmart.com*, browse their products for sale, *and place an order*.

If Walmart believed in their case, why resort to deception?

I owe this Court an apology. I just read the late Chief Judge Emeritus of the United States Court of Appeals for the Third Circuit Ruggero J. Aldisert's *Winning on Appeal: Better Briefs and Oral Argument*. Had I read it earlier, my POB would have been shorter and easier to understand. What it would not have been was more objective and fairer. Unlike Walmart's brief, it recited the facts, friendly and adverse, and pointed to the record establishing those facts.

Contrast with Walmart's Introduction that said *[b]ecause she requested them [text messages], Walmart sent her updates about each order*. I.M. didn't request

text updates. Walmart prechecked a box, pre-loaded the phone number, and placed it way down a checkout page where I.M. never noticed. See ER 82:23-83:4:

Q. Okay. Before you were getting text messages to your number, did you ever really notice this part of the webpage with the phone number and the check box?

A. No, because, regardless, I get the e-mails of the status of my order. So I never really paid much attention to it.

Q. Okay. Would you say when you were placing orders, did you -- did you scroll down every order? Did you ever scroll down? Do you scroll down sometimes?

A. I -- I don't know, to be honest with you. I just would checkout and move on with my day.

This Court can recreate I.M.'s experience. View Dkt. Entry 13.1, page 9, and zoom in on the order confirmation page so that it fills the width of your screen. Is the Mobile contact portion visible, or must you scroll down to see it? If you don't know, Walmart doesn't either. ER 82:8-10:

Q. So as she's placing these orders and she's using that web page that we were just looking at, is it possible that she has no idea that text messages are being sent out because she didn't scroll down on her device?

A. *I don't know what she saw during her checkout experience.*

Walmart knows I.M. saw the credit card CVV code field because it's required, but Walmart has no idea if I.M. saw the pre-checked box and agreed with it. If I.M. had been making online orders for years, why would she start scrolling down the day after Walmart added her old phone number and prechecked the "I

want to received text updates” box? I.M. didn’t request the calls, Walmart duped her like they have repeatedly tried to dupe the Court.

Just as Walmart duped IM, they want to dupe the Court.

Example 1. Asserting that I consider TCPA lawsuits my job. *One of the things he does is generate and file TCPA claims, which he considers to be his "job"*. DktEntry 13:1, 14. Then see 1-SER-14: *felt like it was kind of my job then to make the phone stop ringing*. Which was hearsay I moved to strike in FER 20 starting at line 19.

Example 2. Asserting that I have multiple investigation phones. See DktEntry 13:1, 23: *Plaintiff has a separate set of "investigation phones"*. Then see 2-SER 279 *I have a phone that I call my investigation phone*.

Example 3. “. . . the phone number initially belonged to Plaintiffs son . . . and *Plaintiff often checked it.*” DktEntry 13:1, 24. Walmart cited this as a fact when 1-SER-9-10 shows it was based on Barton’s hostile ex-wife’s hearsay *In about August 2022, however, I learned that Nathen was frequently checking our son’s phone*. I demonstrated that my hostile ex-wife didn’t know what she was talking about, and I moved to strike it in FER 17 starting at line 13.

Example 4: *And his son seldom used the phone even when staying with Plaintiff*. DktEntry 13.1, 16, pointing to 3-SER-551. 3-SER-551 is testimony from the boy’s Chinese step-mother, Ms. Zhou, that her 12 year old step son J rarely

called *her*, and vice versa. Walmart misrepresented Ms. Zhou's testimony to the Court.

Example 5: *[I] asked for \$261,000 in statutory damages.* DktEntry 13.1, 16, pointing to ER-260-287. ER-260-287 doesn't mention any amount of damages.

Example 6: *the texts did not even mention any specific goods or services . . . And unlike those cases, the text messages here did not offer Plaintiff any free goods or services.* DktEntry 13.1, 34. But they admit texts offered the service of "curbside pickup", DktEntry 13.1, 11 (according to Walmart so that they *do not have to spend time in the store*" DktEntry 13.1, 35) and the service of providing substitution based on substitution preferences. DktEntry 13.1, 11.

Example 7: "as one of Plaintiffs own cited cases explains, texts that are "informative and confirmatory in nature" are not telemarketing solicitations". DktEntry 13.1, 45. What the *Moskowitz* court said was "The messages [at issue in the lawsuit] were informative and confirmatory in nature and do not . . .".

Example 8: "Plaintiffs "profit motive" theory cannot be squared with *Phan*, *MacKinnon*, and *Wick*, each of which would have come out the other way if Plaintiffs view were correct." DktEntry 13.1, 40. Perhaps Walmart is just ignorant. *Phan*, *MacKinnon*, and *Wick* were correctly decided by courts bound by *Van*

*Patten v. Vertical Fitness Grp., LLC*⁴ “we hold that the scope of a consumer's consent depends on the transactional context in which it is given”.

Response to Argument I (Page 24)

Phan didn't hold that texts that *simply confirm[] a transaction* are not solicitations. *Phan* said that Agoda's texts *simply confirmed a transaction Phan agreed to enter with Agoda*. The *Phan* decision pointed to the FCC's definition of *advertising*, messages that *facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements*. Neither the FCC nor the *Phan* court held that transaction related text messages sent to *someone else* are not advertising. Had the FCC or the ninth circuit intended to exempt transaction related calls sent to wrong numbers, either of them could have.

If Agoda mistakenly sent the “Good news! Your Agoda booking [number] is confirmed. Manage your booking with our free app <http://app-agoda.com/GetTheApp>.” to an Agoda non-customer, it would have been a solicitation promoting Agoda's commercial enterprise. Walmart's other case citations - *MacKinnon & Wick* – are distinguishable for the same reasons – just like *Phan*, those plaintiffs initiated the transactions that led to the calls.

⁴ [*Van Patten v. Vertical Fitness Grp., LLC*](#), 847 F.3d 1037, 1040 (9th Cir. 2017)

~

I won't rehash the *Walmart refunds orders not picked up so many of their texts were sent with the motive of booking a future profit* POB argument. I'll just note that the *Chesbro* calls also didn't mention specific goods or services for sale. The *Chesbro* court's common sense said the calls were for Best Buy's financial benefit, so they were advertisements. This flows into the *Abboud* case.

~

Walmart asserts *if a message would not be a solicitation when sent to the intended recipient, it does not magically become a solicitation if it is inadvertently sent to someone else*. DktEntry 13.1, 29. As I pointed out in DktEntry 3.1 page 15, at least one Arizona federal judge disagreed in *Abboud v. Circle K Stores Inc.*⁵ noting that a defendant can't send a plaintiff a message to complete a business transaction when there wasn't a business relationship to begin with. This mirrors the FCC's position in ¶150.⁶

Walmart tried to waive away *Abboud*, saying “[*Abboud*] is also inapposite, as that case did not involve a mistaken number situation”. This is odd because the *Abboud* defendant said “[e]ven if it were true that someone else mistakenly (or intentionally) entered Plaintiff's phone number during a Circle K transaction . . .”.

⁵ *Abboud v. Circle K Stores Inc.*, No. CV-23-01683-PHX-DWL, 13 (D. Ariz. Apr. 24, 2024)

⁶ <https://docs.fcc.gov/public/attachments/FCC-06-42A1.pdf>

As I noted in my POB, *encouraging the purchase* is a low bar, and *Abboud* cited *Fiorarancio v. Weare Health Plans, Inc.*⁷ to say as much:

“‘[W]e know from common experience that free offers often come with strings attached.’ . . . Thus, while Defendant's messages may have been informational on their face, it is plausible that they were part of a larger marketing, or profit-seeking, scheme and, as such, fall within the TCPA's prohibition.”

I made this point in Issues 1 & 2 of my POB. Walmart sent most of their texts as part of their day-to-day profit-seeking scheme.

~

Walmart says *both [MacKinnon and Wick] cases would have come out in favor of the plaintiffs [if this Court finds in my favor]*. DktEntry 13.1, 32. This is incorrect on two fronts. I am suing under 47 CFR § 64.1200(c)(2) for telephone solicitation calls Walmart initiated to me while the 1019 phone number was registered on the Federal Trade Commission's do-not-call registry. Telephone solicitation under 47 CFR § 64.1200(f)(15) excludes (i) persons who invited or consented to the calls, and (ii) persons with whom the caller has an established business relationship, so the *MacKinnon* and *Wick* plaintiffs would still fail. Second, the *MacKinnon* and *Wick* plaintiffs sued under 47 U.S. Code § 227(b) and the *Van Patten v. Vertical Fitness Grp., LLC* court held that the defendants could

⁷ [Fiorarancio v. Weare Health Plans, Inc.](#), Civil Action 21-14614 (SRC), (D.N.J. Jan. 11, 2022)

have called the *MacKinnon* and *Wick* plaintiffs based on the circumstance in which the consumers gave their telephone numbers. I never gave Walmart this phone number.

~

Walmart said it *has no duty to check the FCC's database to confirm the accuracy of phone numbers its customers have just confirmed in the process of making their purchases*. DktEntry 13.1, 21. While true, Walmart owns the liability for calling wrong numbers. *N. L. v. Credit One Bank*.⁸

Response to Argument II (“A” of Page 55)

Walmart argues that there are two reasons this Court should affirm the denial of my summary judgment. Both are hokey. My ex-wife and I maintain separate households and my biological son J splits his time between both houses. I remarried six years ago and my ex-wife remains single. Walmart’s first argument is that *About 80 percent of the texts at issue were sent after Plaintiffs son [J] had obtained a new phone that he used as his primary phone*. DktEntry 13.1, 56. What they left out is my ex-wife purchased a new phone for my son J that she could control. Walmart offers no explanation as to why the phone I had provided for my son J years prior suddenly no longer enjoyed the privacy protections of the TCPA just because his mother provided J a different phone.

⁸ [*N. L. v. Credit One Bank*](#), 960 F.3d 1164, (9th Cir. 2020)

No doubt had Walmart started calling J's new phone, and my ex-wife filed suit against Walmart under the TCPA for the calls, they would argue that the new phone didn't have privacy protections because J already had phone service provided by his father.

Walmart ignored the five factors set forth in *Barton v. LeadPoint, Inc.*⁹ except to claim that Barton lives in a catch-22 world – his telephone numbers no longer have legitimate privacy concerns because he frequently sues defendants for violating his family's privacy. And they argue that if J didn't use that phone often enough call my ex-wife, it wasn't residential. DktEntry 13.1, 56. Oddly enough their litmus test only involved calls to my ex-wife. Starting at FER page 6, paragraphs ¶10- ¶15 chronicle some major trips where the phone accompanied my son J during the time Walmart was texting the phone after being told to stop.

Response to B on page 57

Their next argument ("B" on DktEntry 13.1, 57) is even weaker. First, they would have receipts with no name or address of the purchaser authenticate themselves. See ¶14 of ER 42. No one at Walmart ever testified these receipts are true and accurate records kept in the ordinary course of business, nor did anyone at Walmart explain how receipts that don't contain my name or address are for

⁹ [*Barton v. LeadPoint, Inc.*](#), No. 22-35130, 2 (9th Cir. Jul. 20, 2023)

purchases I made at Walmart. I moved to strike them accordingly. FER 21:3-5.

They have the burden of proving an established business relationship (“EBR”) with clear and convincing evidence.¹⁰

Walmart conceded the STOP issue

Second, they acknowledge that a seller specific do-not-call request ends an EBR, and they show that nearly all their texts in this lawsuit said *STOP to opt out* (DktEntry 13.1, 11-12). I replied STOP three times and this circuit said in 2017’s *Van Patten: Some ways Van Patten could have communicated his revocation include . . . messaging "STOP"* but seven years later Walmart wants you to hold that a message’s sender can advertise *STOP to opt out* but after receiving the STOP, arbitrarily decide for themselves what it means.

Section III of my POB (starting on page 24) recounted the STOP instructions in their texts, I followed them three times, and that callers are required to give consumers a direct opt-out mechanism to prevent future calls. Walmart’s response only regurgitates the talking point that they didn’t send further texts about *that order*, thus conceding that I had a reasonable expectation of opting out of all the calls with STOP.

Third, they overlook *Van Patten*’s holding *For purposes of the Telephone Consumer Protection Act of 1991 (TCPA), we hold that the scope of a consumer's*

¹⁰ [Betz v. Glob. Telesourcing](#), Civil Action 21-cv-1320 (BAH), 3 (D.D.C. Dec. 10, 2021)

consent depends on the transactional context in which it is given. The call or text message must be based on the circumstance in which the consumer gave his or her number. I never gave Walmart this number at all, and I didn't ask them to call me about someone else's orders, so even if I had an EBR with Walmart, the messages I received were not based on the *circumstance in which the consumer gave his or her number.*

Last, and they concede the point by failing to address it, Washington State's CEMA does not have an EBR exception.

Response to Argument III (Page 59)

CEMA's "to promote real property, goods, or services" is *similar* to 47 CFR § 64.1200(f)(15)'s 'encouraging the purchase or rental of, or investment in, property, goods, or services', but their Venn diagrams are not identical. This Court may decide that some of Walmart's texts – like those promoting products through substitution preferences *Some items may be low in stock. Pick substitution preferences for your upcoming Walmart order: [hyperlink to Walmart]* – fall inside CEMA but outside of the TCPA. When Walmart testified "Walmart prompts its customers to choose their substitution preferences at the time the order is placed. Customers have three options [at order placement time] . . . customers can pre-select specific substitute items . . . customers can select any items they would like" (ER 95 ¶13) it admitted sending texts to promote *substitute* goods.

Similarly, Ready for [curbside] pickup and Partly ready for [curbside] pickup are promoting goods and services [curbside pickup], just as Substitutions and unavailable's *Anything you don't want? Please let us know soon* is. Dkt.Entry 13.1, 11 & 12.

Walmart started and ended their Response with deception: *the text messages here were not sent to "the public", they were sent to a single customer in response to her specific orders*. Dkt.Entry 13.1, 70. If they sent the text messages to their intended customer they would not be in this lawsuit. I am the public.

CONCLUSION

Walmart is the poster child of what Congress was trying to fix about telephone solicitations –frequent unwanted texts sent by a company trying to make more money and who refuses to quit when requested to STOP, even though seven years ago, *Van Patten* held *[s]ome ways Van Patten could have communicated his revocation include . . . messaging "STOP"*. The district court literally didn't want to hear it, but almost a year after the lawsuit, Walmart testified that the only way it knew to get these calls to stop was to call *1-800-Walmart*. I called the number to ask them how to make the calls stop. Their phone agents were powerless to stop the calls, and their advice included changing my phone number.

Walmart has known since 2020's *N. L. v. Credit One Bank*¹¹ decision that they are responsible for calls to wrong numbers. Yet on pages 1, 15, 18, 26, and 43, Walmart blamed their customer for Walmart's unwanted calls. When the Walmart customer was asked if she knew about the prechecked box and phone number she testified *I -- I don't know, to be honest with you. I just would checkout and move on with my day* and Walmart testified *I don't know what she saw during her checkout experience*.

Walmart whines that I am asking for a quarter million dollars (how they came up with that number is never explained). Would that be enough to cause them to scrub their calling list against the FCC's RND database? Congress created the TCPA's private enforcement to convince the ill-behaved to stop their abusive telemarketing practices.

Date: August 20, 2024

/s/ Nathen Barton
Nathen Barton

¹¹ [*N. L. v. Credit One Bank*](#), No. 19-15399, (9th Cir. Jun. 3, 2020)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form17instructions.pdf>

9th Cir. Case Number(s) _____

The undersigned attorney or self-represented party states the following:

I am unaware of any related cases currently pending in this court.

I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Nathen Barton **Date** August 20, 2024

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s) _____

I am the attorney or self-represented party.

This brief contains 4,921 words, the word limit is 7,000, and the word count excludes the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

[X] complies with the word limit of Cir. R. 32-1.

[] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

[] it is a joint brief submitted by separately represented parties;

[] a party or parties are filing a single brief in response to multiple briefs; or

[] a party or parties are filing a single brief in response to a longer joint brief.

[] complies with the length limit designated by court order dated _____.

[] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Nathen Barton **Date** August 20, 2024

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2024, I caused the foregoing document to be electronically filed with the Clerk of the Court using the ACMS system, which will send notification of such filing to all counsel of record and all pro se parties.