ORAL ARGUMENT SCHEDULED SEPTEMBER 6, 2022
No. 21-3044

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES,
Appellee,

v.

DWIGHT HAYMAN,
Appellant.

Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANT

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IAC: Ineffective assistance of counsel

SUMMARY OF THE ARGUMENT

The government has no answer to Mr. Hayman's argument that, despite his repeated expressions of discontent with his plea and sentence, defense counsel provided misleading and inaccurate advice. Defense counsel told Mr. Hayman that he had no meritorious claims on appeal, instead inexplicably steering him to raise any claim in a 28 U.S.C. § 2255 proceeding despite the obvious disadvantage of Section 2255. That advice was erroneous, and nothing in the government's argument mitigates the significance of that error.

To start, the record contradicts the government's assertion that Mr. Hayman did not adequately express an interest in challenging his conviction and sentence. Mr. Hayman repeatedly indicated to defense counsel that he was discontented with the fifteen-year sentence and wanted relief from it. Indeed, Mr. Hayman's dissatisfaction with the proposed sentence was so apparent to defense counsel that counsel took the non-standard step of explaining Mr. Hayman's options for litigating an ineffective of counsel (IAC) claim in a Section 2255 proceeding. Counsel also scheduled a meeting with the government *after* sentencing so that Mr. Hayman could try to get the government to lower his

sentence. Mr. Hayman's many statements of dissatisfaction in the months leading up to sentencing and his efforts to reduce his sentence gave rise to a duty to consult about appeal, and he was not required to repeat those post-sentencing.

Defense counsel's statements to Mr. Hayman about his options did not properly advise Mr. Hayman about his appeal rights. The government, somewhat puzzlingly, argues that defense counsel was smart to advise Mr. Hayman of a non-existent risk that the government might treat an appeal as a breach of his plea agreement. Defense counsel compounded that error when he advised Mr. Hayman, in connection with appeal, that he did not think he had provided ineffective assistance. To make matters more confusing, defense counsel advised Mr. Hayman to file a Section 2255 motion if he thought defense counsel had been ineffective. But critically, defense counsel failed to tell Mr. Hayman that he would have a right to appointed counsel if he raised this claim on appeal but not if he raised it in a Section 2255 motion.

Finally, the government faults Mr. Hayman for having failed to preemptively respond to its prejudice argument and provide his grounds

for appeal in the opening brief. But the district court did not rule on prejudice. Mr. Hayman need not have identified and responded to this alternative ground for affirmance, and this Court should thus remand. Even if this Court were to reach the issue, the record demonstrates that Mr. Hayman would have appealed and had an opportunity to develop the evidentiary record regarding defense counsel's representation of him had he been adequately advised about that option.

ARGUMENT

I. MR. HAYMAN'S REPEATED STATEMENTS OF DISSATISFACTION WITH HIS PLEA AND SENTENCE DEMONSTRATED A REASONABLE INTEREST IN APPEAL.[1]

The government concedes that Mr. Hayman need not have "directly inquire[d] about an appeal" in order to demonstrate interest in appealing. Gov't Br. 33. It instead argues that Mr. Hayman's repeatedly-expressed dissatisfaction with the plea and sentence did not adequately apprise defense counsel of his interest in appealing. But the government's argument that Mr. Hayman did not specify an interest in future judicial proceedings misunderstands both the record and the law. And the fact

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[1] In line with the Supreme Court's guidance on considering claims stemming from a failure to appeal, Mr. Hayman's opening brief first addresses whether defense counsel provided the required consultation before considering whether such consultation was required. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (explaining that in cases "where the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . the question whether counsel has performed deficiently by not filing a notice of appeal is best answered by first asking a separate, but antecedent, question: whether counsel in fact consulted with the defendant about an appeal."). The government addresses the factors in the opposite order. To facilitate this Court's consideration of the issues, this brief addresses those questions in the same order as the government.

that Mr. Hayman's discussions with counsel preceded sentencing is irrelevant, particularly given the nature of Rule 11(c)(1)(C) pleas. Instead, Mr. Hayman's repeated protestations demonstrated his interest in appealing.

The government starts by asserting that after sentencing, defense counsel had no reason to believe that Mr. Hayman "would want to raise a claim of ineffective assistance on appeal" because Mr. Hayman had pleaded guilty, reserved only an IAC claim on appeal, and received an "exceedingly generous" plea. Gov't Br. 31. But these considerations fade in light of Mr. Hayman's repeated protestations that he was dissatisfied with the resolution of his case. Defense counsel recognized Mr. Hayman's consistent dissatisfaction with the plea and the 15-year sentence. Mr. Hayman expressed that dissatisfaction when defense counsel initially discussed the plea offer with him. JA297 (explaining that when defense counsel first presented the plea, Mr. Hayman "wanted a lower number"). And Mr. Hayman continued to voice his discontent after he entered the plea. JA300 (describing "[s]everal" meetings in which Mr. Hayman "still wanted to convince the government that the deal wasn't really fair, that

he was being asked to take too much time . . . And then as it got closer to sentencing, there were questions about, again, his – him being discontent[ed] with the plea numbers"); JA302 ("The conversations to me in the end seemed driven, the same way that he was really trying hard to give me information or give me reasons to go back to the government to try to get better numbers and to express his dissatisfaction with the 15-year number.").

Indeed, defense counsel recognized, both before and after sentencing, that Mr. Hayman remained dissatisfied with the 15-year sentence and wanted to take steps to lower that sentence. Although it was not "necessarily standard" for defense counsel to discuss a Section 2255 remedy with his clients, he discussed the remedy with Mr. Hayman "a number of times" because of the "particular facts" of Mr. Hayman's case. JA293. There was no reason to have done that unless Mr. Hayman had put counsel on notice that he was dissatisfied with the plea and sentence and wanted further judicial action to challenge the plea and

sentence.[2] In addition, defense counsel set up a reverse proffer meeting with the government that took place *after* sentencing because Mr. Hayman was interested "in convincing them that he didn't have information, that they were treating him too harshly and he wanted a lesser sentence." JA320. Those repeated statements to defense counsel demonstrated that Mr. Hayman was not only dissatisfied with his sentence but also sought relief to lower his sentence and thus were sufficient to give rise to a duty to consult. *See*, *e.g.*, *Frazer v. South Carolina*, 430 F.3d 696, 702 (4th Cir. 2005).

The government argues that Mr. Hayman's case is distinguishable from the cases cited in his opening brief because the defendants in those cases "either expressly asked about an appeal or indirectly

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[2] The government claims that defense counsel's testimony about precisely when he discussed the Section 2255 remedy is "ambiguous" so it might not have been during the conversation the day of sentencing. Gov't Br. 37 n.29. The record is not crystal clear, but defense counsel recalled discussing Section 2255 with Mr. Hayman "a number of times," JA293, testified about talking with Mr. Hayman about Section 2255 in the middle of his testimony regarding the conversation he had with Mr. Hayman the day of sentencing about appeal the day of sentencing, JA303-306, and recalled talking about appeal and Section 2255 "definitely" as "part of the same conversation," JA329.

communicated such an interest," and they did so after sentencing. Govt. Br. 35-36 n.28. The first point is wrong and the second irrelevant. As to the first point, Mr. Hayman's repeated statements to defense counsel about wanting to get less time are at least as specific as statements that other courts have considered sufficient. In *United States v. Cong Van Pham*, 722 F.3d 320, 323 (5th Cir. 2013), for instance, the defendant told his counsel that he "was concerned" about his sentence and "wanted to do something to get less time." Although the defendant did not specify what he wanted to do to "get less time," the Fifth Circuit still found this sufficient to give rise to a duty to consult. *Id.*; *see also Frazer*, 430 F.3d at 702 (finding a duty to consult where defendant "indicated his unhappiness" with his consecutive sentences and asked counsel to "see about" having them run concurrently). So too here. Defense counsel knew that Mr. Hayman was looking for *any* way to bring the 15-year sentence down. That gave rise to a duty to consult about whether he wanted to appeal.

And although Mr. Hayman expressed an interest in meeting with the government in an effort to reduce his sentence, Gov't Br. 35, that did

not obviate counsel's duty to consult with Mr. Hayman about an appeal. The government argues that Mr. Hayman's request for that meeting "evinced [his] understanding that the government—not the court of appeals—controlled his fate." Gov't Br. 35. If that statement is accurate as to Mr. Hayman's belief, it demonstrates precisely why defense counsel had an obligation to advise Mr. Hayman about appeal. Defense counsel set up that meeting knowing not only that Mr. Hayman wanted to convince the government that the plea it offered had treated him too harshly, JA320, but also that the government had no authority to seek a sentence reduction unless Mr. Hayman provided cooperation that defense counsel knew Mr. Hayman could not provide. JA319-20 (recognizing that Mr. Hayman and the government came into that meeting "from different approaches" because Mr. Hayman wanted to "convince [the government] that he didn't have information" and "they believed he had information" that could reduce his sentence). Because defense counsel knew, even after sentencing, both that Mr. Hayman was still desperately trying to get his sentence changed and that the method defense counsel had set up for Mr. Hayman—speaking with the

government—would not change his sentence, counsel had a duty to consult with Mr. Hayman about pursuing an appeal to seek relief from this Court, the one entity that could have changed the prison term that had just been imposed.

Finally, contrary to the government's argument that Mr. Hayman's "post-sentencing silence confirmed that he was not at all interested in appealing," it is irrelevant to the inquiry that Mr. Hayman's repeated statements of dissatisfaction occurred prior to sentencing. Gov't Br. 31, 35 n.28. Because this was a Rule 11(c)(1)(C) plea, defense counsel and Mr. Hayman both knew before sentencing exactly what the sentence was going to be if a sentence was imposed.[3] That is why defense counsel talked to Mr. Hayman about appeal *before* sentencing. JA303; *see also* JA321 (noting that although defense counsel usually discussed appeal after sentencing, he did so before with Mr. Hayman because this was a

[3] The district court's only options at sentencing were (1) to reject the plea and return the case to its pre-plea status, or (2) to accept the plea and sentence Mr. Hayman to fifteen years.

Rule 11(c)(1)(C) plea). Mr. Hayman need not have repeated post-sentencing all of the concerns he had raised before sentencing.

This is particularly true because, unlike in *United States v. Taylor*, 339 F.3d 973, 981 (D.C. Cir. 2003), Mr. Hayman never indicated to counsel that his dissatisfaction had abated. In *Taylor*, although the defendant had earlier expressed dissatisfaction with a Guidelines enhancement, by the time of sentencing, he had agreed to that enhancement. *Id.* Because of that, this Court held that there was no duty to consult. By contrast, Mr. Hayman consistently maintained his dissatisfaction with his sentence, leading his counsel to explain the Section 2255 remedy and to set up a post-sentence meeting with the government. As in the "vast majority" of cases, there was a duty to consult in this case. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

II. DEFENSE COUNSEL FAILED TO ACCURATELY ADVISE AND CONSULT WITH MR. HAYMAN ABOUT APPEAL.

As the government correctly recognizes, Mr. Hayman's plea reserved his right to appeal on ineffective assistance of counsel grounds, Gov't Br. 6, and he thus would *not* have breached his plea agreement by filing a notice of appeal. The government instead asserts that because

defense counsel informed Mr. Hayman on more than one occasion about the fourteen-day deadline for filing a notice of appeal, he adequately consulted with Mr. Hayman about appeal. But knowing the deadline was not sufficient. Mr. Hayman needed accurate advice about the risks and advantages of appeal, and he also was entitled to have counsel make a reasonable effort to determine whether he wanted to appeal. Defense counsel's discussions with Mr. Hayman fell short in all respects.

Beginning with the risks of appealing, the government makes the flatly wrong assertion that counsel "smartly warned" Mr. Hayman that it was possible that the government "'might even try to treat' an appeal as a breach" because it had earlier threatened to take the plea hearing off the calendar. Govt. Br. 40-41 n.31. But the plea agreement reserved Mr. Hayman's right to appeal on IAC grounds. JA132. Given that clear contractual language, the government could not have "treat[ed]" appeal as a breach unless Mr. Hayman briefed prohibited grounds.[4] *See United*

[4] If Mr. Hayman had filed a notice of appeal, he would have been appointed counsel who would have advised him of the issues this Court could consider on appeal.

States v. Jackson, 26 F.4th 994, 1000 (D.C. Cir. 2022) (noting that plea agreements are binding contracts). Warning Mr. Hayman about a legally non-existent risk misinformed him about the risks of appealing. Of course, if Mr. Hayman were to litigate and *succeed* on an IAC claim on appeal—particularly an IAC claim related to the plea—the government on remand might not offer the same plea. But that would occur because Mr. Hayman received the remedy he sought—invalidation of the plea—not because the government treated the appeal as a breach.

Contrary to the government's suggestion, moreover, defense counsel's guidance about the proper forum for Mr. Hayman to raise an IAC claim—on appeal or by way of a Section 2255 motion—was at best muddled and failed to give Mr. Hayman the critical information he needed to decide whether or not to appeal.[5] Defense counsel of course

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[5] The government makes much of the fact that the district court did not credit Mr. Hayman's testimony that he was confused about *when* an appeal needed to be filed. Gov't Br. 47. To be sure, the district court found that defense counsel told Mr. Hayman about the 14-day appeal deadline. But the district court made no factual findings regarding Mr. Hayman's confusion about the available mechanisms for filing an IAC claim, and whether he grasped that he would forgo his right to appointed counsel if he did not pursue that claim on direct appeal.

could not advise Mr. Hayman about the merits of any IAC claim Mr. Hayman might raise on appeal. D.C. Rule of Professional Conduct 1.7(b)(4). Despite that fact, in the one substantive conversation defense counsel had with Mr. Hayman about the merits of an appeal,[6] counsel advised Mr. Hayman that he "didn't think that [his] representation was ineffective . . . [s]o [he] didn't really see anything." JA304.

Instead, defense counsel suggested that Mr. Hayman use a Section 2255 motion to seek the relief Mr. Hayman so clearly desired. JA327. The government claims that Mr. Hayman "paradoxically" faults defense counsel for providing "too much information about his collateral-attack option." Gov't Br. 47. Not true. Mr. Hayman was entitled to accurate information about his options on appeal. But defense counsel's advice steering Mr. Hayman to raise his IAC claim by way of a Section 2255 motion rather than appeal—without telling him that an appeal offered

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[6] Counsel testified that he had several conversations with Mr. Hayman about appeal, but other than the conversation on the day of sentencing, they consisted only of a brief mention of the 14-day appeal deadline. JA307-309 (describing counsel's potential mention of the appeal deadline).

the significant benefit of appointed counsel—was affirmatively misleading. The record demonstrates this point. Testifying about his advice regarding Mr. Hayman raising an IAC claim, defense counsel said that he thought it would help Mr. Hayman to have "a full year to evaluate, talk to people and determine whether to bring an IAC claim against me." JA327. Because of that, defense counsel "thought that was a much more viable way to approach any concerns [Mr. Hayman] had. [Section 2255 and appeal] would have been similar. It's really a matter of timing, I guess." JA327; *see also* JA 359 (quoting defense counsel's email to an assistant federal public defender: "It was pretty clear that his only possible recourse would be a 2255 against me.").

But it was not just a matter of timing. Direct appeal and Section 2255 are distinct in critical ways. *See United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003) (recognizing the differences in the two remedies). Of most importance, Mr. Hayman had a right to appointed counsel on appeal. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963). He did not have that same right on a Section 2255 motion. And contrary to defense counsel's advice, *supra* at 13, there was simply no

downside to raising an IAC claim on appeal rather than in Section 2255 proceedings.[7] The fact that defense counsel appears to have been confused about the potential advantages and disadvantages of raising the IAC claim on appeal underscores Mr. Hayman's need for guidance on this point and demonstrates that he did not receive the critical advice he needed to decide whether to appeal.

Given these particular facts, including Mr. Hayman's repeated statements that he wanted his sentence changed along with the fact that his only viable claim on appeal was an IAC claim, defense counsel's advice that his assistance was not ineffective and Mr. Hayman should wait and "talk to people" about whether to bring an IAC claim in a Section 2255 motion was erroneous. The proper course would have been to advise Mr. Hayman about filing a protective notice of appeal so that new counsel

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[7] Defense counsel's assertion that Section 2255 was the better path because it offered Mr. Hayman the advantage of "talk[ing] to people" to "determine whether to bring an IAC claim against me," JA327, was not correct. Had Mr. Hayman filed a notice of appeal, he would not have had to immediately determine the claims he would raise on appeal. He would have been appointed counsel who would have ordered the relevant transcripts and reviewed those before advising Mr. Hayman about his best path moving forward.

would be appointed to explore whether Mr. Hayman had a viable claim. Because defense counsel failed to advise Mr. Hayman about his options for ensuring that he preserved his IAC claim for appeal, counsel did not adequately consult with Mr. Hayman.

Grasping at straws, the government asserts that defense counsel need not have told Mr. Hayman that he had a right to appointed counsel had he appealed on IAC grounds because the district court adequately informed Mr. Hayman of that right. Gov't Br. 43-44. Not so. There may be instances where the sentencing court's "instructions about appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult." *Flores-Ortega*, 528 U.S. at 479-80. But that did not happen here. As the government's record citations illustrate, Gov't Br. 44, the district court did not mention that Mr. Hayman would retain his right to appointed counsel for an IAC claim. That is far from an instruction "so clear and informative" that it substitutes for counsel's duty to consult. Nor is Mr. Hayman suggesting "detailed rules for counsel's conduct." Gov't Br. 45 (internal quotation marks omitted). Instead, given the particular facts presented here—where Mr. Hayman

reserved his right to appeal on IAC grounds and defense counsel steered him toward a less advantageous Section 2255 motion—Mr. Hayman had a right to know that he would have had a right to appointed counsel on appeal.

Finally, the government does not dispute that, in addition to advising Mr. Hayman about the appeal, defense counsel also needed to make a reasonable effort to determine Mr. Hayman's wishes regarding appeal in order to have provided sufficient consultation. *See Flores-Ortega*, 528 U.S. at 479*; In re: Sealed Case*, 527 F.3d 174, 175 (D.C. Cir. 2008). It contends instead that Mr. Hayman's case is distinguishable from *In re: Sealed Case* because defense counsel met with Mr. Hayman several times after sentencing and mentioned the appeal deadline one or two times. Gov't Br. 48-49. But defense counsel's efforts to determine Mr. Hayman's wishes about appeal mirror those in *In re: Sealed Case*. Just as defense counsel in that case did not try to ascertain the defendant's wishes about appeal after sentencing, defense counsel, in his meetings with Mr. Hayman after his sentencing—meetings generated by Mr. Hayman's dissatisfaction with his plea and sentence—never asked

whether Mr. Hayman wanted to appeal. Each time counsel met with Mr. Hayman, counsel could easily have asked whether Mr. Hayman wanted to appeal. Each time, he did not. Instead, just as in *In re Sealed* Case, he told Mr. Hayman to contact him. That is not sufficient. Both because counsel did not advise Mr. Hayman about the risks and benefits of appeal and because counsel did not reasonably try to ascertain Mr. Hayman's wishes about appealing, Mr. Hayman has established that defense counsel did not consult with him about appeal.

III. THE DISTRICT COURT'S SILENCE ON PREJUDICE REQUIRES REMAND.

Finally, the government faults Mr. Hayman for not robustly establishing prejudice in his opening brief. Gov't Br. 49-54. But the district court never addressed whether Mr. Hayman had established prejudice. The government's attack on Mr. Hayman's showing of prejudice might be read as raising prejudice as an alternative ground for affirmance. But Mr. Hayman need not have disproven an alternative ground for affirmance until the government raised it. And the government cites nothing to support its argument that Mr. Hayman

needed to address in his opening brief an issue that the district court did not address.

There is good reason the government cited no cases for this point. As the Supreme Court has pointed out, the question whether a given defendant has made the requisite showing turns on the facts of a particular case. *Flores-Ortega* 528 U.S. at 485. But the district court did not make findings of fact related to prejudice. In particular, the district court never got to the question—and thus did not determine—whether, had Mr. Hayman been properly advised that he had a right to counsel on appeal and it was a better option for raising an IAC claim than by way of a Section 2255 motion, Mr. Hayman would have appealed. This Court should thus remand for the district court to consider in the first instance whether Mr. Hayman established prejudice.

In any event, Mr. Hayman has met the minimal bar for prejudice. Had he been properly advised that there was no downside to filing a notice of appeal, that a new lawyer would have been appointed to determine his most viable IAC claims, and that he would not have had a right to counsel if he raised this claim in a Section 2255 motion, this

entire record demonstrates that he would have done so. He was consistently distraught with his sentence and eager to explore any option open to him. But he was misadvised about the risks of appealing; advised that Section 2255 was the better option for raising an IAC claim; and not informed that although he had a right to appointed counsel on appeal, he would have to file his Section 2255 motion pro se. *See supra* Part II. It is in the context of these factors that Mr. Hayman's diligence in filing a Section 2255 motion is relevant. He heard and responded to defense counsel's advice that the better course was to wait to raise an IAC claim in a Section 2255 motion. His adherence to counsel's advice about bringing this claim demonstrates that he would have appealed had he had accurate information. There is simply "no self-evident reason why [Mr. Hayman] would not have filed a direct appeal" had he been properly advised. *Cong Van Pham*, 722 F.3d at 327; *see also* Opening Br. 46.

The government faults Mr. Hayman for failing "to identify any nonfrivolous grounds for appeal," and asserts that Mr. Hayman "abandoned that effort altogether" in this Court. Gov't Br. 51. It is not clear why the government thinks Mr. Hayman abandoned *anything*

related to the prejudice inquiry. Although Mr. Hayman did not raise an argument under *Flores-Ortega*'s first prong—consultation required when there is "reason to think" that a "rational defendant in his position would want to appeal (for example, because there are nonfrivolous grounds for appeal)," 528 U.S. at 480—that has nothing to do with whether he has demonstrated a "reasonable probability" that he would have appealed had he been properly advised, *id*. at 484.

Perhaps of most importance, unlike most claims brought on direct appeal, the record for ineffective assistance claims brought on direct appeal often is incomplete and needs to be developed on remand to the district court. *See Rashad*, 331 F.3d at 911. And although the government deems defense counsel's work "superlative," Gov't Br. 52, the record regarding trial counsel's performance—other than his failure to consult with Mr. Hayman about appeal—simply has not been developed. Given that there was absolutely no downside to Mr. Hayman filing a notice of appeal, being appointed an attorney, and having that attorney develop the record for an ineffective assistance of counsel claim, Mr.

Hayman has established a reasonable probability that he would have appealed had he been properly informed.

Finally, the government asserts that there is a "'strong chance [Mr. Hayman] would receive a lengthier—not shorter—sentence on remand.'" Govt. Br. 53 (quoting *Neill v. United States*, 937 F.3d 671, 678 (6th Cir. 2019). But that misses the point. Unlike the defendant in *Neill*, who only sought to appeal his sentence and likely would have received a longer sentence had he prevailed on appeal, there is simply no way of knowing whether Mr. Hayman still would have been convicted had he prevailed on appeal and gone to trial.[8]

CONCLUSION

For the foregoing reasons, this Court should reverse and remand either with instructions to grant relief or with instructions to determine prejudice.

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[8] Although the government asserts that the "likelihood of conviction [at trial] was high, Gov't Br. 52, it fails to mention that the lead defendant in this case was acquitted at trial. JA11, JA85. Had Mr. Hayman prevailed on an IAC claim on appeal, he would likely have gone to trial and also might have been acquitted.

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June 28, 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,509 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on June 28, 2022, this brief was served on counsel for Appellee via the Court's ECF system

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