Nos. 17-40, -42

In the Supreme Court of the United States

COACHELLA VALLEY WATER DISTRICT, *et al.*,
Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS, *et al.*,
Respondents.

DESERT WATER AGENCY, *et al.*,
Petitioners,

v.

AGUA CALIENTE BAND OF CAHUILLA INDIANS, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF NEVADA, ARIZONA, ARKANSAS, IDAHO, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, WISCONSIN, And WYOMING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Office of the
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
LVanDyke@ag.nv.gov

Counsel for Amicus Curiae

ADAM PAUL LAXALT
Attorney General of Nevada
LAWRENCE VANDYKE*
Solicitor General
JORDAN T. SMITH
Assistant Solicitor General
MICHELINE N. FAIRBANK
Senior Deputy Attorney General
JUSTINA A. CAVIGLIA
Deputy Attorney General
* *Counsel of Record*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In light of the fundamental differences in how the States regulate surface water versus groundwater, as well as this Court's past "narrow construction" of the reserved rights doctrine because of the congressional policy of "deferring to state water law," does the implied federal reserved water rights doctrine recognized in *Winters v. United States*, 207 U.S. 564 (1908) always preempt state-law regulation of groundwater?

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INTEREST OF AMICUS CURIAE[1]

The State of Nevada, acting through its Attorney General, is authorized by statute to commence, join, or participate in any suit necessary for the purpose of protecting and securing the interests of the State. Nev. Rev. Stat. § 228.170 (2017). Consistent with the vital importance of water in the Western States, Nevada's Attorney General is specifically authorized to "appear in any action or proceeding … when it is necessary … for the purpose of … determining the rights of the State of Nevada [in relation] … to the waters therein and thereunder, located in the State of Nevada." Nev. Rev. Stat. § 228.190 (2017). As the driest state in the nation, Nevada has a paramount interest in the rules governing the management and allocation of the scarce water resources within its borders. Nevada has the highest percentage in the nation of land under federal ownership or control, with a large portion of that land subject to possible claims of federal reserved water rights.

Like Nevada, all *amici* States have a sovereign interest in their respective water resources. While the States have adopted various approaches to managing and allocating water rights, every state has an obvious stake in the preservation, maintenance, and allocation of their most precious natural resource.

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[1] Counsel for Nevada has notified counsel of record for the parties more than ten days before the filing of this *amicus* brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), represents the high-water mark of uncertainty and disruption for the States with respect to the management of groundwater resources—especially the nine states in the Ninth Circuit. The contours of federal reserved water rights—known as the *Winters* doctrine—have ebbed and flowed, but never has this Court extended the doctrine to groundwater. Indeed, in *Cappaert v. United States*, 426 U.S. 128, 142-43 (1976), this Court specifically acknowledged that federal reserved water rights had not been applied to groundwater.

In the absence of this Court's guidance, the application of federal reserved water rights to groundwater has flowed in at least three different and irreconcilable directions. At least one state has concluded that there are no federal reserved rights in groundwater. *See* Coachella Pet. at 19. Others have held that there can be reserved rights, but only where state protections are inadequate. *Id.* at 19-20. And now the Ninth Circuit has rejected both approaches because "state water rights are preempted by federal reserved rights"—full stop. Coachella Pet. App. 21a-22a. The split of authority could not be wider or more fractured. *See* Sup. Ct. R. 10(a) (certiorari is appropriate when "a United States court of appeals … has decided an important federal question in a way that conflicts with a decision by a state court of last resort").

By imposing federal reserved water rights over groundwater in nearly a fifth of our nation's states, *Agua Caliente* is literally a watershed opinion washing away the authority and control that states have traditionally exercised over groundwater resources. *See* Sup. Ct. R. 10(c) (certiorari is appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court"). Regardless of the approach states have adopted to allocate water rights—a "riparian" regime, a "prior appropriation" system, or any variation thereof—states within the Ninth Circuit are now specially limited in regulating groundwater in their states, and may be subject to unanticipated federal reserved water right claims, some of which may involve groundwater basins that are already fully appropriated under state law.

This Court should grant review of the Ninth Circuit's decision in *Agua Caliente* to resolve the conflict among the lower courts and answer the fundamental question of whether the *Winters* doctrine applies to groundwater, and if so, when and how. As described by Petitioners, this case presents a clean vessel to resolve the issue—an issue that, as Petitioners correctly note, is exceedingly important and often recurring, but only rarely properly situated for this Court's review.[2] The *amici* States respectfully request this Court's review of these cases.

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[2] Coachella Pet. 29-31.

ARGUMENT IN FAVOR OF GRANTING THE PETITIONS FOR CERTIORARI

A. The Ninth Circuit's Expansion of the Federal Reserved Water Rights Doctrine Unsettles the Scope of the States' Authority over Groundwater Resources.

Since the late 1800's, water has been effectively legally severed from the land, affording states the ownership and authority to regulate the manner of water use, including water present upon federal lands. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935) ("What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became public juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."). This bedrock principle of water law has been repeatedly affirmed by Congress and this Court. *See*, *e.g.*, *Nevada v. United States*, 463 U.S. 110, 123-24 (1983); *California v. United States*, 438 U.S. 645, 665-67 (1978); *see also* Mining Act of July 26, 1866, § 9, 43 U.S.C. § 661 ("Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is

acknowledged and confirmed ….”); Mining Act July 9, 1879, § 17, 43 U.S.C. § 661 (“All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.”); Desert Land Act March 3, 1877, 43 U.S.C. § 321 (“[A]ll surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.”); Reclamation Act of June 17, 1902 ch. 1093 § 8 (“Nothing in this Act shall be construed as affecting or intending to affect or in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation … and the Secretary of Interior … shall proceed in conformity with such laws ….”).

This Court has recognized that “[p]erhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the United States to state-court jurisdiction for general stream adjudications:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found,

> which State is vested with the primary control thereof.
>
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years."

California, 438 U.S. at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951)).

Accordingly, as a general matter, water rights must be acquired under state law, even for federal lands. *See California Oregon Power Co.*, 295 U.S. at 163-64. In *Winters*, however, this Court carved out what purported to be a narrow exception to the general rule and established the federal reserved rights doctrine. Under the *Winters* doctrine, the creation of an Indian reservation by the federal government necessarily implies that *surface* water was reserved to achieve the purpose of the Indian reservation, even though the agreement creating the Indian reservation did not expressly contemplate water rights. *Winters*, 207 U.S. at 575-77.

This Court again addressed the federal reserved water rights doctrine in *Cappaert*. There, the Court reiterated that when the federal government withdraws land from the public domain it, "by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138. The Court explained that this "implied" authority arose

under the Commerce Clause, Art. I, § 8, and Property Clause, Art. IV, § 3, of the Constitution. *Cappaert*, 426 U.S. at 138.

"In determining whether there is a federally reserved water right implicit in a federal reservation of public land," the Court explained, "the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." *Id*. at 139. The Court limited any implied reservation of water rights to the minimal amount needed to fulfill the purpose of the reservation, and no more. *Id*. at 141.

But the *Cappaert* Court left unresolved two important questions. First, after noting that none of its cases had applied the implied reservation of water rights to groundwater, the Court declined to reach that issue because it concluded that that case involved only surface water. *Id.* at 142. Second, the Court left undefined the parameters of what it meant by the "purpose" of the reservation.

This Court addressed the latter (but not the former) question in *United States v. New Mexico*, 438 U.S. 696 (1978). It recognized that "many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified," and that the doctrine had significant federalism implications given the vast quantities of federal land that have been withdrawn from the public domain, especially in Western States. *Id*. at 699-700. The potential conflict between the States and the federal government "is compounded by

the sheer quantity of reserved lands in the Western States ...." *Id*. at 699.

To balance the competing state and federal concerns, the Court required a "careful examination" of the asserted water right and the purpose for which the land was reserved. *Id*. at 701. "This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law." *Id*. at 701-02. And as an "implied" doctrine, the Court's *Winters* reservation is an exception to Congress's usual explicit deference to state water law, and in some obvious tension with that repeatedly expressed intent. *See id*. at 715. The Court indicated, therefore, that courts must carefully examine the text and legislative history of the Congressional act that set aside the federal land in question in determining the scope of the implied reservation. *See id*. at 702-18.

The Court in *New Mexico* attempted to solve the tension between state and federal interests by limiting the federal reserved water right to the amount necessary to fulfill the *primary* purpose for which the federal reservation was created. *Id*. at 702. The Court "emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *Id*. at 700 (quoting *Cappaert*, 426 U.S. at 141). "Where water is only valuable for a *secondary* use of the reservation," the Court held that "there arises the contrary inference that Congress

intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." *Id*. (emphasis added); *see also In re Gen. Adjudication of All Rights to Use Water In Gila River Sys. & Source*, 289 P.3d 936, 941 (Ariz. 2012).

Ignoring all of this nuance, the Ninth Circuit in *Agua Caliente* expanded the federal government's implied reserved water rights to include "both surface water and groundwater appurtenant to reserved land" because "state water rights are preempted by federal reserved water rights." Coachella Pet. App. 21a-22a. Going even further, the Ninth Circuit held that these reserved rights "are not lost through non-use" and "are flexible and can change over time." *Id*. at 21a. It was thus irrelevant, under the Ninth Circuit's analysis, that the Tribe did not historically use groundwater. *Id*.

Under the Ninth Circuit's rule, so long as a federal reservation "envisions" or "contemplates" *any* use of water (it is hard to imagine any reservation that did not envision *some* use of water), then groundwater use, whether such water was reasonably available or anticipated at the time of the reservation or not, is implicitly reserved. Coachella Pet. App. 17a. Taking the Ninth Circuit's application of the federal reserved rights doctrine to its logical conclusion, a federal reserved right to groundwater applies irrespective of the reservation's intended purpose or the federal reservation's need for groundwater, and without regard to whether the federal government was putting groundwater to any beneficial use at the time of the reservation. *Id*. at 1270; *compare*, *e.g.*, *Tweedy v. Texas Co.*, 286 F. Supp. 383, 385-86 (D. Mont. 1968)

(observing that need and use of water are prerequisites to a federal reservation).

Even more troubling is the Ninth Circuit's holding that that any federal reserved water right is not limited by the purpose and expected beneficial use at the time of the creation of the reservation. Rather, in the Ninth Circuit's view, the implied reservation can expand in the future based upon the changing dynamic of the federal reservation, so long as the federal government or tribe asserts that it is related to the original purpose of the reservation, broadly construed. Coachella Pet. App. 21a-22a. In essence, the Ninth Circuit held that a federal reservation's groundwater right can evolve over time. *Id*. at 21a ("Instead, they are flexible and can change over time.").

In sum, the Ninth Circuit's indiscriminate application of the *Winters* doctrine to groundwater glosses over at least three important factors, any one of which could have led to a different result in *Agua Caliente*. First, the long historical differential treatment of surface water and groundwater by most States, informed by the fact that never before has any court recognized an unqualified reserved right in groundwater disconnected from any consideration of the protections already offered by the State. Second, that under this Court's guidance in *New Mexico*, the primary purpose(s) of the reservation should inform whether a reserved groundwater right exists at all, not just the quantity of the right. And third, the fact that in many instances, just because the primary purpose of a federal reservation may have included a need for *surface* water, that is a different question from whether the purpose included a need for *ground*water.

Factually, these are two different questions—and should legally be treated as such, not merged as the Ninth Circuit did in this case.

These oversights by the Ninth Circuit in expanding the reserved rights doctrine in *Agua Caliente* threatens real and extensive harm to the States. States have allocated and adjudicated groundwater rights against the historical and doctrinal background limned above. *Agua Caliente* has injected uncertainty as to the extent to which federal reservations have a reserved groundwater right, and muddied the application of the primary purpose doctrine to the federal government's implied water rights.

Relying on this Court's past decisions and the rationale underlying those decisions, states have had a legitimate expectation that they had primary control over their groundwater resources and that each possible claim for federal reserved rights was necessarily limited to the reservation's primary purpose, its ability to obtain water other than through a federal reserved right in groundwater, and with at least some plausible nexus to the actual historical use of water related to the federal reservation. *Agua Caliente* has tremendous implications for states managing finite groundwater resources, which have largely been fully allocated over the past 100 years. The Ninth Circuit's decision subjects a state's appropriation and groundwater resource management processes to uncertainty. If a federal reservation can assert absolute preemption over state groundwater allocation laws and regulations, a state's effort to effectively manage those limited water resources will be thrown out of balance.

For instance, in a state like Nevada where many of the groundwater allocation systems are already fully appropriated, the longstanding and settled appropriation regime will be disrupted by new, unaccounted-for federal reserved groundwater rights claims that are suddenly asserted for the first time. In those circumstances, a federal reserved claim to groundwater, likely having a senior priority date, will result in the over-allocation of the system. The new federal reserved water rights claim would injure existing groundwater users. Those water rights holders who relied upon the availability of groundwater, and who not only went through the process of securing their water rights but also invested in putting the water to a beneficial use, will suddenly be dispossessed of their expectation (and, in many instances, their livelihood), based on a newly-created senior water right that has no historical basis beyond the nebulous claim that the federal reservation's purpose included the need for water. Not groundwater, necessarily—just water. Existing groundwater users may lose their established right to use that water, or be subject to curtailment in the inevitable times of scarcity. Current rights holders may see their investment backed decisions evaporate. This is particularly unfortunate given this Court's explicit recognition in *New Mexico* that "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators" and "[t]his reality … must be weighed in determining what, if any, water Congress reserved for use …." *New Mexico*, 438 U.S. at 705. None of that concern has been carried over in the Ninth Circuit's *Agua Caliente* decision.

Nevada thus illustrates well the potentially devastating consequences of *Agua Caliente*. Nevada has extraordinarily limited water resources and has already extensively appropriated available surface and ground water within the State through the State's carefully balanced water laws. Under *Agua Caliente*, however, Nevada may be forced to curtail by priority existing, long-standing water rights to provide for new, and previously unknown, federal reserved rights in groundwater that no one contemplated as being necessary for the purpose of the federal reservation at the time of its creation.

The rule in *Agua Caliente* has no less potential to create significant uncertainties even in water-rich states that manage their groundwater and surface water resources under riparian, rather than the prior-appropriation principles that apply in the Western States. Minnesota, to take one example, has long recognized that overlying landowners, including tribes and federal agencies, have the right to the reasonable use of ground or surface water abutting their property. *See Erickson v. Crookston Waterworks, Power & Light Co.*, 111 N.W. 391, 393-94 (Minn. 1907). The allocation of waters in the state follows a statutory order of priority based on end use that does not rely upon any element of temporal priority. Minn. Stat. § 103G.261(a)(1)-(6) (listing water allocation priorities dependent on use and identifying domestic water supply as the first priority); Minn. R. 6115.0740, subp. 2.A ("In no case shall a permittee be considered to have established a right of use or appropriation by obtaining a permit."). Under this system, no user has an absolute priority of right to use or appropriate surface or ground water within the state. In the event that the

available supply of water in a given area is limited such that the competing demands among existing and proposed users exceed the reasonably available waters, there is an administrative process to address the water-use conflict. Minn. R. 6115.0720. If there is an unresolved conflict, allocations are made to existing and proposed users based on statutory order of water-use type. *Id.*

Applying *Agua Caliente*'s principles in Minnesota would, in essence, graft a federal rule of temporal priority onto the state's water law despite the fact that the state has long rejected prior appropriation principles. *See Minnesota Canal & Power Co. v. Koochiching Co.*, 107 N.W. 405, 410 (Minn. 1906) ("[T]he doctrine of the appropriation of waters, adopted in some of the western states, does not prevail in Minnesota ...."). Such a result would raise significant federalism concerns, given the States' primacy in matters of water law. Indeed, applying prior-appropriation principles in a riparian state like Minnesota that does not recognize an order of allocation would mean that implied federal reserved rights would always be first in line even over those appropriating for domestic water supply purposes. This outcome makes little sense when, under Minnesota's law, there is no need to imply a federal right to water for reservation purposes because the right already exists under applicable state law. *See also* Coachella Pet. 26-28 (describing similar adverse consequences for California and other similarly situated non-priority States).

The consequences that Nevada, California, and Minnesota would face from the unqualified federal preemption rule in *Agua Caliente* are hardly unique. While each state's predicament will inevitably vary based upon its own water laws, it is hard to imagine any Western State in the Ninth Circuit not being adversely affected. Meanwhile, as Minnesota demonstrates, states outside of the Ninth Circuit must also sit in limbo waiting to see if their Circuit will follow the Ninth Circuit's severe approach, or whether their Circuit might hew closer to the balance expressed in this Court's cases like *New Mexico*.

Indeed, given the geographical reality of groundwater aquifers in Nevada and other states that border the Ninth Circuit, the *Agua Caliente* decision creates an especially troubling incentive for forum shopping. Nevada (like many states) has groundwater aquifers that traverse state lines. Nevada also has Tribal and other federal reservations located above those aquifers where only part of the reservation and part of the aquifer are in the Ninth Circuit—for example, on the border of Nevada and Utah. Entities bringing a new reserved water right claim related to those cross-state groundwater aquifers would be strongly incentivized to bring their claims in the Ninth Circuit, instead of, for example, the Tenth Circuit, which has not adopted *Agua Caliente*'s absolute rule of preemption. This only exacerbates the uncertainty that will reign until this Court addresses the issue presented by this case.

One thing is certain: *Agua Caliente* has left States with great uncertainty in an area of paramount sovereign importance, and in an area where such

uncertainty has serious practical consequences. It leaves States facing a possible tide of federal reserved water right claims in excess of those rights already allocated, and budgeted, in the States' respective water allocation system. This Court should entertain the petition and resolve this uncertainty.

B. The Federal Government's Implied Reservation of Groundwater Rights is Inconsistent with the Clear Statement Rule.

In *Gregory v. Ashcroft*, this Court held that if Congress intends to preempt a power traditionally exercised by a state, "it must make its intention to do so 'unmistakably clear in the language of the statute.'" 501 U.S. 452, 460 (1991) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). This so-called clear statement or plain statement rule serves as an acknowledgement that, under the Tenth Amendment, States retain substantial sovereign power with which Congress does not easily interfere. *Id*. at 461-63. "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *U.S. v. Bass*, 404 U.S. 336, 349 (1971).

To satisfy the clear statement rule, Congress must make "unmistakably clear" its intent to alter the usual Federal-State balance in areas of "traditional and essential state function." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998). The intention "must be plain to anyone reading the [statute] …." *Gregory*, 501 U.S. at 467.

Here, the States have traditionally exercised plenary power over all non-navigable waters within their borders. *Kansas v. Colorado*, 206 U.S. 46, 93, (1907) ("It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."); *California Oregon Power Co.*, 295 U.S. at 163-64 ("all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states").

As this Court recognized over a century ago, many of the congressional acts establishing Indian reservations and other federal enclaves did not specifically contemplate the reservation of water rights. *See*, *e.g.*, *Winters*, 207 U.S. at 575-77. And, given the state of technology at the time, it is no surprise that even fewer acts specifically addressed the use of groundwater. *See*, *e.g.*, Coachella Pet. 12-13.

The absence of express reservations of water rights that prompted the creation of the *Winters* doctrine—and now *Agua Caliente*—also triggers the application of the clear statement rule. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (applying clear statement rule when the result would have "a significant impingement of the States' traditional and primary power over land and *water use*") (emphasis added); *Montana v. U.S.*, 450 U.S. 544, 552 (1981) ("[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government," courts "must not infer such a conveyance unless the intention was definitely declared or otherwise made plain … in clear and

special words.") (internal citations and quotations omitted); *John v. U.S.*, 247 F.3d 1032, 1046-47 (9th Cir. 2001) (Kozinski, J., dissenting) (applying clear statement rule to dispute involving reserved water rights and navigable waters).

Courts cannot simply presume that Congress considered, let alone intended, to displace the States' traditional authority over groundwater when (1) not only is the enabling act creating the reservation silent about water rights, but also (2) it was not even feasible, much less contemplated, that groundwater would be used. *See* Coachella Pet. at 32. To carry over a doctrine rooted in implied Congressional intent requires more. This Court should grant the petition to correct the Ninth Circuit's erroneous extension of the implied reservation of water rights to groundwater in the absence of a clear expression of Congressional intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DOUG PETERSON
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

MARTY J. JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

BRAD SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming

ADAM PAUL LAXALT
Attorney General of Nevada
LAWRENCE VANDYKE*
Solicitor General
JORDAN T. SMITH
Assistant Solicitor General
MICHELINE N. FAIRBANK
Senior Deputy Attorney General
JUSTINA A. CAVIGLIA
Deputy Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1100
LVanDyke@ag.nv.gov
* *Counsel of Record*

Counsel for Amicus Curiae

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