No. 22-35762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMAN RIGHTS DEFENSE CENTER,
Plaintiff - Appellant,

v.

JEFFREY A. UTTECHT, Warden, Superintendent of Coyote Ridge Corrections Center of the Washington Department of Corrections in his individual and official capacities and JOHN D. TURNER, Mailroom Sergeant of Coyote Ridge Corrections Center in his individual and official capacities,
Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON
CASE NO. 4:21-cv-05047-TOR
The Honorable Thomas O. Rice, United States District Court Judge

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is a non-profit entity that does not have parent corporations, and no publicly held corporation owns 10 percent or more of any stake or stock in Amicus. *See* Fed. R. App. P. 26.1.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Fed. R. App. P. 29(a)(2), *Amicus* submits this brief without an accompanying motion for leave to file because all parties have consented to its filing. Pursuant to Fed. R. App. P. 29(a)(4)(E), *Amicus* states that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *Amicus*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

Dated: February 13, 2023

Respectfully Submitted,

By: */s/ Jazmyn Clark*
Jazmyn Clark

ACLU of Washington Foundation

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I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (ACLU-WA) is a statewide, nonpartisan, nonprofit organization with over 150,000 members and supporters, dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws and has a particular interest and expertise regarding the First Amendment. The ACLU-WA has long advocated in support of the freedom of speech and of the press and has participated in numerous cases involving the federal and state constitutional guarantees of free speech, not only in the context of incarcerated persons, but also in myriad other contexts.

Attorneys for *Amicus* have read all relevant filings in the matter and are familiar with the record and the issues on review. The *Amicus Curiae* brief submitted in this matter addresses the scope of and protections afforded to individuals by the First Amendment, including publishers. *Amicus*'s brief further explains how prison mail policies, such as that in the present case, adversely affects constitutional guarantees, chills future speech, and unnecessarily and impermissibly violates the First Amendment rights of both incarcerated and non-incarcerated people alike. The ACLU-WA's *Amicus* brief also discusses the overwhelming importance of and need to protect incarcerated individuals' access to legal materials as self-directed legal education furthers rehabilitation and civic involvement.

This case challenges the constitutionality of the Coyote Ridge Corrections

Center's (CRCC) case law policy, in its original and revised forms, and involves a significant violation of the First Amendment rights of anyone wishing to engage in written mail correspondence with a person incarcerated at CRCC. Because of the impact on fundamental rights of numerous individuals, both incarcerated and otherwise, the issue raised by this case is of great public interest. The far-reaching consequences of this case warrant the Court's exercise of discretion to accept this amicus brief.

II. FACTUAL BACKGROUND

The pleadings filed in this case indicate that from September 2018 until November 2020, the Washington Department of Corrections (DOC) prohibited incarcerated individuals from possessing case law, pursuant to DOC Policy No. 590.500, titled "Possession of Legal Materials/Documents" at Section III, A, 2, (prohibiting the possession of case law documents) and III, A, 3 (prohibiting the possession of materials containing information regarding another individual currently incarcerated in Washington State). *See* 8-ER-1860, 8-ER-1847; 7-ER-1571, 1588-1589; 3-ER-0314 and 0323. This policy barred incarcerated people from possessing any case law at all, regardless of subject matter, and under this policy, the Coyote Ridge Corrections Center (CRCC) mailroom rejected all incoming mail to incarcerated individuals containing case law from any court, state or federal, including Plaintiff Human Rights Defense Center's (HRDC) book, *The Habeas*

Citebook: Ineffective Assistance of Counsel (*Citebook*), a publication which contains sample pleadings and is intended to assist pro se incarcerated people in understanding and navigating the intricacies of habeas litigation. *See* 8-ER-1854; 7-ER-1574; 3-ER-0316.

The Habeas Citebook offers a thorough collection of all cases related to ineffective assistance of counsel claims, provides virtually everything an incarcerated person would need in order to prepare and file a proper habeas petition, and serves as an indispensable tool for those bringing such claims. *See* 8-ER-1853-1854. Materials provided by HRDC regularly contain case law and information about individuals currently incarcerated in Washington State and HRDC has commonly sent its publications to incarcerated people in Washington State, including DOC facilities like CRCC, for over 30 years. *Id.* at 1854. While HRDC distributes its publications containing case law to facilities in every state, CRCC is the only facility that has rejected its book based on content.

Although the DOC received complaints about the ban on case law violating the First Amendment and HRDC worked to ensure compliance with the DOC's case law ban, the DOC continued to censor sixteen copies of said publication. *See* 8-ER-1843, 1844, 1845. Following written appeals from HRDC and numerous grievances from incarcerated people about the *Citebook's* censorship, the DOC's Publication

Review Committee (PRC) reversed the CRCC mailroom's rejection of the *Citebook* and allowed delivery of the books.[1] *See* 7-ER-1577.

Currently, the DOC no longer bans case law from outside of Washington State, however, it continues to reject case law containing information regarding individuals currently incarcerated in the state, summarizing its policy change as follows: "Case law will only be rejected if it contains information about other currently incarcerated Washington State individuals, or contains material which is a threat to the safety/security of the facility or the public." *See* 7-ER-1589. This includes individuals housed at all state, federal, and county facilities. *Id*.

The DOC's previous and current policy does nothing to ameliorate the problems caused, continues to hinder HRDC's ability to communicate with incarcerated people in Washington, and creates an ongoing chilling effect on future speech, unnecessarily and impermissibly violating the First Amendment rights of both incarcerated and non-incarcerated people alike.

[1] Per the pleadings filed in this case, CRCC failed to promptly deliver eleven of the sixteen books to incarcerated individuals (delivery took between 32 and 493 days), and never delivered the book to one incarcerated person who was released prior to the PRC's decision and four incarcerated people who were released following the PRC's decision. Defendants have no record of delivery for four additional incarcerated people. *See* 7-ER-1578-1582.

III. ARGUMENT

A. Both of the DOC's Original and Revised Case Law Policies Violate the First Amendment Right to Send and Receive Mail Under the *Turner* Test

The right to receive and send mail is unquestionably protected by the First Amendment. *Blount v. Rizzi*, 400 U.S. 410 (1971). The law is also clear that people who are incarcerated generally retain the First Amendment right to send and receive mail. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled in part on other grounds by Thornburgh*, 490 U.S. 401 (noting that correspondence between an incarcerated person and an outsider implicates the First and Fourteenth Amendments); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). Additionally, the First Amendment protects the ability of publishers to communicate with incarcerated individuals. *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2011) (holding Oregon DOC blanket rejection of HRDC mail was unconstitutional censorship of core protected speech); *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) (affirming permanent injunction against Washington DOC officials for censoring HRDC's mail to incarcerated people). A "blanket prohibition against receipt of the publications by any prisoner carriers a heavy presumption of unconstitutionality." *Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982); *see also Prison Legal News*, 238 F.3d at 1149.

Turner v. Safley, 482 U.S. 78 (1987), details the inquiry used to evaluate the constitutionality of prison regulations that impinge on the constitutional rights of people who are incarcerated. The Supreme Court made clear that the *Turner* standard is required even "when the regulation at issue affects the sending of a publication to a prisoner." *Thornburgh*, 490 U.S. at 413.

Under the *Turner* test, a prison mail policy which limits incoming mail must be "reasonably related to legitimate penological interests." Four factors are considered in making such a determination: (1) whether the regulation is rationally related to the legitimate and neutral governmental objective "put forward to justify it;" (2) whether alternative avenues remain for the inmates to exercise the rights; (3) the impact that accommodating "the asserted constitutional right will have on guards and other prisoners, and on the allocation of prison resources generally;" and (4) whether the "existence of obvious, easy alternatives" indicates that the regulation is an "exaggerated response" by officials. *Turner*, 482 U.S. at 89-90. The first of these factors is fatal to any regulation if the connection between the regulation and the asserted goal is arbitrary or irrational, "irrespective of whether the other factors tilt" in favor of upholding the regulation. *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) (citing *Turner*, 482 U.S. at 89-90).

As detailed in the pleadings of this case and by their own admission, the DOC lacked any legitimate penological basis for its total prohibition on case law and as

such, the Court's analysis must end here as the first *Turner* factor is dispositive. *See* 7-ER-1572. As to the DOC's current policy prohibiting case law regarding currently incarcerated individuals in the state, Defendants purport this policy is necessary to address the issue of "paper checking." *See* 7-ER-1597.

Paper checking is the process by which incarcerated individuals verify the status of another by demanding to see court documents, such as their Judgment & Sentence or police reports, to prove they are a "solid individual" and have not, as an example, been convicted of a sex crime. *Id*. While in theory this would appear on its face to be a legitimate penological interest, Defendants were not able to produce any records to illustrate the basis for this policy, any data as to the occurrence of paper checking or the violence they allege may occur as a result, nor were they aware of any instance in, at least, nearly the last two decades in which any incarcerated individual obtained case law through the mail to engage in paper checking. *Id.* at 1596-1597.

Additionally, incarcerated individuals still have access to a variety of ways in which they can learn about other individuals' crimes, such as unfettered access to television, including the news, and on Lexis Nexis in the law library. *Id.* at 1599-1601. Although the DOC proffers paper checking as the alleged legitimate penological interest for its current policy, this position is weakened dramatically by the fact that the DOC does not take any affirmative steps to prevent incarcerated

individuals from accessing or obtaining information about other incarcerated individuals through other means. *Id.* at 1600-1604.

As a result, the DOC's current policy prohibiting case law regarding currently incarcerated people in the state, a policy unique to Washington State alone and one the DOC has failed to advance a legitimate penological interest for, fails to satisfy the first *Turner* prong, and as such, the Court's analysis must cease.[2]

The fundamental purpose of our Constitution, and particularly the Bill of Rights, is to protect individual liberty against government encroachment, the potential for which is magnified in prison settings. Additionally, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. "[N]or do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh*, 490 U.S. at 407. Although "courts should ordinarily defer" to the "expert judgment" of corrections officials, they must not "abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

[2] The fact that no other prison system in the United States has a policy like Washington's is not a minor detail to be brushed aside. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. at 414 n.14 ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.").

The scope of the First Amendment is not defined by the whims of the government. The mere invocation of "prison security" is not a trump card that can be used by officials as a means of squelching speech. Unquestioning deference to government officials defending seemingly arbitrary regulations that impinge upon the freedom of the press is incompatible with the Founder's vision of the Judiciary as "the guardian" of the Bill of Rights and "an impenetrable bulwark against . . . every encroachment upon [the] rights expressly stipulated for in the Constitution[.]" *New York Times Co. v. United States*, 403 U.S. 713, 718 n.5 (1971) (Black, J., concurring) (quoting James Madison, 1 Annals of Cong. 457).

B. The DOC's Current Policy and Continued Practice Does Not Remedy the Constitutional Violation, Inconsistently Safeguards First Amendment Rights, and as a Result, the Constitutional Rights of HRDC, Prisoners, and Their Correspondents Are Not Fully Protected

Pursuant to its formal policies, both prior and current, CRCC and the DOC have been systematically violating the First Amendment for years by refusing to deliver copies of HRDC's publications, including: *The Habeas Citebook*, *Criminal Legal News*, and *Prison Legal News*, as well as a myriad of Washington State Supreme Court decisions concerning criminal law and procedure, sentencing, and post-conviction relief. As the United States Supreme Court has noted, "[o]f course" the commission of past wrongs is relevant to the likelihood of future injury. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983) (noting that 15 incidents in less than two years shows "'credible

threat'" of recurrence). Further, the Supreme Court has made clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, *unquestionably constitutes* irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added).

The ruling of the lower appellate court allowed DOC officials to escape an adjudication that its amended policy violates the First Amendment. Judgment was entered as a matter of law for the DOC because it no longer prohibited distribution of HRDC's publications. Notwithstanding that the DOC permitted the circulation of *The Habeas Citebook* , and with compliance with the censorship policy still required, DOC's amended policy has continuing, adverse effects on free speech and poses an ongoing threat to HRDC's First Amendment right.

In order to comply with the arbitrary policy set forth by the DOC and to ensure delivery of their publications to individuals incarcerated at CRCC, HRDC is now put in the tenuous position of censoring itself, in violation of the First Amendment. Where speakers must self-censor as a result of a jail's policies, such chilling constitutes the "continuing, present adverse effects" that show a real and immediate threat of future injury. *See O'Shea*, 414 U.S. at 495-96; *Thomas v. Cnty. of L.A.*, 978 F.2d 504, 507 (9th Cir. 1993). The DOC's current policy remains unconstitutional and the policy's history and the shadow cast by it warrant immediate relief.

Even if the new policy were facially constitutional, the record shows that, in practice, it does not ensure lawful conduct by mailroom personnel. For example, Defendant Turner, CRCC's mailroom sergeant, testified that under his own application of the existing policy, HRDC's 2021 *Prison Legal News* article concerning court decisions and legal development updates from the Washington Supreme Court, would continue to be rejected. *See* 7-ER-1569, 1588-1590, 1590-1594; 3-ER-0313, 0323, 0324-0326. Under such application and enforcement, other consequential and arguably landmark state case law would be barred from dissemination to those who need it most. This would include cases such as: (i) *State v. Blake*, 481 P.3d 521 (Wash. 2021) (holding the state's main drug possession offense was unconstitutional, resulting in the invalidation of any prior or current offenses dating back to the law's inception in 1971, and impacting several thousand currently incarcerated individuals who now qualify for resentencing, some of whom were released from the DOC's custody as a near-immediate result of this decision); (ii) *In re Pers. Restraint of Dodge*, 502 P.3d 349 (Wash. 2022) (regarding standards the Indeterminate Sentencing Review Board must use when considering release of inmates serving long sentences for crimes committed as juveniles); (iii) *In re Pers. Restraint of Monschke*, 482 P.3d 276 (Wash. 2021) (holding that 17-20 year-olds can challenge sentences of life without parole); (iv) *State v. Delbosque,* 456 P.3d 806 (Wash. 2020) (regarding standards for resentencing under the "*Miller* fix"

statute, which provided new sentencing hearings for incarcerated people who were convicted of homicide as 16-to-18 year-olds); and (v) *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that trial court's decision to sentence the defendant above the statutory maximum of the standard range violated the Sixth Amendment). These facts establish that there is, undoubtedly, a reasonable likelihood of future injury. The lower court's decision that HRDC's challenge is moot based on voluntary cessation of the conduct is incorrect as HRDC has shown a real and immediate threat of future injury.

The consequences of denying relief in the present case are extremely distressing. *Amicus* is well aware that the current practice at CRCC does not eliminate the threat of future injury, as *Amicus* and its members have direct experience of numerous occasions in which a correctional facility may temporarily resolve an issue, only for the facility to later resume in violating the constitutional rights of those incarcerated, or as in the present case, outsiders, including publishers like HRDC, who seek to communicate with incarcerated individuals. This omnipresent danger of regression means that a voluntary change in CRCC's practices—to no longer enforce a complete ban on all case law—cannot be relied on to continue, absent an enforceable injunction.

Unlawful, unconstitutional practices of carceral facilities can and do recur in the absence of judicial enforcement. If, following years of unconstitutional conduct,

correctional facilities can evade injunctive relief by simply rewording unlawful policies, without addressing and resolving the core issue central to said policy's illegality, then even meritorious litigants will fail to achieve robust and long-lasting protections of their First Amendment rights and an adequate remedy for the irreparable injury of First Amendment violations.

C. It is Imperative for the DOC to Protect Incarcerated Individuals' Access to Justice as Self-Directed Legal Education Furthers Rehabilitation and Civic Involvement

This Court is well aware of the incarceration epidemic in the United States. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011) (affirming order requiring California to reduce its prison population). Since 1972, the rate of incarceration in the United States has ballooned from 161 per 100,000 residents to more than 700 per 100,000 residents. *See* Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 33 (2014), https://nap.nationalacademies.org/read/18613/chapter/1#xvi. Washington State, which spends $2.5 billion each year to operate a state prison system over 3.5 times larger than that of the entire United Kingdom, is no exception.[3]

[3] Office of Financial Management, 2022 Department of Corrections Budget, https://ofm.wa.gov/budget/state-budgets/gov-inslees-proposed-2022-supplemental-budgets/agency-recommendation-summaries/310 ; *see also* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021 (2021),* https://www.prisonpolicy.org/global/2021.html .

The economic toll of mass incarceration is astronomical. A recent estimation of the annual cost to taxpayers of running every state and federal corrections system in the United States is $88.5 billion.[4] When including the direct cost of policing and the judicial and legal systems, that cost skyrockets to a shocking $295.6 billion.[5] Given the high price to the public of incarceration, one of the primary objectives of imprisonment should be the prevention of its recurrence. *See McKune v. Lile*, 536 U.S. 24, 36 (2002) (quoting *Pell*, 417 U.S. at 823) (noting that because "most offenders will eventually return to society," one of the "paramount objective[s] of the corrections system is the rehabilitation of those committed to its custody").

As the adult prison population has significantly lower literacy and education levels than that of the general population, the education and literacy of incarcerated people, particularly legal education and literacy, provides rehabilitative benefits and serves as "[one of the] most important elements for an ex-offender to successfully transition back into the community."[6] Legal education of incarcerated individuals

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[4] Shelley S. Hyland, Ph.D., *Justice Expenditure and Employment Extracts, 2016-Preliminary* (2019), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6728, Table 1 .

[5] *Id.*

[6] *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Pub. No. 2016-040, *Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training* 6 tbl. 1.2 (2016), https://nces.ed.gov/pubs2016/2016040.pdf ; *See also* Nathan James, Cong. Research Serv., RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* (2015), https://sgp.fas.org/crs/misc/RL34287.pdf .

can reduce recidivism by "changing inmates' perceptions and attitudes [about the law], developing their cognitive and analytical skills, and imparting the rudimentary legal skills and knowledge necessary to deal with daily problems both inside and outside of a correctional setting." *See* Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 Rutgers L. Rev. 699, 718-719 (1992), https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1319&context=fs. "[B]y confronting injustice and focusing on problem-solving, prisoners can create a positive reality, even within the confines of the prison," which "can also assist in forging a sense of community around the law, learning, and social action." *See* Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 Harv. C.R.-C.L. L. Rev. 369, 387 (2006), https://www.angelfire.com/az/sthurston/Jailhouse_Lawyers_-_Harvard.pdf.

By allowing incarcerated individuals access to justice through the materials and resources offered by entities such as HRDC and others, and encouraging them to engage constructively with the legal system through an increased legal education, positively impacts both the individual and the legal system, at large. A more legally savvy incarcerated individual is less likely to file a frivolous lawsuit or a lawsuit that will be dismissed for procedural errors. *See* Feierman, 41 Harv. C.R.-C.L. L. Rev. at 382–83 & n.84 (citing Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer* 156 (1988)). As incarcerated individuals disproportionately file

more civil suits than non-incarcerated people, the reduction in frivolous suits and procedural errors would help reduce the burden that prison litigation puts on an already overburdened court system. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1575 (2003), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2295&context=articles (noting that inmates were 35 times more likely than non-inmates to file a civil lawsuit in 1995). Additionally, filing a lawsuit that is not immediately dismissed or deemed frivolous can improve an incarcerated individual's sense of "procedural justice," which, in turn, creates and reinforces a more positive view of the legal system and society generally. *See* Feierman, *supra*, at 387 n.114 (citing Summer J. Syndeman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*, 3 Psychol. Pub. Pol'y & L. 207, 210 (1997).

Incarcerated people already face substantial barriers to self-advocacy, commonly resulting in the view that the legal system, and society generally, do not treat them fairly. Denying them access to invaluable and pertinent legal information results in these already vulnerable individuals being unable to educate themselves properly and leaves them uninformed as to their constitutional rights. To *Amicus*' knowledge, although the DOC offers some educational programs, it does not provide legal education to incarcerated individuals that might mitigate these obstacles to self-

advocacy.[7] Even if it did, such government-run programs are not a surrogate for self-directed study and introspection by incarcerated people, which are, arguably, more effective and impose no cost burden on taxpayers. *See, e.g.*, Jolene van der Kaap-Deeder *et. al.*, *Choosing When Choices Are Limited: The Role of Perceived Afforded Choice and Autonomy in Prisoners' Well-Being*, 41 Law & Hum. Behav. 567 (2017), (discussing research showing that incarcerated people who are afforded autonomy regarding leisure activities, work, and education report a higher quality of life while incarcerated, which promotes rehabilitation). As HRDC's publications and resources, including *The Habeas Citebook*, are specifically intended to provide legal information to incarcerated people, they are crucial to cultivate a sense of procedural justice and engender positive views of the legal system and society. As such, DOC's current policy and practice of censoring materials, like those of HRDC, amounts to an impermissible attempt to imprison not only the body, but the mind as well.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse and remand.

DATED this 13th day of February, 2023.

[7] *See* Department of Corrections Washington State, https://www.doc.wa.gov/corrections/programs/education.htm .

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Dated: February 13, 2023

By: */s/ Jazmyn Clark*
Jazmyn Clark, WSBA No. 48224

Counsel for ACLU of Washington Foundation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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