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April 19, 2024

Molly C. Dwyer, Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: Response to Rule 28(j) Letter in *Imperial Sovereign Court of the State of Montana v. Knudsen*, No. 23-3581 (oral argument scheduled June 4, 2024)

Dear Ms. Dwyer,

Through a Rule 28(j) letter filed April 18, 2024, the State cites a recent three-justice concurrence in *Labrador v. Poe*, 601 U.S. __ (April 15, 2024). The order, issued in response to an emergency application for a stay, is neither "pertinent" nor "significant." Fed. R. App. P. 28(j).

First, the three-justice concurrence is exactly that—an opinion of three justices. Notably, the Court recently denied an emergency application for a stay despite the contrary votes of the same three justices. In *Griffin v. HM Florida-Orl, LLC*, 601 U.S. __ (Nov. 16, 2023), Florida presented the very theory for which the State cites the *Labrador* concurrence—that a preliminary injunction should not extend to non-parties. Florida lost. Unless and until the reasoning of the *Labrador*

concurrence makes its way into a controlling opinion, overreliance on the concurrence equates to prognosticating, not reasoning from authority.

Second, *Labrador* did not involve a facial challenge brought under the First Amendment. As Justice Kavanaugh, joined by Justice Barrett, noted in *Griffin*, such challenges present unique "complexities about the scope of relief." *Griffin*, 601 U.S. __, __ (2023) (statement of Kavanaugh, J.) (slip op., at 3). This makes immediate sense: a law that likely unconstitutionally chills protected speech raises special concerns within the *Winter* analysis—particularly with regard to the equities and the public interest.

Third, the *Labrador* concurrence has no bearing on the threshold question of whether the State adequately raised the issue of the injunction's scope to the district court.

Sincerely,

/s/ *Constance Van Kley*
Constance Van Kley
Counsel for Plaintiffs-Appellees

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