No. 20-35668

In the United States Court of Appeals for the Ninth Circuit

ALMA ROSALES,
PLAINTIFF-APPELLANT

v.

IDAHO DEPARTMENT OF HEALTH & WELFARE, ET AL.,
DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO (1:19-CV-00426) (THE HONORABLE DAVID C. NYE, C.J.)

REPLACEMENT BRIEF OF APPELLANT

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INTRODUCTION

Alma Rosales is a 63-year-old American citizen living in Meridian, Idaho. She speaks very little English and takes medications that significantly impair her cognitive function. Her doctor acknowledges that she is "totally disabled," and she relies on her son, Raul Mendez, as her full-time caretaker. ER41. The U.S. Social Security Administration and the State of Idaho also consider Rosales disabled, and she receives Social Security and Disability benefits as a result.

Rosales is unable to work due to her age and disability, and relies month-to-month on her disability benefits and food stamps to get by. So when the Idaho Department of Health and Welfare unexpectedly informed her in 2019 that her food stamps would be reduced, and her Medicaid "Aged and Disabled" benefit discontinued, her son tried his best to get answers and to challenge the Department's decisions. The Department ultimately reduced Rosales's benefits and took away her Aged and Disabled benefit without a hearing. She sued.

When Rosales filed her Complaint, she simultaneously moved for appointment of counsel under 28 U.S.C. § 1915(e)(1), which provides that a court "may request an attorney to represent any person unable to afford counsel." Rosales made clear that she could neither afford an attorney, nor represent herself. As the motion explained, Rosales "cannot represent herself in Court

and present her case to the Judge or Jury" because of "her disability and limited English proficiency," and because her medications make it hard for her to process and remember information or act independently. ER226–27. Indeed, the motion made clear that "every single pleading [Rosales] is submitting to open this case" was not drafted by her, but "was in fact drafted by her son Mendez." *Id.*

The district court denied the motion. While acknowledging Rosales was "relying on her son to help her draft any documents," the court concluded that appointing counsel was unnecessary because the arguments in Rosales's briefs—which Mendez wrote—were "coherent and well-founded." ER16.

The case therefore proceeded without appointed counsel. At every turn, Rosales's filings made clear that her son was drafting her pleadings because she could not. Her filings also repeatedly reiterated her request for an attorney, emphasizing her inability to represent herself. Eventually, Rosales submitted a handwritten letter reiterating this plea, attached to a motion for default judgment against the defendants. ER191. As if noticing for the first time that Mendez was writing pleadings on his mother's behalf, the district court struck the filing, noting that "Rosales may represent herself or may seek a lawyer authorized to practice law in this district to represent her, but her son Mendez may not do so." ER189.

Rosales therefore moved *again* for appointment of counsel. The motion

was again written by her son, and was accompanied by a sworn declaration that Rosales was unable to afford an attorney, was not competent to represent herself, and had made diligent efforts to find pro bono counsel. ER184–86. The motion noted that, under Federal Rule of Civil Procedure 17(c), "[t]he court *must* appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c) (emphasis added). It also cited this Court's precedent requiring the district court to inquire into Rosales's ability to represent herself and either "attempt to request the assistance of volunteer counsel" or "explain its failure to do so." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986).

Instead of conducting a hearing or appointing counsel, the district court denied the motion without any analysis and dismissed Rosales's case sua sponte. ER4–9. The court accepted as true the motion's statement that Rosales was not competent, and therefore presumed she could not understand the papers written by her son and filed on her behalf. But instead of conducting any inquiry under Rule 17, the district court imposed a remedial Catch-22, requiring Rosales to either appear pro se, or refile with an attorney—neither of which, on the undisputed record, she was capable of doing.

That was error. This Court's precedent makes clear that when a district court is on notice of a plaintiff's potential incompetency, Rule 17(c) requires it

to take appropriate steps to protect the plaintiff's interests, including appointing counsel if warranted. *30.64 Acres*, 795 F.2d at 804. What a district court may not do is precisely what the court did here: "close[] the courthouse doors" and "use the Rule as a vehicle for dismissing claims or for allowing the interests of an incompetent litigant to go completely unprotected." *Davis v. Walker*, 745 F.3d 1303, 1310–11 (9th Cir. 2014). As other circuits have concluded, this rule applies with full force and requires an inquiry into competency and potential appointment of counsel when, as here, an incompetent plaintiff is assisted by a well-meaning non-lawyer like Rosales's son.

Because the undisputed record shows that Rosales satisfies the requirements for appointment of counsel, this Court should not only reverse the dismissal and remand, but do so with instructions for the district court to appoint counsel. At a minimum, however, this Court should remand with instructions for the district court to hold a hearing on appointment of counsel.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Rosales's action under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3). This Court has jurisdiction under 28 U.S.C. § 1291 because Rosales appeals from a final order dated July 1, 2020, which dismissed the complaint and all her claims. Rosales timely filed a notice of appeal on July 22, 2020. ER19–28.

In prior briefing (before undersigned counsel was appointed), the Department of Health and Welfare agreed that this Court had jurisdiction to review the district court's order dismissing Rosales's complaint on the ground that Rosales's son could not represent her. Dep't Initial Br. 2–3, 9th Cir. Dkt. 19 (filed Feb. 16, 2021). The Department contended, however, that this Court's jurisdiction to review the dismissal order rested on the collateral order doctrine, and therefore did not extend jurisdiction for this Court to review the district court's decisions denying appointment of counsel. *Id.*

The Department is incorrect. Here, the district court dismissed the complaint in full and without prejudice. ER4. Because "[a] dismissal of an action without prejudice is a final appealable order," this Court has jurisdiction under 28 U.S.C. § 1291. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1085 (9th Cir. 2003). And because the dismissal order was final, the district court's denial of appointment of counsel—ordinarily an interlocutory order—merged into the judgment and is therefore reviewable on appeal. *See Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984).

The Department's contrary argument is based on the assertion that "[d]ismissals without prejudice are not final decisions under 28 U.S.C. § 1291." Dep't Initial Br. 1 (citing *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1135 (9th Cir. 1997) (en banc)). But the Department's reliance on *WMX Technologies* is misplaced. There, the Court held that a dismissal without prejudice *with leave*

to amend was not a final decision under section 1291. Here, however, the district court dismissed the complaint without prejudice, but *without* leave to amend. As this and other circuits have recognized, such a dismissal without leave to amend is a final decision. *See Laub*, 342 F.3d at 1085; *Cooper v. Ramos*, 704 F.3d 772, 776 (9th Cir. 2012) (distinguishing *WMX* on this basis); *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1256 (D.C. Cir. 2020) (same); *Weber v. McGrogan*, 939 F.3d 232, 240 (3d Cir. 2019) (same).

This Court therefore has jurisdiction over the final decision dismissing Rosales's suit and any orders that merged into it, including the orders denying appointment of counsel.

STATEMENT OF THE ISSUES

1. Whether the district court erred by dismissing the suit sua sponte rather than inquiring into Rosales's competence and the need for appointment of counsel, when Rosales repeatedly stated she was not competent to proceed pro se and submitted evidence to that effect.

2. Whether this Court should remand with instructions to appoint counsel based on the undisputed evidence in the record.

STATEMENT OF THE CASE

A. Alma Rosales's Underlying Suit

Alma Rosales, a U.S. citizen living in Meridian, Idaho, relies on her public benefits to survive. She is fully disabled, and her only income is her Social

Security benefits and her food stamps. Her son, Raul Mendez, is her full-time caretaker.

In September 2019, Rosales received a letter from the Idaho Department of Health and Welfare informing her that, beginning the following month, the Department would decrease her monthly food stamp benefits due to a purported change in her expenses. ER230. Mendez contacted the Department and explained that Rosales's expenses had not changed. In response, the Department told him the change was the result of federal guidelines changing, but declined to provide him with the relevant guidelines. ER230–31. After additional correspondence, Mendez requested a hearing before reduction of Rosales's benefits. ER232. But the Department did not provide a hearing before reducing her benefits, and the reduction went into effect in October 2019. ER232.

Also in September 2019, the Department informed Rosales she was losing coverage under the Medicaid "Aged and Disabled Waiver." The waiver provides in-home services to allow elderly and disabled recipients to stay in their homes, rather than moving to a nursing home.[1] Although Rosales had received these benefits since 2017, a nurse conducted a home assessment and

[1] *See* Nat'l Council on Aging, *Medicaid Aged and Disabled Waiver (ADW)*, available at https://benefitscheckup.org/fact-sheets/factsheet_medicaid_wv_aged_disabled_hcbs/#/

told Rosales the Department had no record of her in its system. That same day, the administrator of Rosales's health coverage sent her a letter stating that it was disenrolling her from her benefit plan because "she [did] not have a qualifying level of Medicaid." ER234. Rosales lost her Aged and Disabled Waiver benefits without receiving a hearing before their termination.

In November 2019, Rosales filed a complaint pro se against the Idaho Department of Health and Welfare and Molina Healthcare (a private company administering Rosales's Medicaid benefits on Idaho's behalf) in the U.S. District Court for the District of Idaho. As relevant here, Rosales alleged that the Department and Molina violated the Due Process Clause, the Social Security Act, the Food Stamp Act, and Title II of the Americans with Disabilities Act by reducing her food stamp benefits and discontinuing her waiver benefits without adequate notice or a hearing. *See* ER235–44.

B. First Motion for Appointment of Counsel

At the same time she filed the complaint, Rosales also filed an application for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a) and a motion for the court to appoint counsel under 28 U.S.C. § 1915(e)(1).

In her motion for appointment of counsel, Rosales explained she was unable to proceed on her own behalf because "[s]he has limited English proficiency," "is disabled," and "takes several medications that significantly impair [her] cognitive function." ER226. The motion further explained that Rosales

"cannot represent herself" for those reasons, that she had tried and failed to obtain pro bono counsel from local organizations, and that "every single pleading" she was submitting to open the case was drafted not by her, but "by her son Mendez." ER226–27.

The district court granted the application to proceed *in forma pauperis* in part, finding that Rosales could pay the filing fee over several months. Because section 1915(a) requires a district court to evaluate the merits of a complaint before permitting a litigant to proceed *in forma pauperis*, the court evaluated the complaint and found that Rosales's allegations "clearly" stated a claim under *Goldberg v. Kelly*, 397 U.S. 254 (1970), which recognized that the Due Process Clause protects "those receiving public assistance benefits, particularly when [a case] involves the termination of such benefits." ER222–23.

The court did not, however, rule on Rosales's motion for appointment of counsel. Rosales therefore renewed her request for counsel in a motion to reconsider, reiterating that she "has disabilities . . . and limited English proficiency," and that "her son has been drafting [her] pleadings," but "is not an Attorney." ER203. The motion documented Mendez's unsuccessful efforts to find pro bono counsel for his mother. ER203, ER207–11.

After Rosales's motion for reconsideration, the district court denied the motion to appoint counsel. In so doing, the court analyzed two elements: Rosales's likelihood of success on her claims and her ability to prosecute the

case on her own. ER16. But because the court concluded that it was "without sufficient information to make a decision on Rosales's likelihood of success on the merits," ER16, it relied wholly on her purported ability to prosecute the case.

The district court acknowledged that Rosales "has been relying on her son to help her draft any documents," and "[b]ecause her son cannot represent her in court, Rosales believes that this is an additional factor that calls for the Court appointing her counsel." ER16–17. But the court disagreed, noting that it was not concerned by her difficulties with English and observing that "so far, Rosales has proven herself capable of pursuing her claims as a pro se plaintiff. She successfully filed her Complaint . . . and has made coherent, well-founded arguments through her briefing." ER17. The court concluded that, "if it seems appropriate at a later date, the Court may reconsider appointing counsel." ER17. It made no attempt to square its statement that Rosales was capable of representing herself pro se with its acknowledgement that her son had drafted all her filings.

Rosales filed a notice of appeal from the district court's denial of the motion to appoint counsel. The notice of appeal emphasized again that it, "and all pleading filed to date [in] this case . . . have been drafted by Ms. Rosales['s] son because she is disabled and it has been determined that she needs 'nursing facility level of care.'" ER196. In the notice, Mendez explained that the court

clerk told him he could write his mother's pleadings as long as she signed them, but expressed concern that this was a "misrepresentation," or that the defendants might argue that Rosales "is not being represented by counsel and that she is not representing herself." ER198. The notice renewed the request for appointment of counsel. ER199.

Although the notice of appeal was docketed in the district court, the district court did not respond to any of the substantive points. And in the absence of a final order, this Court held it lacked jurisdiction over the appeal. ER194. Rosales's case therefore proceeded in the district court without appointed counsel.

C. Second Motion for Appointment of Counsel

In March 2020, counsel for the Department appeared in the case and sought an extension of time to respond to the complaint, which the district court granted. ER192–93. Apparently unaware of the extension, Rosales moved for a default judgment. She attached to the motion a handwritten letter in Spanish stating that she was not competent to represent herself, reiterating that her son had written all of her papers, and authorizing Mendez to proceed on her behalf. ER191. The district court struck the motion, observing that, "[h]owever well-intentioned Mendez is, and despite Rosales' health, this letter cannot supersede the rule that a non-lawyer cannot represent another. . . . Rosales may represent herself or may seek a lawyer authorized to practice law

in this district to represent her, but her son Mendez may not do so." ER189.

Consistent with that admonition, Rosales filed a second motion for appointment of counsel. The motion sought appointment of counsel under three sources of authority.

First, the motion cited 28 U.S.C. § 1915(e)(1), which provides that "[t]he court may request an attorney to represent any person unable to afford counsel."

Second, the motion cited Federal Rule of Civil Procedure 17(c) and this Court's decision in *United States v. 30.64 Acres of Land*, which held that, in appropriate cases, Rule 17(c) and 28 U.S.C. § 1915 impose on a federal court "a duty . . . to assist a party in obtaining counsel willing to serve for little or no compensation." 795 F.2d 796, 804 (9th Cir. 1986). Based on that precedent, the motion emphasized that "[Rule] 17(c) requires a court to take whatever measures it deems proper to protect an incompetent person during litigation." ER176.

Third, the motion cited 42 U.S.C. § 2000e-5(f)(1), which allows courts to appoint counsel in Title VII cases. The motion noted that Rosales brought a claim under the Disability Act, which incorporates the "remedies, procedures, and rights" set forth in Title VII. *See* 29 U.S.C. § 794(a). ER178.

The second motion to appoint counsel, like Rosales's prior filings, plainly disclosed that her pleadings were "written by her son Mendez" because "she

is incapable of writing them herself." ER172. It again reiterated that Rosales "has limited English proficiency, she has disabilities and takes several medications [that] significantly impair cognitive function," and that she was "not capable" of writing her own pleadings. ER176. It also observed that "the court has never made an inquiry into Rosales['s] ability to represent herself." ER178.

Based on a conversation with the court clerk, Mendez understood that he was permitted to write Rosales's filings as long as she personally signed each of them. ER177. The two of them therefore carefully adhered to that approach. ER177. But Mendez nonetheless explained that he and Rosales were doing their best to "[be] truthful, protect[] the integrity of the judicial system, and do[] what's best for disabled/incompetent people in court." ER176. The motion acknowledged that "Rosales and her son understand that parties can only appear represented by a licensed Attorney or appear pro se, but the point is that Rosales is not appearing pro se because she is incapable of doing so and the court has never inquired into her competency." ER177.

Although Rosales had signed each pleading herself, Mendez affirmatively raised his concern that she was incapable of understanding the pleadings due both to "disabilities and language barrier." ER177. For all these reasons, the motion requested that the court "inquire[] into Rosales['s] ability to represent herself," "request an Attorney to take her case," or, under Rule 17(c),

"take whatever measures it deems proper to protect an incompetent person during litigation." ER178.

Mendez submitted a sworn declaration with the motion. ER184–86. In it, he attested that Rosales was "not capable of appearing pro se during legal proceedings due to her disabilities," and that he wrote Rosales's pleadings because she is "incapable of doing so." ER184. He also emphasized he had made diligent efforts to secure counsel by contacting several individual attorneys, public-interest organizations, the Idaho Trial Lawyers' Association, and by requesting a list of possible attorneys from the district court's "pro se/pro bono" program. ER185.

The Department opposed appointment of counsel. Rosales filed a reply emphasizing that her inability to represent herself "would be obvious during a hearing." ER40. The reply attached a letter from Rosales's primary care physician confirming that Rosales was fully disabled and that she relied on Mendez as her full-time caretaker. ER41. The reply also attached the Department's own functional health assessment of Ms. Rosales, which noted that Rosales suffered from "frequent difficulty remembering and using information," required "direction and reminding from others," could not "follow written instructions," and experienced periodic hallucinations of her deceased husband's voice. ER165–70.

D. The District Court's Sua Sponte Dismissal

The district court did not hold a hearing on the motion to appoint counsel, or even to assess Rosales's competence or ability to represent herself. Instead, the district court dismissed the complaint sua sponte, relying on the general principle that non-attorneys cannot represent parties in court.

Apparently crediting the evidence in the record that Rosales was not competent, the court wrote that "Mendez's explicit representation that he is filing pleadings on his mother's behalf . . . in which his mother both unknowingly perjures herself and is ignorant to how her interests are being represented is deeply troubling to the Court." ER7. Without considering whether appointment of counsel was necessary or appropriate, the court ruled that, "[w]here Rosales has claims that require adjudication, she is entitled to represent herself or, if she is incompetent, retain legal assistance so her rights may be fully protected." ER7. "Accordingly," the court reasoned, "the Complaint must be dismissed because Mendez may not bring a pro se action on behalf of his mother." ER8.

The district court did not cite or discuss appointment of counsel under 28 U.S.C. § 1915(e)(1), Rule 17(c), the Disability Act, or this Court's precedent in *30.64 Acres of Land*. It nonetheless specified that the motion for appointment of counsel was denied. ER8, ER9. Thus, without considering whether Rosales could represent herself, the court "dismiss[ed] the Complaint without

prejudice so that Rosales may bring this action either on her own or with a lawyer to represent her interests." ER8. It dismissed the remaining pending motions as moot. ER9.

This appeal followed. On appeal, Rosales moved for appointment of counsel, and the Department opposed the motion. 9th Cir. Dkt. Nos. 2, 3. This Court denied the motion, 9th Cir. Dkt. No. 8, and denied a request to reconsider its ruling, 9th Cir. Dkt. No. 16. The parties submitted an initial round of briefing, after which the Court determined that appointment of counsel was warranted and appointed undersigned counsel to represent Rosales. 9th Cir. Dkt. Nos. 26, 27.

SUMMARY OF ARGUMENT

I. The district court erred by dismissing Rosales's complaint on the grounds that it was drafted by her son without first taking steps to inquire into her ability to represent herself. For more than three decades, the settled law of this Circuit has been that Rule 17(c) "*requires* a court to take whatever measures it deems proper to protect an incompetent person during litigation." *30.64 Acres*, 795 F.2d at 805 (emphasis added). Thus, "[i]n an appropriate case, a federal court has a duty under section 1915[(e)(1)] to assist a party in obtaining counsel willing to serve for little or no compensation." *Id.* at 804.[2] And this

[2] Prior to 1996, the relevant provision was codified at section 1915(d), but was redesignated section 1915(e)(1) by the Prison Litigation Reform Act, Pub. L.

Court was clear that a district court "does not discharge this duty if it makes no attempt to request the assistance of volunteer counsel or, where the record is not otherwise clear, explain its failure to do so." *Id.*

Rosales and Mendez repeatedly emphasized to the district court that Rosales was not capable of representing herself pro se. The federal government considers Rosales disabled. For years—until the events underlying this suit—she received Medicaid Aged and Disabled waiver benefits, which substitute for nursing-home care. And the record below contained ample evidence of her inability to represent herself, including no fewer than *five* filings in which Mendez—his mother's full-time caretaker—explained he was writing his mother's pleadings because she was incapable of doing so, ER226–27, ER203, ER196–98, ER172–78, ER30, a handwritten letter from Rosales stating that she was not competent, ER191, a declaration under oath from Mendez attesting to the same facts, ER184–86, a letter from Rosales's primary care provider, ER41, and medical records reflecting Rosales's medications and functional limitations, ER200–01, ER165–70.

Despite this undisputed record evidence, the district court sua sponte dismissed the complaint instead of conducting a hearing on competence or appointment of counsel. In so doing, the district court appeared to credit the ample evidence in the record that Rosales was not competent. But instead of

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No. 104-134, 110 Stat. 1321 (1996).

appointing counsel or inquiring further, it dismissed the suit so that Rosales could refile the suit herself (which, given her limitations, is not possible) or refile with the assistance of counsel (which Mendez had repeatedly tried, and failed, to secure).

This Catch-22, which effectively would close the courthouse doors to indigent individuals unable to represent themselves pro se, is precisely what Rule 17(c) seeks to avoid. Rule 17(c) obligates the court to act when it is "on notice" of the need for action, regardless of whether a litigant "compli[ed] with technical rules." *30.64 Acres*, 795 F.2d at 805. And, faced with similar circumstances where an incompetent litigant was assisted by a family member, other circuits have made clear that the appropriate course is not to dismiss the suit, but to consider whether appointment of counsel is warranted to protect the plaintiff's rights. *See infra*, pp. 25–26.

II. Here, the Court should remand with instructions for the district court to appoint counsel. The undisputed record evidence establishes that the conditions for appointment of counsel under either 28 U.S.C. § 1915(e)(1) or 29 U.S.C. § 794(a) are satisfied. Rosales is not capable of representing herself, not able to afford private counsel, and has stated claims on which she is likely to succeed. Indeed, this Court previously found that litigants in a similar suit were likely to succeed on their claims that the Department violated due pro-

cess and the Medicaid Act by reducing similar benefits without the opportunity for a hearing. *See K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 970 (9th Cir. 2015).

In the alternative, to the extent there are any questions regarding the evidence in the record, the Court should remand with instructions for the district court to hold a hearing. At a minimum, there are serious questions concerning Rosales's ability to represent herself and the district court was obligated to holding a hearing to assess whether to appoint counsel.

STANDARD OF REVIEW

This Court reviews de novo when the district court "fail[s] to consider whether Rule 17(c) applie[s]." *Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014); *30.64 Acres*, 795 F.2d at 804 (same). To the extent the district court conducted a reasoned analysis of the motions to appoint counsel, the court would review for abuse of discretion. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004).

ARGUMENT

I. The District Court Erred in Dismissing the Suit Sua Sponte.

This Court's precedent is clear: Once the district court is on notice that a litigant potentially is incompetent, the court has a duty to inquire and enter whatever orders are necessary to protect the litigant's rights. Here, the dis-

trict court had more than ample notice that Rosales was not competent to represent herself, yet it dismissed her complaint without appointing counsel. Contrary to the Department's contention, that Rosales's son drafted her pleadings makes no difference. As other circuits have confirmed, the foregoing rule applies even where, as here, an incompetent litigant is assisted by a family member. Indeed, any other approach would threaten disabled and indigent plaintiffs' ability to vindicate their rights.

A. Rule 17(c) Imposes a Duty To Protect Potentially Incompetent Litigants.

1. Rule 17(c) provides that "[t]he court *must* appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." Fed. R Civ. P. 17(c) (emphasis added). Because the language of the rule is mandatory, it imposes an "obligation . . . to ensure" a litigant's "interests in the litigation are adequately protected." *Davis v. Walker*, 745 F.3d 1303, 1310 (9th Cir. 2014). The Rule's broad grant of authority allows a court to appoint counsel where "the incompetent person's interests would be adequately protected by the appointment of a lawyer." *Naruto v. Slater*, 888 F.3d 418, 423 (9th Cir. 2018) (citation omitted).

Rule 17(c) stems from the "ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests." *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 654 (2d Cir. 1999) (quoting *Dacanay v. Mendoza*, 573 F.2d 1075,

1079 (9th Cir. 1978)). Accordingly, once a court is on notice that a party may require a guardian or appointed counsel under Rule 17(c), it must take some action to ensure a litigant's interests are protected.

In the words of one leading treatise, Rule 17 "manifests a desire to protect the interest of infants and incompetent persons by assuring them proper representation in and access to a federal forum." 6A Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1571 (3d ed. 2010). Thus, several courts of appeals have recognized that "[w]hile making . . . determinations [under Rule 17] the district court should consider that access to the courts by aggrieved persons should not be unduly limited." *Adelman ex rel Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984). Put otherwise, when entertaining a request by an incompetent person to appoint counsel, "the fact that the party has no means of asserting his rights other than through counsel is certainly a factor that must be considered." *Wenger v. Canastota Central Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998) (per curiam).

2. Under this Court's precedent, Rule 17(c) and 28 U.S.C. § 1915—which allows a court to request pro bono counsel for an indigent litigant—impose a duty to inquire into competency and take appropriate steps to protect litigants who cannot represent themselves. Thus, in *30.64 Acres*, this Court reversed dismissal and remanded where "a question clearly existed whether [the plaintiff] was competent and could adequately protect himself." 795 F.2d at 805. In

that case, "the court was clearly on notice that [the plaintiff] claimed to be incompetent and his claim was made credible by official documentation." *Id.* Despite this, the court failed to make any inquiry into the issue and "took no steps to insure that [his] interests were adequately protected." *Id.* This Court concluded that Rule 17(c) did not permit dismissal under those circumstances. Indeed, the district court's failure to conduct any inquiry whatsoever was "not an abuse of discretion[,] but a failure to exercise legally required discretion," which this Court reviewed de novo. *Id.*

This Court reaffirmed the rule in *Davis v. Walker*. 745 F.3d 1303 (9th Cir. 2014). There, the district court indefinitely stayed an inmate's section 1983 action after concluding no guardian was available to protect the incompetent inmate's interests. The district court ruled that the stay would be lifted "only upon a finding that Davis was competent and able to represent himself pro se." *Id.* at 1311. This Court reversed, concluding that evidence in the record was "sufficient to put the district court on notice that Davis is incompetent and that he shows no signs of regaining competency in the future." *Id.* But "[i]nstead of satisfying the obligation created by Rule 17(c) to ensure that Davis's interests in the litigation would be adequately protected, the district court closed the courthouse doors, aware of the strong probability that Davis would not soon return." *Id.*

Davis makes clear that, although Rule 17(c) gives the court "discretion

to craft an appropriate remedy to protect the incompetent person, the court may not use the Rule as a vehicle for dismissing claims or for allowing the interests of an incompetent litigant to go completely unprotected." 745 F.3d at 1310. Instead, this Court noted in *Davis* that a court has "many options available" to find counsel under Rule 17(c), including inquiring with bar associations, clinical programs, or other assistance programs; placing Davis on a waiting list for services; or appointing counsel under section 1915(e)(1). *Davis*, 745 F.3d at 1311.

3. Here, the district court had more than ample notice of Rosales's incompetency. Unrebutted evidence in the record showed that Rosales could not "represent herself," as the district court contemplated. ER7. As her filings consistently explained, she is disabled, and her medications impair her cognitive function. The federal government and the Idaho state government both acknowledged her disability, and provided her with disability benefits. A letter in her own hand explained that she was unable to represent herself, and a sworn declaration from her son confirmed that. ER191, ER184–86. She submitted a list of the approximately 20 different medications she takes on a daily basis, including several with mental effects. ER200–01. And her primary care doctor submitted a letter confirming Rosales is "totally disabled" and Mendez is "her fulltime caretaker." ER41.

Similarly, ample evidence in the record demonstrated that Rosales could

not find "a lawyer to represent her interests" without the district court's intervention. ER8. As her filings in connection with her application to proceed in forma pauperis show, she is indigent. ER248–51. And Mendez submitted a record of his several unsuccessful attempts to find a lawyer who would assist pro bono. ER207–11, ER179–82.

Despite this, and despite Rosales's raising Rule 17(c) as a basis for appointing counsel in light of her incompetence—and therefore her inability to proceed pro se—the district court dismissed without mentioning or considering Rule 17. Nor did it "attempt to request the assistance of volunteer counsel" or "explain its failure to do so." *30.64 Acres*, 795 F.2d at 804. It therefore failed to "discharge [its] duty" under Rule 17. *Id.*

To be sure, the district court dismissed without prejudice "so that Rosales may bring this action either on her own or with a lawyer to represent her interests." ER8. But based on the undisputed facts in the record, compliance with the conditions the district court set in its dismissal order was impossible. Rosales could not refile her suit herself, nor could she secure counsel. As a result, the district court effectively "closed the courthouse doors" to Rosales. *Davis*, 745 F.3d at 1311. Not only did the district court err by "completely fail[ing] to consider whether Rule 17(c) applied," but its dismissal order ultimately let Rosales's interests "go completely unprotected." *Id.* at 1310, 1312 n.7.

B. The Duty Under Rule 17(c) Is the Same Even When the Suit Is Brought by a Non-Lawyer.

Because the district court never mentioned Rule 17 in dismissing the case, this Court must reverse. In a prior brief filed before undersigned counsel was appointed, however, the Department argued that dismissal was appropriate notwithstanding Rule 17(c) because Mendez wrote Rosales's pleadings on her behalf. *See* Dep't Initial Br. 20–27. That is incorrect.

1. Rule 17's protections apply even if an incompetent litigant does not perfectly comply with procedural rules. Thus, in *30.64 Acres*, it was irrelevant that the plaintiff had not moved for appointment under Rule 17 "or any other rule or statute": "Quite obviously an incompetent person cannot be held to compliance with technical rules." 795 F.2d at 805. What mattered was that the court was "clearly on notice" of the claim of incompetence, and therefore had a duty to act. *Id.*

Other circuits have adopted this approach, holding it is reversible error to dismiss suits without conducting a Rule 17(c) inquiry even when—as here—the underlying cases were filed by non-attorneys on the incompetent plaintiff's behalf. For example, in *Libero v. Commissioner of Social Security*, the Third Circuit reversed dismissal where a mother brought suit on behalf of her son. 799 F. App'x 162 (3d Cir. 2020) (per curiam). The district court refused to appoint counsel and dismissed. But the Third Circuit reversed and remanded, holding that, "[a]t a minimum, . . . the District Court should inquire into

whether [the son] knows and understands the substance of his claims." *Id.* at 166. If he did, he could proceed pro se; if not, "then the District Court will have to consider other options, which might include appointment of a guardian or reconsideration of appointment of counsel under 28 U.S.C. § 1915(e)(1)." *Id.*; *see also Pinkney v. City of Jersey City Dep't of Hous. & Econ. Dev.*, 42 F. App'x 535, 536 (3d Cir. 2002) (per curiam) (similar).

Similarly, in *Wenger v. Canastota Central School District*, a father brought suit on behalf of his son. 146 F.3d 123 (2d Cir. 1998) (per curiam). The district court declined to appoint counsel, and ultimately granted summary judgment against the son. The Second Circuit vacated the judgment, holding that, although the father could not represent the son, the district court "should have focused on [the son's] need for an attorney" in conducting an analysis under Rule 17(c). *Id.* at 125. The Second Circuit therefore vacated the judgment and remanded for the district court to consider "whether [the son was] entitled to the appointment of counsel." *Id.*; *see also Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 135 (2d Cir. 2009) (similar).

2. Here, the district court cited a handful of cases for the general proposition that a non-attorney may not "represent" a party, but those cases are not contrary to the above authorities. Indeed, two of the Ninth Circuit cases the district court cited have nothing whatsoever to do with competency or Rule

17(c).[3]

In the third case, *Johns v. County of San Diego*, the district court sua sponte appointed a father as the guardian ad litem for his minor son under Rule 17(c), "on the condition that [the father] secure counsel within thirty days of the court's order or the complaint would be dismissed with prejudice." 114 F.3d 874, 876 (9th Cir. 1997). The father did not secure counsel, so the district court dismissed with prejudice. On appeal, this Court vacated the judgment and directed the district court to dismiss without prejudice so that the son could sue once he reached the age of majority. But in that case, unlike this one, there was no request for appointment of counsel. Thus, neither the district court nor this Court considered the question presented here.

3. Permitting courts to dismiss without proper inquiry and procedural safeguards threatens litigants with a Catch-22. Individuals who are not competent plainly cannot represent themselves pro se. And litigants who are indigent may often be unable to secure an attorney without the assistance of the court. This case is a perfect example: if the judgment below stands, Rosales will have no effective ability to seek redress for her claims. The district court's decision to dismiss—rather than to appoint counsel on the undisputed record or, at a minimum, conduct further inquiry under Rule 17(c)—threatens

[3] *See Simon v. Hartford Life & Accident Ins. Co., Inc.*, 546 F.3d 661 (9th Cir. 2008); *C.E. Pope Equity Tr. v. United States*, 818 F.2d 696 (9th Cir. 1987).

Rosales's ability to access the courts and to vindicate her rights.

Although there is no right to counsel in civil suits generally, *see 30.64 Acres*, 795 F.2d at 801, the Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution, *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (citing *Chambers v. B&O R.R. Co.*, 207 U.S. 142, 148 (1907)). The Bill of Rights confers the inalienable rights "to petition the Government for a redress of grievances" and not to be deprived of "life, liberty, or property, without due process of law." U.S. Const. amends. I, V. From this derives the constitutional right of access to the courts. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (due process); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (First Amendment); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (equal protection); *Chambers*, 207 U.S. at 148 (article IV privileges and immunities clause).

Ordinarily, litigants can exercise this right of access on their own, by proceeding pro se on their own behalves. But disabled individuals cannot pursue that path, and summary dismissal of their claims, without considering appointment of counsel, threatens their ability to vindicate their rights.

To be sure, a court's obligation under Rule 17(c) is not unlimited: Triggering the duty requires some evidence of incompetence. *30.64 Acres*, 795 F.2d at 805. And in the "unusual case" when it is "clear" that a party has no cognizable legal interest, a court might not need to conduct a full competency

inquiry. *Harris v. Mangum*, 863 F.3d 1133, 1139 (9th Cir. 2017). But absent findings to support its reasoning, a district court may not simply decline to consider whether it must take steps to protect a litigant. *30.64 Acres*, 795 F.2d at 803–04. As this Court explained in *Davis*, courts have a variety of tools at their disposal to do so—including appointing counsel under section 1915(e)(1) and inquiring with bar associations and other organizations to find counsel willing to serve. 745 F.3d at 1311.

II. This Court Should Remand with Instructions To Appoint Counsel or, at a Minimum, To Hold a Hearing on Appointment of Counsel.

When the district court has failed to exercise its discretion to consider a motion to appoint counsel, or failed to articulate its reasons for denying a motion, the Court may remand for the district court to consider the request in the first instance. *See 30.64 Acres*, 795 F.2d at 804; *Davis*, 745 F.3d at 1311–12.

However, when denial of a motion for appointment of counsel is properly before the Court on review from a final decision, the Court may also perform the necessary analysis itself based on the record below and remand to the district court with instructions to request counsel under section 1915(e)(1) or appoint counsel under 29 U.S.C. § 794(a). *See Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004) (remanding with instructions); *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000) (per curiam) (same); *Bradshaw v. Zoological Soc'y*, 662 F.2d 1301 (9th Cir. 1981) (same).

Here, the Court should therefore remand with instructions for the district court to request or appoint counsel based on the undisputed evidence in the record.

A. Appointment of Counsel Is Warranted Under Section 1915(e)(1).

Under section 1915(e)(1), a court may request that counsel assist a litigant proceeding in forma pauperis in "exceptional circumstances." *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986). To find "exceptional circumstances," a court must evaluate both "the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved." *Id.* (citation omitted). Neither factor is dispositive, and "both must be viewed together before reaching a decision on request of counsel under section 1915[(e)(1)]." *Id.*[4]

1. Rosales has demonstrated a likelihood of success on the merits of her claims. Indeed, when the district court granted her petition to file in forma pauperis, it was required to consider whether the complaint was frivolous or malicious, failed to state a claim, or sought monetary damages from any defendant immune to such relief. 28 U.S.C. § 1915(e)(2)(B). The district court

[4] Circuits disagree on whether "exceptional circumstances" is the correct standard, with some Circuits rightly observing that the standard has no basis in the text of section 1915(e)(1). *See Parham v. Johnson*, 126 F.3d 454, 457 (3d Cir. 1997) (describing split). If the Court finds this standard dispositive, Rosales respectfully reserves the right to seek en banc review or certiorari.

concluded that Rosales's complaint was legally sufficient to state a claim that she was denied benefits without appropriate process. ER222–23. In denying Rosales's first motion for appointment of counsel, the district court never found that Rosales was unlikely to succeed, and simply concluded it was "difficult to determine Rosales' likelihood of success at this time." ER16.

When evaluating whether an indigent plaintiff is likely to succeed on the merits, this Court looks past technical deficiencies to determine whether the plaintiff could bring any cognizable claims with the benefit of experienced counsel. In *Agyeman v. Corrections Corp. of America*, for example, this Court observed that the plaintiff had alleged a *Bivens* claim against a corporation when he should have sued under the Federal Tort Claims Act or sued directly in tort, while naming individuals as *Bivens* defendants. 390 F.3d at 1103-04 (ordering appointment of counsel). The plaintiff's complaint displayed various other errors, which this Court observed that an "attentive" attorney could have remedied in prosecuting the case. *Id.* at 1104. The relevant inquiry is whether the complaint "states cognizable claims," even if "clarity and legal precision are wanting." *Johnson*, 207 F.3d at 656 (ordering appointment of counsel).

Here, although portions of Rosales's complaint are inartfully pleaded, the complaint alleges cognizable claims. In relevant part, it alleges that the Department violated the Due Process Clause, Title XIX of the Social Security

Act (that is, the Medicaid Act), and Title II of the Americans with Disabilities Act by failing to provide adequate notice and a hearing before the reduction of Rosales's benefits. These claims are closely analogous to those in *K.W. ex rel. D.W. v. Armstrong*, where the plaintiffs successfully pursued similar claims against the Department in connection with a similar program—there, the Developmental Disabled Waiver to Medicaid, rather than the Aged & Disabled Waiver to Medicaid. *See* Amended Complaint, Dkt. 148, *K.W. ex rel. D.W. v. Armstrong*, 1:12-cv-00022-BLW (D. Idaho) ("*K.W.* Complaint").

In *K.W.*, upon review of an application for preliminary injunction, this Court held that the plaintiffs were likely to prevail on their claims that the Department violated the Medicaid Act by reducing each beneficiary's budget calculation and thereby decreasing their Medicaid benefit without complying with the Medicaid Act's notice requirements. 789 F.3d 962, 970 (9th Cir. 2015). It further concluded that the same plaintiffs "were likely to prevail on their claim that they were denied adequate notice under the Due Process Clause." *Id.* at 972. The District of Idaho ultimately denied the Department's motion for summary judgment on the class-wide claims and granted preliminary approval of a settlement between the parties. *See K.W. v. Armstrong*, 180 F. Supp. 3d 703 (D. Idaho 2016).

To be sure, the claims in *K.W.* are not identical to Rosales's claims. In

prior briefing, the Department argued that the *K.W.* case involved developmentally disabled adults challenging the Department's benefit determinations and implementation of the Developmental Disabled Waiver to Medicaid, while Rosales's claim involves the Aged & Disabled Waiver to Medicaid. Dep't Initial Br. 27 n.5. And portions of Rosales's complaint would benefit from amendment to fix technical defects, such as naming individuals in their official capacities, rather than the Department itself, as defendants in the section 1983 counts. *See K.W.* Complaint ¶¶ 18, 19 (naming defendants accordingly). This Court has previously concluded that, where repleading would solve potential issues, appointment of counsel was appropriate to permit a litigant to litigate the merits of their claim. *See Agyeman*, 390 F.3d at 1104.

2. Rosales also has shown that the complexity of this case warrants appointment of counsel. In denying the first motion for appointment of counsel, the district court concluded that Rosales was capable of pursuing her claim on her own because she had purportedly drafted cogent legal arguments up to that point. ER17. The district court did not provide any analysis in denying the second motion for counsel.

The issues in the underlying suit are highly complex. This case involves constitutional issues, overlapping state and federal regulatory regimes, and a body of case law around section 1983 and other issues. These complexities

warrant the appointment of counsel. *See Agyeman*, 390 F.3d at 1104 (reversing denial of counsel where plaintiff failed to frame theories of liability due to complex issues); *Johnson*, 207 F.3d at 656 (reversing denial of counsel where the complaint "stat[ed] cognizable claims" but "clarity and legal precision are wanting"); *Gil v. Reed*, 381 F.3d 649, 657 (7th Cir. 2004) (finding abuse of discretion and reversing denial of appointment of counsel where the district court "underestimated the complexity of [an inmate's] Eighth Amendment" claim).

Again, *K.W.* is instructive. There, the District of Idaho awarded plaintiffs' counsel over $400,000 in fees, concluding that the "magnitude and complexity" of the issues warranted that amount, and noting the Department "fought plaintiffs on every issue." 180 F. Supp. 3d at 710.[5] The same considerations counsel for appointment of counsel here to assist Rosales in litigating her claims—which might help remedy violations not only of her rights, but the rights of other disabled Idahoans who had their benefits reduced.[6]

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[5] A subsequent order awarded plaintiffs' counsel an additional $115,380 for their ongoing work. Memorandum Decision and Order, Dkt. 463, *K.W. ex rel. D.W. v. Armstrong*, 1:12-cv-00022-BLW (D. Idaho).

[6] The district court also noted in considering the first motion for appointment of counsel that "[t]he Court has no funds to pay for attorneys' fees in civil matters such as this one," and "it can be difficult to find attorneys willing to work on a case without payment." ER15. To the extent that motivated the district court's decision-making, that was error: "a request for appointment of counsel should not be denied solely for the reason that an attorney who takes the case may not be compensated for his efforts." *Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) (per curiam). Indeed, as this Court emphasized, there are

These considerations militate in favor of appointment of counsel even notwithstanding Rosales's incompetence—even a competent pro se litigant would have difficulty given the complexity of the legal and factual issues at play. But in light of the evidence of Rosales's disability, appointment of counsel here is all the more necessary to protect her rights.

B. Appointment of Counsel Is Warranted Under Section 794(a).

Appointment of counsel also is warranted under the Americans with Disability Act, 29 U.S.C. § 794(a), which incorporates the "remedies, procedures, and rights" in Title VII, including 42 U.S.C. § 2000e-5(f). *See* § 794(a). Section § 2000e-5(f) provides that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant." 42 U.S.C. § 2000e-5(f); *see 30.64 Acres*, 795 F.2d at 799 n.5 (recognizing this provision as a source of authority for appointment of counsel). Rosales requested appointment of counsel under this provision in her second motion for appointment of counsel. ER178.

Under Title VII, and therefore the ADA, "[t]he court is required to assess: (1) the plaintiff's financial resources, (2) the efforts made by the plaintiff to secure counsel, and (3) whether the plaintiff's claim has merit." *Bradshaw*, 662 F.2d at 1318.

Here, all three factors support appointing counsel. First, the record

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a variety of options to solve this problem. *See Davis*, 745 F.3d at 1133.

clearly reflects that Rosales does not have the financial resources to afford counsel. Rosales relies on $1,221 monthly in disability benefits and $117 in food stamps, although her monthly expenses routinely exceed this amount. ER248–50. Although the district court expressed confusion on the exact numbers in Rosales's statement of expenses, it acknowledged that Rosales's income "likely [make] it very difficult for her to meet her basic needs and pay the filing fee for this case." ER219–20. It follows with even more force that she lacks the financial resources to pay counsel.

Second, the record shows that Mendez, on his mother's behalf, made diligent attempts to secure counsel. Mendez contacted several public interest organizations and private attorneys to no avail. *See* ER207–11, ER179–82. He also contacted the Idaho Trial Lawyers Association and the district court's pro se/pro bono program in search of referrals. ER185. This certainly satisfies the requirements on a "reasonably diligent effort under the circumstances to obtain counsel." *Bradshaw*, 662 F.2d at 1319 & n.45 (efforts adequate when plaintiff "has done all that may reasonably be expected").

Third and finally, for the reasons explained above, Rosales's claims have at least "some merit"—indeed, more than "some." *Id.* at 1319. Sophisticated counsel have succeeded in bringing similar claims against the Department, and with the benefit of counsel, Rosales will be in a position to do the same. *See supra*, pp. 31–33.

C. If District Court Had Concerns About Rosales's Competence, It Should Have Held a Hearing, Not Dismissed.

For the reasons above, the undisputed record evidence supports appointing counsel, and this Court should remand with instructions for the district court to do so. To the extent, however, that this Court has any doubts about Rosales's competence or her ability to file a new action pro se, this Court should remand for the district court to hold a hearing, rather than dismissing the suit entirely.

"A party proceeding pro se in a civil lawsuit is entitled to a competency determination when substantial evidence of incompetence is presented." *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005). Thus, "[i]f an infant or incompetent person is unrepresented, the court should not enter a judgment which operates as a judgment on the merits without complying with Rule 17(c)." *Krain v. Smallwood*, 880 F.2d 1119, 1119 (9th Cir. 1989). Instead, "[t]he preferred procedure when a substantial question exists regarding the mental competence of a party proceeding pro se is for the district court to conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed." *Id.* Other circuits agree. *See Yoder v. Patla*, 234 F.3d 1275 (7th Cir. 2000) (remanding for determination).

Here, there was ample evidence that Rosales was not competent to proceed on her own behalf, which should have prompted the district court to at least hold a hearing on the issue. Among this evidence was Rosales's own

statement she was incompetent, her receipt of disability benefits, her son's sworn declaration that she was incompetent, her letter from her doctor, her list of medications, and her functional assessment. Indeed, the *premise* of the district court's dismissal was that Rosales was incompetent, and therefore did not understand the filings submitted in her name. Thus, at a minimum, this Court should remand with instructions to hold a hearing.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment dismissing Rosales's suit and remand with instructions for the district court to appoint counsel. Alternatively, this Court should reverse and remand with instructions for the district court to hold a hearing on the appointment of counsel.

Respectfully submitted,

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APRIL 11, 2022

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Michael J. Mestitz, counsel for appellant and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Ninth Circuit Rule 32, that the attached Replacement Brief of Appellant Alma Rosales, is proportionately spaced, has a typeface of 14 points or more, and contains 8,957 words.

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APRIL 11, 2022

CERTIFICATE OF SERVICE

I, Michael J. Mestitz, counsel for appellant and a member of the Bar of this Court, certify, that, on April 11, 2022, a copy of the attached Replacement Brief of Appellant Alma Rosales was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

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APRIL 11, 2022