Intervenor-Plaintiff-Appellant No. 21-16082, No. 21-16427
and No. 21-16205, Consolidated

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELEODORO GARCIA; JONATHAN X.ABELL, Plaintiffs, and EVEREST NATIONAL INSURANCE COMPANY, a/s/o Nugate Group, LLC, Intervenor-Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 21-16082 No. 21-16427 D.C. No. 1:19-cv-00658-KJM District of Hawaii, Honolulu ORAL ARGUMENT REQUESTED

On Appeal from the United States District Count
for the District of Hawaii of No.: No. 1:19-cv-00658-KJM
The Honorable Kenneth J. Mansfield United States Magistrate Judge

EVEREST'S REPLY BRIEF

Lowell D. Snorf, III
LAW OFFICES LOWELL D. SNORF, III
77 West Washington Street, Suite 703
Chicago, Illinois 60602
(312) 726-8961
LSnorf@aol.com

Attorney for Intervenor-Plaintiff-Appellant
EVEREST NATIONAL INSURANCE CO.
a/s/o NUGATE GROUP, LLC

INTERVENOR-PLAINTIFF-APPELLANT EVEREST NATIONAL INSURANCE COMPANY A/S/O NUGATE GROUP, LLC'S REPLY BRIEF

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

1. Cases

2. Federal Rules of Civil Procedure

3. Military Regulations and Code of Federal Regulations

4. Federal Statutes

5. Other Authorities

I. ARGUMENT

A. The District Court Erred in Granting the Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

1. Sending Workers Onto Range "C" Without First Ensuring Worksite Safety Does Not Provide the Government With Discretionary Immunity.

Everest's case is not about the government's 'policy and guidance" in the general operation of active military ranges. Ans. Br. 2. Everest's case is about the April 6, 2015 breach of mandatory regulations governing the DOA's operation of a high impact closed military range and the DOA's negligent warnings and direction of the Nugate workers onto that range. Everest's Open. Br. 18; ER 53 ¶ 5, 82, 128. *White v. United States*, 211 F.2d. 79 (9th Cir. 1954) [a decision not to dedud Army firing range is assumed discretionary; telling persons going onto the range that it is safe, is not].

This Court should reverse the April 28, 2021 dismissal for lack of subject matter jurisdiction because Everest has shown on April 6, 2015 one or more of the specific Army regulations governed the DOAs management of Nugate's workers while on high impact Range "C." Everest's Open. Br. 20-23. This court should reverse the April 28, 2021 dismissal and reinstate Everest's case because on April 6, 2015 the DOA was not justified in telling Nugate's workers the Range "C" workspace was safe when it was not. Everest's Open. Br. 5-7. The Court should also reverse the April 28, 2021 dismissal and reinstate Everest's case because

Everest was denied a reasonable opportunity to file an amended subrogation complaint to plead subject matter jurisdiction. Everest's Open. Br. 30-33.

This Court should not accept the government's arguments because the DOAs April 6, 2015 'policy driven decisions' cannot control over specific military regulations governing the DOA's April 6, 2015 management of Range "C." Ans. Br. 20-23. This Court should not accept it was reasonable for the DOA on April 6, 2015 to tell Nugate workers that the high impact Range "C" was safe and cleared of UXO when it was not. This court should not accept the trial court's orders and the government's arguments that Everest did not meet its post-judgment burden to file an amended complaint. Everest Open. Br. 14-15; Answering Br. 40.

The government is liable for tort claims in the same manner as private individuals under the same circumstances 28 U.S.C.A. § 2674. The exception to the government's waiver of sovereign immunity are found at 28 U.S.C.A. § 2680(a), which excepts the government from liability for "[Any] claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved any abuse 28 U.S.C.A. § 2680(a)."

It is the government's burden of proof to show on April 6, 2015, the government was exercising a discretionary function when Army personnel directed

Garcia and Abell to cut grass in a closed high impact range. Everest's Open. Br. 4; ER 128, 132. *Navarette v. United States,* 500 F 3d 914 (9th Cir. 2017); *Bolt v. United States,* 509 F 3d 1028 (9th Cir. 2007). The government has not factually shown its April 6, 2015 direction of Nugate workers onto MMR Range "C" were policy decisions. Everest's Open. Br. 6-7. At MMR, on April 5, 2015, the government has not explained how Bert Burha's warranty to Garcia and Abell their work space was free and clear of UXO was a policy decision and not a ministerial error in execution. Ans. Br. 8. Everest alleges negligence in the maintenance of DOA property. ER 23, ¶ 17.

Everest's alleges a failure to warn of unexploded ordinance on a high impact range on DOA property. Everest's Open. Br. 4; ER 23, ¶ 19. Bert Burha's action in failing to warn the Nugate employees cannot be deemed regulatory, nor were Burha's actions of the nature and quality Congress intended to shield from tort liability. Everest's Open. Br. 30-36; *Kennewick* Irrigation *Dist. v. United States,* 880 F.2d. 1018 (9th Cir. 1989). The government has not met its burden of proof under 28 U.S.C.A. § 2680(a). *Whisnant v. United States*, 400 F.3d. 1177 (9th Cir. 2005); *Bear Medicine v. United States*, 241 F.3d. 1208, 1217 (9th Cir. 2001); *Young v. United States*, 769 F.3d. 1047 (9th Cir. 2014).

The government offers 'management for operating military ranges is a policy of Garrison Commanders.' Ans. Br. 13, 21. But to meet its U.S.C.A.

§ 2680(a) affirmative defense of discretionary function immunity, the government is required to show on April 15, 2015, at Range "C", the DOA was exercising a discretionary function when it directed workers onto the high impact range and told the workers the range was safe for grass cutting. Everest's Open. Br. 6-8. The government does not show its 'policy decision' of April 6, 2015, for failure to warn the workers at the MMR range was reasonable, explain why it did not mitigate the obvious and easily correctible dangers in Garcia's and Abell's work site, and/or explain government supervision over Nugate workers when the contract said not to. Everest's Open. Br. 9.

The Ninth Circuit makes it clear that when determining whether the discretionary function execution applies in a particular case, "*the question of how the government is alleged to have been negligent is critical.*" *Young v. United States*, 769 F.3d. 1047 (9th Cir. 2014); citing *Whisnant v. United States*, 400 F.3d. 1177 (9th Cir. 2005). The focus is on the action or actions of those involved and their choice to make the decisions. These decisions must be rooted in social, economic, or political policy. *Arizona Maintenance Co. v. United States*, 864 F.2d. 1497, 1503 (9th Cir. 1989).

The government does not address Everest's argument that once the government undertook the responsibility to warn of the hazards in a high impact range, execution of that responsibility is not subject to the

discretionary function exception. *White v. United States*, 211 F.2d. 79, 82 (9th Cir. 1954); Everest's Open. Br. 24; ER 231, ¶ 2-21. Instead, the government argues Garcia and Abell were lawn maintenance workers assuming the risks of encountering UXO in their workspace. Ans. Br. 33. This is not what happened. Everest's Open. Br. 4-8.

The government argues the Nugate workers' April 6, 2015 job injury falls within the discretionary function exception. Ans. Br. 20. This analysis focuses on what the DOA did or did not do on April 6, 2015 at MMR. *Young v. United States*, 769 F.3d. 1047, 1053 (9th. Cir. 2014). What the DOA did on April 6, 2015 is Bert Burha told the Nugate workers their work in the high impact range was safe and cleared of UXO. Everest's Open. Br. 6. Bert Burha told the workers where to cut the grass. There were no warning signs in the workers' job site. 2014 DA Pam 385.63 ¶ 2.2 (WL). Everest's Open. Br. 6-8. When Bert Burha sent the workers onto the high impact range, the workers did not expect to encounter an unexploded anti-tank rocket. Everest's Open. Br. 4. The government does not dispute the facts in **Everest's III. STATEMENT OF THE CASE.** Everest Open. Br. 2-9.

II. ARGUMENT

B. (High Impact) Army Regulations Required UXO Clearance, Escorts, and Proper Warning Signs Before Allowing Workers Onto High Impact Range "C."

2005 AR 350.19 ¶ 4-12(a) (WL) required compliance with DA PAM 385.63.

2014 DA PAM 385.63 ¶ 2-1(b) (WL) forbids range access unless fencing or UXO warnings signs are posted. The government does not acknowledge the dangers of working in a closed high impact areas are greatest. Ans. Br. 20, 21. This is why 2005 AR 350.19 ¶ 4-15(b)(e) (Impact Areas) and 2014 DA PAM 385.63 ¶ 2.1(b)(e) (Impact Areas) specify exactly what is required of the DOA before the DOA lets people onto an high impact range. Everest's Open. Brief. 21-22. 2005 AR 350.19 ¶ 4-15(b) (Impact Areas) required UXO clearance, UXO avoidance, or UXO support before the Nugate workers were allowed onto the impact range. The government breached 2005 AR 350.19 ¶ 4-15(b) (WL). 2014 DA Pam 385.63 ¶ 2-1(b)(e) required fencing or warning signs; surface clearance of UXO's in impact areas was required before any persons were allowed onto the impact area. The government breached 2014 DA Pam. 385.63 ¶ 2-1(b)(e) (WL). 2014 DA Pam. 386.63 ¶ 2-2(a) (WL) required the posting of warning signs in Nugate's work area. The government breached 2014 DA Pam. 385.63 ¶ 2.2(a) (WL). ER 122, 138; Everest's Open. Br. 23.

The government argues: "2005 AR 350-19 (WL) vests a significant amount of discretion in the Garrison Commander to determine the "frequency and degree to which range clearance is required to support sustainable and safe use of ranges for operational purposes." Ans. Br. 13 (citing *2005 AR 350.19* (WL) ¶ 4-12. 2005 AR 350 19 ¶ 4-15(b) (Impact Areas) is mandatory and the DOA had to follow the

regulation In the first amended complaint in intervention, Everest alleged specific violations of 2005 AR 350.19 ¶ 4-12 and ¶4-15 (WL); ER 22-24.

The government does not contest the workers were sent onto the impact range by Army personnel. Everest's Open. Br. 20; Ans. Br. 1-2. Through 2005 AR 350.19 ¶ 4-8(e) (WL) the government argues range control safety is based on the authority of "The Garrison Commander". Answer Br. 21, 23. The government has never shown the 'Garrison Commander' knew anything about the April 6, 2015 events at the MMR range. Ans. Br. 4, 10, 13, 24, 76. The government never distinguished between managing UXO on operational ranges verses managing hidden UXO in closed high impact firing ranges. ER 227, Lines 5-13. In reality, for the April 6, 2015 accident, the only facts established are an outdated safety protocol, a lack of communication between the DOA Army Range Control Officer (RCO) and the security detail assigned by Borrowed Military Manpower (BMM), who let the Nugate workers onto Range "C." Everest's Open. Br. 4-6; ER 128, 132, 134. On April 6, 2015 BMM did know who was or was not supposed to have range access. ER 134. There is no showing the RCO adhered to the specific directives of 2005 AR 350.19 4-15(b)(e) and 2014 DA Pam. 385.63 2-1(b)(e) and 2.2.

The government cannot combine the discretionary function exception (*Gaubert v. United States*, 499 U.S. 315, (Sup. Ct. 1991)) with the government's

mandatory obligation to follow 2005 AR 350.19 (WL) *The Army Sustainable Range Program*, 2012 Range Safety (WL) 385-63, 2013 DA Pamphlet 385-11 (WL) *Army Guidelines for Safety Color Codes, Signs, Tags, and Markings,* 2014 DA Pam. 385.63 (WL) *Range Safety*, and 29 CFR 1926. 200, *Accident Prevention Signs and Tags*. Ans. Br. 20. Everest showed the government's wrongful conduct violated one or more of the specific military regulations. Everest's Open. Br. 10; 20-21; ER 18-29. The trial court accepted Army regulations were applicable to the government's April 6, 2015 activity. ER 232; Everest's Open. Br. 9.

Once Everest established a military regulation applied to the DOA's April 6, 2015 conduct, and/or the government breached a contract term, the trial court should have ended analysis under the discretionary function exception. *Bibeau v. Pac Nw. Research Found, Inc.*, 339 F.3d. 942, 945 (9th Cir. 2003). Everest's Open. Br. 19. The Court did not consider 2005 AR 350-19 ¶ 4-15(b)(e) (Impact Areas) and 2014 DA PAM 385, 63¶ 2.1(b)(e) (Impact Areas) governed the DOA's management/conduct on Range "C." *Eleodoro Garcia and Jonathan X. Abell and Everest National Insurance Co. a/s/o Nugate Group, LLC v. United States of America*, 2021 WL 2661025

The government argues 2005 AR 350-19 ¶ 4-8(e) and ¶ 4-12(b) gave the Garrison Commander discretion to fully enforce the regulations. Ans. Br 20. On April 6, 2015 the RCO had to follow the commands of AR 350-19 ¶ 4(e). 2005

AR 350.19 ¶ 4-8(e) and ¶ 4-15(b) are not posed in the alternative and they are mandatory. 2005 AR 350.19 ¶ 4-8(e) and ¶ 4-15(b) stand on their own, are direct and compliance is not discretionary. Ans. Br. 20.

Everest established a breach of the performance contract between Nugate and the DOA. Everest's Open. Br. 9. On April 6, 2015 the workers were not to be given instructions on where to work or how they were to cut the grass. Everest's Open. Br. 6-7. The government admits the contract with Nugate required the DOA to advise Nugate employees which areas within the MMR range were cleared of UXO. Ans. Br. 8. DOA's *duty to advise* is the same as a *duty to warn* which is never discretionary; *United States v. White*, 211 F.2d. 79 (9th Cir. 1954); *Young v. United States*, 769 F.3d. 1047 (9th Cir. 2014). The government does not refute Bert Burha sent the workers onto Range "C" when it was not cleared of UXO's. Everest's Open. Br. 7-8.

The government argues there is no specific regulation requiring a "Garrison Commander" to ensure an operational range is completely free of UXO. Ans. Br. 21. *That is not the duty – on April 6, 2015, either the Garrison Commander or the RCO had to clear Impact Range "C" before directing Nugate's workers to that area to cut grass*. The intervening complaint and proposed amended complaint allege the government's duty to keep the Garcia and Abell worksite cleared of UXO, not the entire MMR range. Again the DOA sent the Nugate workers onto an

impact range. 2005 AR 350.19 4-15(a). Everest's Open. Br. 21; ER 53. The UXO's were not cleared, no avoidance support was provided and no signs were posted. 2014 DA Pam 385.63 ¶ 2-2 (WL). ER 82, 128 and 132.

Further the trial court found 2014 Army Pam, 385-63 ¶ 2.2 (WL) posting warning signs, markers and flags applied to Nugate's workspace. Everest's Open. Br. 232, 242. The government never refuted 2014 Army Pam 385.63 ¶ 2.2 (WL) applied to Nugate's workspace. The government did not admit the DOA complied with 2014 Army Pam 385.63 ¶2.2 (WL). The government has not shown following 2014 Army pamphlet 385.63 ¶ 2.2 (WL) was discretionary. The Court also ignored the purpose of impact provisions in the Army regulations is to keep workers off an impact range until it is safe to enter. ER 268.

III. ARGUMENT

C. For the DOA's April 15, 2015 Operations on Range "C", Controlling Ninth Circuit Precedent Requires the Court to Reject the DOA's Affirmative Defense of Discretionary Function Immunity.

The government relies on *Lam v. United States of America,* 979 F.3d. 665 (9th Cir. 2020) to show the government's April 6, 2015 management of Nugate's worksite entitles the government to sovereign immunity. The facts of *Lam* are not applicable to what occurred on April 6, 2015 at Range "C." Everest's Open. Br. 3-6. In *Lam*, at 3:30 a.m. on July 5, 2014 Phong Lam was sleeping in this tent at the 200 Acre Lake

Mendocino Recreation area. Lake Mendocino is a civilian public works project administered by the U.S. Army Corps. of Engineers. While Phong Lam was asleep an oak tree fell onto another tree and that tree struck and injured Lam's foot. Lam sued the Army Corp. of Engineers because they ran the park and should have discovered the diseased tree. In *Lam*, under review were policies' found in an Army Corp. of Engineer's Operational Management Plan (OMP) and whether the discretionary function exception barred Lam's claim. Affirming the trial court's dismissal, the Ninth Circuit found the OMP policies lacked the specifics found in mandatory, rules, regulations or statutes. The OMP contained no criteria about managing safety risks. OMP policies cannot be compared with the April 6, 2015 DOA violations of sending workers onto a duded high impact range. Everest's Open. Br. 6, 23.

Referencing J. Royals special concurrence in *Lam v. United*, 979 F.3d 665, 683 (9th Cir. 2020), the government argues *Childers v. United States* 40 F.3d 973 (9th Cir. 1994); *Valdez v. United States*, 56 F.3d 1177 (9th Cir. 1995); *Chadd v. United States*, 794 F.3d 1104 (9th Cir. 2015); *Gonzalez v. United States*, 814 F.3d 1022 (9th Cir. 2016) and *Morales v. United States*, 845 F.3d 708 (9th Cir. 2018) should be interpreted to hold some element of implementing or failing to implement safety precautions can be enough for a court to apply the DFE and

dismiss under Fed. R. Civ. Pro. 12(b)(1). Ans. Br. 28, 31. Facts of *Childers*, *Valdez*, *Chadd*, *Gonzalez* and *Morales* are inapposite to what the DOA did on April 6, 2015 at Range "C". Everest's Open. Br. 4-7.

In *Childers*, a young child was climbing on an open Yellowstone National Park unmaintained winter hiking trail and was injured. Yellowstone covers 2.2 million areas. Suit was brought against the National Park Service (NPS). The government safety manual said the child's trail had to be either closed or the public adequately warned while on the trial. When the child was injured, the trail was open and the issue was whether the manner of warnings was discretionary. Because Yellowstone National Park provided warnings through brochures and other written materials, the acts were discretionary. There was no subject matter jurisdiction, and trial court's dismissal was affirmed on appeal.

In *Valdez*, plaintiff, who had been drinking, fell down the face of a King's Canyon National Park waterfall and was injured. King's County was operated by the NPS and maintains 461,901 acres. *Valdez* argued following NPS guidelines was mandatory. The Ninth Circuit disagreed finding NPS policy guidelines were too broad and not specific and therefore discretionary. The trial court's dismissal was affirmed, noting there are unlimited natural hazards in the Canyon National Park.

In *Chadd*, decedent Boardman was at Olympic National Park (part of NPS)

and a mountain goat killed Boardman. Park officials evaluated multiple and competing policy considerations to manage the problematic wild goat. Accordingly, service guidelines gave the park vast discretion in dealing with the Park goats; the court's dismissal under the discretionary function exception was affirmed.

Childers, *Valdez* and *Chadd* suggest because of the expansiveness of the National Park System (NPS), Congress rarely specifies exact NPS safety procedures. Public safety concerns are usually addressed to the Park superintendent's discretion. *See:* Scott Breen, *Tort Liability in National Parks and How NPS Tracks Manages and Responds to Tortious Incidents* (2013).

The governments citation to *Gonzales v. United States*, 814 F.3d. 1022 (9th Cir.) is not relevant to what happened on April 6, 2015 on Range "C." Everest's Open. Br. 4-7; Answer Br. 7-8. In *Gonzalez*, plaintiff's sued the FBI because the FBI did not tell local law enforcement about a suspected anti-immigration gang attack on the Gonzalez household. The court agreed the FBI's day-to-day operations and law enforcement decisions required policy decisions of public safety and the District Court's dismissal was affirmed.

In *Morales v. United States*, 895 F.3d. 708 (9th Cir. 2018) helicopter pilot, Ray Perry, (with three passengers onboard) was flying above the Verde River in Prescott National Forest in Arizona. While flying, Perry hit an unmarked cable

suspended forty feet above the Verde River. The impact with the cable caused the helicopter to crash killing the passengers. The passengers sued the United States Geological Survey ("USGS") for failing to warn of the forty foot cable. USGS had a policy of not marking cables under 200 feet and no federal statute prescribed the marking of the cable Perry hit with his helicopter. Because there was not violation of any statue requiring cable maintenance the discretionary function exception applied and the dismissal was affirmed.

IV. ARGUMENT

D. The Government Neither Addresses Everest's Post-Judgment Motion to Vacate, Nor Everest's Motion for Leave to File an Amended Complaint

Everest provided specific reasons behind Everest's post-judgment motions. ER 5-30. Everest provided facts and authority as to why the trial court erred by not granting Everest's motion to vacate and not granting Everest's motion to amend. ER 5-29; ER 71-81; Everest's Open. Br. 10-11; 33-35.

The government argues Everest's motions to vacate and for post-judgment complaint amendment are the same as Plaintiffs. Ans. Br. 38, 40. The postural procedure of Everest's post judgment motions and proposed amended complaint are different from Plaintiffs. ER 5-29; Everest Open Br. 30-35. The government offers nothing to dispute Everest's support for Everest's motion to vacate, for leave to amend the scheduling order, and for leave to file an amended complaint. Answer. Br. 40. The government incorrectly argues Everest did not provide

proposed complaint amendments. Ans Br. 40. Everest complied with LR 7.1 and Fed. R. Civ. Proc. 59(e), 60(b), 16(b)(4), and 15(a)(2). ER 8-29. Everest's proposed amended complaint was given to the court on May 11, 2021, within twelve days of the April 28, 2021 order. ER 5-29; ER 290-291. In Everest's April 16, 2020 subrogation complaint, Everest could not plead violations of military regulations because the government did not disclose applicable military regulations as a basis to their defense until after the pleadings amendments closed. ER 9-13. Everest was diligent in alleging violations of Army regulations. The government's late Fed. R. Civ. Pro 26(a)(1)(A) disclosures prevented Everest's complaint amendment. ER 8-13; Everest's Open. Br. 11.

The government's statement that Everest failed to prove the basis of Everest's motion to vacate is not accurate. ER 5-29; Everest's Open. Br. 30-31. The trial court never addressed the merits of Everest's Motion to Amend the scheduling order, motion to amended the complaint, or the merits of the Amended Complaint. Everest's Open. Br. 31.

Citing to the July 13, 2021 order, the government cites to *plaintiffs* request to file an amended complaint, not Everest's. Ans. Br. 41; Everest's Open. Br. 30; ER 18-29.

The government claims prejudice by Everest's post-judgment request to amend. Ans. Br. 14. The government never established prejudice to the

government by any of Everest's post-judgment motions. Everest's Open Br. 30-32; ER 13, 56-57. The, government does not address Everest's post-judgment complaint amendment was due, in part, by the government's mislabeling of its Fed. R. Civ. Pro. and 12(b)(1) or 12(B)(6) factual attack on the complaint. Everest's Open. Br. 28. The government does not address the government's violation of Fed. R. Civ. Pro 26(a)(1)(A) disclosures and the need for Everest's amendment. Everest's Open. Br. 11, 31; ER 10.

VI. CONCLUSION

Everest requests this Court reverse the April 28, 2021 judgment that found the discretionary immunity exception bars Everest's claims and reinstate Everest's case. Everest alternatively requests the April 28, 2021 judgment be vacated, Everest's motion for reconsideration be granted, and motion for leave to file an amended complaint be granted so that the Court can reach the merits of the case.

DATED: Chicago, Illinois March 15, 2022

/s/Lowell D. Snorf, III
LAW OFFICES OF LOWELL D. SNORF, III
77 West Washington Street, Suite 703
Chicago, Illinois 60602
Counsel for Appellant EVEREST
NATIONAL INSURANCE CO.
a/s/o/ NUGATE GROUP, LLC.
Case No.'s: 21-16082, 21-16205, 21-16427

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-35116

I am the attorney or self-represented party.

This brief contains **4,771** **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ☑ complies with the word limit of Cir. R. 32-1.
- ☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ☐ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ☐ Complies with the length designated by the court order dated
- ☐ Is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Lowell D. Snorf, III **Date** March 15, 2022

(use 's/[typed name]" to sign electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2022, I electronically filed Everest's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM.SCF users will be served by appellate CM/ECF system.

Date: March 15, 2022

/s/Lowell D. Snorf, III
LAW OFFICES OF LOWELL D. SNORF, III
77 West Washington Street, Suite 703
Chicago, Illinois 60602
Telephone: (312) 726-8961
Facsimile: (312) 726-8973

Attorney for Intervenor-Plaintiff-Appellant
EVEREST NATIONAL INSURANCE COMPANY
a/s/o NUGATE GROUP, LLC