No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, *et al.*

Plaintiffs-Appellees,

v.

DONALD TRUMP, *et al.*,

Defendants-Appellants.

On Motion for a Stay Pending Appeal of a Temporary Restraining Order Issued by the United States District Court for the Western District of Washington
Case No. 2:17-cv-141, Hon. James L. Robart

MOTION FOR LEAVE TO FILE BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, SOUTHERN POVERTY LAW CENTER, AND AS *AMICI CURIAE* SUPPORTING APPELLEES AND DENIAL OF A STAY, AND REQUEST TO FILE 2759-WORD BRIEF

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INTRODUCTION

Currently before the Court is Defendants' emergency motion for a stay of the temporary restraining order issued February 3, 2017, by the U.S. District Court for the Western District of Washington (Robart, J.). Pending determination of the State of Washington's request for a preliminary injunction, for which the court directed the parties to set a briefing schedule so that the request could be decided with dispatch, the court restrained enforcement of Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), which bars immigrants and refugees from predominantly Muslim countries from entering or remaining in the United States. Defendants have impermissibly appealed an unappealable temporary restraining order and have sought a stay of that TRO pending resolution of their putative appeal.

Americans United for Separation of Church and State and the Southern Poverty Law Center respectfully request leave to file the accompanying proposed *amicus* brief in support of Plaintiffs and against issuance of the requested stay.

Identity and Interest of *Amici Curiae*

i. *Amicus* Americans United for Separation of Church and State is a national, nonsectarian public-interest organization. Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious

communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United represents more than 125,000 members and supporters across the country. Since its founding in 1947, Americans United has regularly participated as a party, as counsel, or as an *amicus curiae* in leading church–state cases decided by the United States Supreme Court and by federal and state trial and appellate courts throughout the country.

Americans United has long defended the fundamental rights of religious minorities in the United States by, among other things, bringing legal challenges to governmental action that singles out particular religions for favor or disfavor. *See, e.g.*, *Ziglar v. Abbasi*, 2016 WL 7473962 (U.S. 2016) (supporting Muslim petitioners who were detained and tortured after the terror attacks of September 11, 2001); *Hassan v. City of New York*, 2014 WL 3572027 (3d Cir. 2015) (supporting challenge to New York City Police Department's surveillance of Muslim communities); *Awad v. Ziriax*, 2011 WL 2118216 (10th Cir. 2012) (supporting challenge to Oklahoma law that singled out Islam for official disfavor). Americans United also advocated for the passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, under which a claim has been made in this case, as well as its sister statute, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and routinely

participates as counsel or as an *amicus curiae* in cases arising under these statutes. *See, e.g.*, *Holt v. Hobbs*, 2014 WL 2361896 (2015). Notably, Americans United filed an *amicus* brief in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), proposing the factors for the test of constitutionally permissible religious accommodations under RFRA and RLUIPA that the Supreme Court then adopted.

ii. *Amicus* Southern Poverty Law Center has provided *pro bono* civil-rights representation to low-income persons in the Southeast since 1971, with particular focus on seeking justice for the most vulnerable people in society. SPLC has litigated numerous cases to enforce the civil rights of immigrants and refugees to ensure that they are treated with dignity and fairness. SPLC monitors and exposes extremists who attack or malign groups of people based on their immutable characteristics. SPLC is dedicated to reducing prejudice and improving intergroup relations. SPLC has a strong interest in opposing governmental action premised on unlawful discrimination that undermines the promise of civil rights for all.

REASONS WHY THE MOTION SHOULD BE GRANTED

1. The issues in this case have important ramifications for persons living across the United States and around the world. If the challenged TRO were to be stayed, families who currently find themselves living in different countries will be estranged. People fleeing war-torn regions will

be turned away from this nation's borders and given no opportunity to seek or obtain refuge from the horrors that they face in their countries of origin. Children coming to the United States for necessary medical care will be shunned. People lawfully residing and working in the United States will be prevented from traveling abroad by the threat that they will be detained and deported when they try to return home—or if they are already traveling abroad, they will have no way to avoid that consequence. And people lawfully in this country and not contemplating travel abroad are also at risk of being rounded up, detained, and deported. In short, nothing more than religion (albeit couched in the language of national origin or one-time residence) will determine whether hundreds of thousands of people have access (or continued access) to the opportunities of life in the United States.

2. What is more, it is not only the targeted Muslims who will be affected by the implementation of the Executive Order. The seismic shift in this Nation's treatment of a religious minority will be felt by families, neighborhoods, houses of worship, local businesses, and, as the district court recognized, public universities and other public institutions. All will suffer the loss of valued employees, customers, relatives, and members of the community.

3. The hardships in this country and around the world that will be caused by official discrimination against a single, disfavored religious group highlight the importance of correctly analyzing and deciding questions of religious-freedom rights—legal issues that *amici* are uniquely positioned to assist this Court in assessing. The proposed *amicus* brief explains why the Establishment Clause of the First Amendment to the U.S. Constitution bars enforcement of the anti-Muslim Executive Order, and hence why Plaintiffs are likely to succeed on the merits and why a stay of the TRO would be improper. As the brief explains, the government is forbidden to discriminate against Muslims. And it is forbidden to endorse or disfavor one religion as compared with others. The Executive Order does all of this and more.

4. All parties issued blanket consents to the filing of *amicus* briefs. At 10:34 p.m. PST (1:34 a.m. EST) on February 5, however, *amici* were informed that Defendants altered their position from straightforward consent to all *amicus* briefs, now giving consent solely if the *amicus* briefs were filed by the deadline for Plaintiffs' brief of 11:59 p.m. PST (2:59 a.m. EST)—i.e., less than an hour and a half after the notice. *Amici* had been anticipating filing the brief in the morning on February 6. In light of Defendants' changed position, *amici* immediately raced to finish and finalize their brief and this motion and endeavored to file them. It was

simply not possible, however to do so by 11:59 p.m. PST, so *amici* filed very shortly thereafter, as soon as the technical aspects of the file the brief could be resolved in accordance with the rules. Because of the late notice of change of position from Defendants, Defendants may now be withholding consent. *Amici* request that the Court accept the brief, whether as uncontested or as contested.

5. Finally, *amici* respectfully request that the Court also grant leave to file the possibly overlength proposed brief. Circuit Rule 27-1 provides that motions may be no longer than twenty pages. Assuming that the normal rules for *amicus* briefs apply to *amicus* briefs supporting or opposing motions, *amici* would then have ten pages for their brief. Circuit Rule 32-3(2) provides that one may comply with the court's length requirements by "filing a monospaced or proportionally spaced brief or other document in which the word count divided by 280 does not exceed the designated page limit." Hence, we assume that the Rules allow for 2800-word *amicus* briefs supporting motions. The proposed brief is 2759 words. If *amici* have misunderstood the rules and the brief is overlength, we respectfully request that the Court grant leave to file it regardless.

CONCLUSION

The Court should grant the request to file the proposed *amicus* brief and order the Clerk to accept the accompanying brief for filing.

Date: February 6, 2017

Respectfully submitted,

/s/ *Richard B. Katskee*

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Counsel for Amici Curiae

Date: February 6, 2017

CERTIFICATE OF SERVICE

I certify that on February 6, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Richard B. Katskee
Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit corporations. They have no parent corporations, and no publicly held corporation owns any portion of either of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

As detailed in the accompanying motion, *amici curiae* are nonprofit public-interest organizations committed to preserving religious freedom. Because the Executive Order under challenge discriminates against Muslims based solely on their faith, and because constitutional injuries will accrue immediately if the temporary restraining order is stayed, *amici* have a strong interest in ensuring that the TRO remains in place.

INTRODUCTION

Executive Order 13,769 makes good on President Trump's promise to ban Muslims from entering the country. *See* First Am. Compl. ¶¶ 42–61. The Executive Order is unsupported by fact and is instead motivated by religious animus. It has already harmed scores of people; if reinstated, it will harm millions more. Accordingly, the district court issued a temporary restraining order and directed the parties to propose a briefing schedule on the State of Washington's motion for a preliminary injunction.

Instead of having the preliminary-injunction motion resolved with dispatch, the government appeals an unappealable order and seeks the extraordinary relief of an emergency stay, contending that being

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. As the motion details, the parties appear to have consented to this filing.

prevented from deporting and refusing entry to people based on their religion makes it, *the government*, the injured party. Nonsense.

The Executive Order harms the State, its institutions, and its citizens. And because the Executive Order on its face violates the Establishment Clause—among other constitutional provisions—it is indefensible as a matter of law. If it goes into effect, it will do immediate and irreparable damage to individuals, families, and entire communities. Should this Court consider the merits of this impermissible appeal, therefore, it should conclude as the district court did: The Executive Order cannot stand—even for a day. The request for a stay should be denied.

ARGUMENT

THE TEMPORARY RESTRAINING ORDER WAS WARRANTED; A STAY IS NOT.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their Establishment Clause Claim.

"[T]he First Amendment mandates governmental neutrality" with respect to religion, forbidding official discrimination. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *accord, e.g.*, *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005); *Larson v. Valente*, 456 U.S. 228, 246 (1982). Ignoring this clear constitutional command, the government has singled out one religious group—Muslims—for official disfavor and maltreatment. By instituting a wide-ranging, punishing ban on Muslim immigrants, the government runs roughshod over core First Amendment

protections. The district court therefore correctly concluded that the State is likely to succeed on the merits of its claims.

1. The Executive Order Fails The Larson *Test.*

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Thus, when the government designates one denomination for different treatment—favorable or unfavorable—its action is subject to strict scrutiny under *Larson v. Valente*, *supra*. *See, e.g.*, *Awad v. Ziriax*, 670 F.3d 1111, 1128 (10th Cir. 2012) (applying strict scrutiny to and invalidating state law disfavoring Islam).

The Executive Order singles out countries that are almost entirely Muslim and subjects those who were born in or come from those countries—i.e., Muslims—to harsh legal disabilities and punishments, including exclusion, detention, and expulsion. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). Even legal U.S. residents are targeted and put at severe risk of detention and deportation because of their officially disfavored Muslim faith. First Am. Compl. Ex. 10.

The Executive Order also favors refugees who are "religious minorit[ies]" in their home countries, again assigning legal rights based on religious denomination. *See* Exec. Order No. 13,769 § 5(b), (e). To be sure, affording refuge to victims of religious persecution would be

constitutionally permissible. But merely being "a minority religion in the individual's country of nationality" (*id.* § 5(b)) does not automatically make one a victim of persecution, so affording preferred status on that basis is "precisely the sort of official denominational preference that the Framers of the First Amendment forbade" (*Larson*, 456 U.S. at 255). And because most refugees worldwide currently come from Muslim countries, the preference will primarily benefit non-Muslims (*see infra* Section A.2), making the preference run against a disfavored minority faith in *this* country.[2] The Executive Order is thus "suspect" and the courts should "apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 246.

The government counters by asserting an interest in "stop[ping] attacks by foreign nationals . . . admitted to the United States." Exec. Order No. 13,769 § 1. To be sure, preventing terrorism is a compelling interest. But the Executive Order must be "closely fitted to further the interest." *Larson*, 456 U.S. at 248. It isn't.

National security is not furthered by a policy of suddenly, flatly, and universally excluding Muslims *whose entry the government has already*

[2] The government's suggestion that it merely "recognize[s] that religious minorities are more likely to face persecution" (Emer. Mot. 19) cannot be squared with the Executive Order's text, which makes merely belonging to a minority faith the basis for receiving favorable treatment (Exec. Order No. 13,769 § 5(b)).

approved. Much less is the policy closely fitted to that end. People from the seven countries listed in the Executive Order have, collectively, killed *zero* people in terrorist attacks in the United States since 1975. Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx. None of the top five countries of origin for foreign-born perpetrators of terrorism in the United States are listed in or covered by the Executive Order. *See id.* And homegrown terrorism—by non-Muslims—is a far greater (and unaddressed) threat. *See, e.g.*, Ellen Nakashima, *Domestic Extremists Have Killed More Americans than Jihadists Since 9/11. How the Government Is Responding*, WASH. POST (Oct. 15, 2015), http://wapo.st/1Qh8Kft. Hence, the policy's fit with the defendants' asserted interest is not merely loose; it is nonexistent. As the district court stated from the bench, the Executive Order would not survive even rational-basis review—much less strict scrutiny.[3]

[3] Because the Executive Order cannot withstand strict scrutiny, it also violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2015). RFRA applies strict scrutiny to substantial government-imposed burdens on religion. *See Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). Under the Executive Order, visa-holding Muslim residents of the United States cannot make a pilgrimage to Mecca—a mandatory religious obligation to be fulfilled at least once in a practicing Muslim's lifetime (Diaa Hadid, *What Muslims Do on Hajj, and Why*, N.Y. TIMES (Sept. 8, 2016), http://nyti.ms/2kYGovS). For if they leave the country and then try to return, they will be detained and deported. Being jailed and then expelled

2. The Executive Order fails the Lemon *Test.*

The Executive Order also violates the *Lemon* Test, which requires that governmental action have a preeminently secular purpose (*McCreary*, 545 U.S. at 864) and a "principal or primary effect . . . that neither advances nor inhibits religion" (*Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

a. The secular-purpose requirement is violated if the "government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). The government's articulated "secular purpose . . . has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864.

The secular-effect requirement is violated whenever "it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion." *Vernon v. City of L.A.*, 27 F.3d 1385, 1398 (9th Cir. 1994). "[T]he government may not favor one religion over another" by appearing to endorse the one or condemn the other. *McCreary*, 545 U.S. at 875.

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because of religious exercise surely meets any definition of a substantial burden.

b. Taking these requirements together, the constitutional question is "'whether an objective observer . . . would perceive" the government to have placed its stamp of approval or disapproval on religion or a particular faith. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)); *accord, e.g.*, *McCreary*, 545 U.S. at 862 (purpose determined from same perspective). This Court must therefore consider whether a hypothetical reasonable, objective observer would understand the government either (i) to have intended to mark Muslims as "outsiders, not full members of the political community" or (ii) to have actually conveyed that message. *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Because "reasonable observers have reasonable memories," the Court must not "turn a blind eye to the context" but must "look to the record of evidence showing the progression leading up to" the challenged policy. *McCreary*, 545 U.S. at 866, 868. For the objective observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show" (*id.* at 866), which means that all publicly available information about the genesis, evolution, and implementation of the challenged policy speaks directly to whether it is an unconstitutional religious endorsement. And even officially repudiated

past acts are not "dead and buried" but remain in the reasonable observer's memory, affecting how the final policy is viewed. *Id.* at 870; *accord Trunk v. City of San Diego*, 629 F.3d 1099, 1119 n.19 (9th Cir. 2011). Finally, the Establishment Clause is violated by "both perceived and actual endorsement of religion" (*Santa Fe*, 530 U.S. at 305), so a message of endorsement is unconstitutional even if the government did not intend it.

c. Disapproval of Islam and favoritism toward other faiths is apparent from the bare text of the Executive Order. It singles out for detention, deportation, and exclusion persons from seven overwhelmingly Muslim nations: Iran (99.5% Muslim), Iraq (99.0% Muslim), Libya (96.6% Muslim), Somalia (99.8% Muslim), Sudan (90.7% Muslim), Syria (92.8% Muslim), and Yemen (99.1% Muslim). Exec. Order No. 13,769 § 3(c); PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), http://bit.ly/2k4Us8B.

It also blocks entry of *all* refugees temporarily and of Syrian refugees indefinitely (Exec. Order No. 13,769 § 5(a), (c)), again disproportionately affecting Muslims. Not only is Syria overwhelmingly Muslim, but Muslims made up a plurality of *all* refugees resettled in the United States last year, the number of Muslim refugees having increased almost every year over the past decade. Jens Manuel Krogstad & Jynnah

Radford, *Key Facts About Refugees to the U.S.*, PEW RES. CTR. (Jan. 30, 2017), http://pewrsr.ch/2kk7ro8.

The disfavor toward Islam is compounded by the Executive Order's favoritism toward refugees who belong to minority religions (*see* Exec. Order No. 13,769 § 5(b), (e)), as most refugees worldwide currently come from Muslim-majority countries (*Figures at a Glance*, UNHCR, http://bit.ly/2cmTBiF (last visited Feb. 2, 2017)).

d. While these features of the Executive Order alone communicate official preference against Islam, the objective observer also perceives much more.

First, the precursor to the Executive Order was then-candidate Trump's repeated promise of a "total and complete shutdown of Muslims entering the United States." First Am. Compl. Ex. 1. Second, after public outcry that a Muslim ban would be unconstitutional, candidate Trump explained that he would get around the Constitution by papering over the targeting of Islam: "I'm talking territory instead of Muslim." First Am. Compl. Ex. 4, at 6. Indeed, he publicly described this change not as "a pull-back" but as "an *expansion*" of the Muslim ban. First Am. Compl. Ex. 4, at 1 (emphasis added). Third, after the election, President-elect Trump asked Rudy Giuliani (then being considered for Secretary of State) to figure out how the "Muslim ban" could be implemented "legally." First Am. Compl.

Ex 17. Fourth, in an interview with the Christian Broadcasting Network on January 27, 2017—the day he issued the Executive Order—President Trump declared that the government would now expressly give priority to Christians over other refugees. First Am. Compl. Ex. 8. And fifth, he exempted from the ban everyone in the seven listed countries who holds an Israeli passport (and therefore is likely Jewish). *See Message from U.S. Embassy Tel Aviv Consular Section*, U.S. EMBASSY IN ISRAEL, http://bit.ly/2l0KWB8 (last visited Feb. 2, 2017).

Taking all of that into account, an objective observer could hardly help but perceive governmental condemnation of Islam and endorsement of other faiths. Indeed, for more than a year President Trump has bombarded the public with the message that Muslims are "outsiders, not full members of the political community." *Santa Fe*, 530 U.S. at 309 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). The Executive Order thus communicates that Muslims are a disfavored caste in this country.

That is not a message that the government can or should convey: "When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship." *McCreary*, 545

U.S. at 883 (O'Connor, J., concurring). The violation of the Establishment Clause is forthright and flagrant.

B. The Balance Of Harms And The Public Interest Favor The TRO And Denial Of A Stay.

The remaining factors likewise favor denial of a stay.

The TRO is necessary, as the district court determined, to protect against imminent and unconstitutional official discrimination against Muslims. Since its issuance on Friday afternoon, the TRO has already resulted in reinstatement of some 60,000 visas revoked under the Executive Order from people whom the government had previously screened and approved for entry. Michael Edison Hayden & Maia Davis, *World's Airlines Are Told It's Back to Business as Usual for US-bound Travelers in Wake of Judge's Order*, ABC NEWS (Feb. 4, 2017), http://abcn.ws/2l8PYvy. There can be little doubt that the government would immediately reinstate the mass revocation if the TRO were stayed. For those whose visas are in jeopardy, there would then be no adequate remedy for the harms.

What is more, "it is always in the public interest to protect First Amendment liberties." *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 2002)); *accord Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.

2012). Because the Executive Order violates First Amendment rights, the injuries that it inflicts are irreparable as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And, of course, "[t]he public has no interest in enforcing an unconstitutional" law. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272–73 (11th Cir. 2006). Quite the contrary.

On the other side of the equation, the government asserts unfettered discretion to exclude an entire "class of aliens" whenever it makes "the predictive judgment" that the "class" threatens national security; and it argues that judicial review of those decisions offends the public interest. Emer. Mot. 21–22. But the government has no legitimate interest, much less a weighty one, in enforcing unconstitutional policies. *See Melendres*, 695 F.3d at 1002. It has no legitimate interest in discriminating on the basis of religion. It has made no showing that there is any serious risk from the people whom it has already vetted and granted the right to be in the United States. And it has made no showing that judicial review of unconstitutional conduct undermines governmental authority.[4] Rather, judicial review is the principled constitutional bulwark against naked abuse of political power that confers legitimacy on all governmental action.

[4] The cases on which the government purports to rely (*United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483 (2001); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977)) implicate no constitutional rights.

The harms to Plaintiffs and the public from a stay are imminent and extreme; the purported harms to the government are not legally cognizable. All factors favor the TRO and denial of a stay.

* * *

The Executive Order is what President Trump promised all along: a "Muslim ban." No amount of rebranding can change that. People are excluded, detained, and deported for no reason other than their deity and preferred holy book. The Executive Order is an insult to the fundamental principles of religious freedom enshrined in our Constitution. It cannot stand—even for a day.

CONCLUSION

The temporary restraining order was warranted. The stay request should be denied.

Respectfully submitted,

/s/ *Richard B. Katskee*

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Counsel for Amici Curiae

Date: February 6, 2017

CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amici curiae* certifies that:

(i) Pursuant to Federal Rule of Appellate Procedure 29(a)(5), this brief can be no longer than one-half the maximum length of the party briefs; and

(ii) under Circuit Rule 32-3(2), a proportionally spaced brief with the word count divided by 280 cannot not exceed the maximum page limit of ten pages, half of the pages allowed by Circuit Rule 27-1(1)(d), making the maximum word count 2800.

(iii) This brief complies with the type-volume limitation of Circuit Rule 27-1(1)(d) and Circuit Rule 32-3(2) because it contains 2759 words including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(iv) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in proportionally sized Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on February 6, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*