

No. 17-1351

IN THE
**United States Court of Appeals
for the Fourth Circuit**

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, No. 17-cv-00361

**BRIEF OF JOHN DOE #8 IN SUPPORT
OF APPELLEES AND AFFIRMANCE**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS AND INTEREST OF JOHN DOE #8.....1

SUMMARY4

ARGUMENT4

 I. Agency Action Mandated by the Order Is Reviewable under the
 Administrative Procedure Act4

 A. The *Sarsour* Case.....6

 B. The APA Issue Has Broad Implications That This Court Should
 Resolve on Appeal.....9

 II. Federal Courts Have the Power and Responsibility to Remedy
 Violations of the APA11

CONCLUSION14

CERTIFICATE OF COMPLIANCE.....15

CERTIFICATE OF SERVICE16

TABLE OF AUTHORITIES

Cases

<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	11, 12
<i>Block v. Community Nutrition Institute</i> , 467 U.S. 340 (1984).....	13
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986).....	11, 12
<i>Chamber of Commerce of U.S. v. Reich</i> , 74 F.3d 1322 (D.C. Cir. 1996).....	8, 10, 11
<i>City of Carmel-By-The-Sea v. U.S. Department of Transportation</i> , 123 F.3d 1142 (9th Cir. 1997).....	10
<i>Dunlop v. Bachowski</i> , 421 U.S. 560 (1975).....	12
<i>Darweesh v. Trump</i> , No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017), Petition For Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, ECF No. 11.....	5
<i>Hawaii v. Trump</i> , No. 1:17-cv-00050 (D. Haw. Feb. 2, 2017), First Amended Complaint, ECF No. 37.....	5, 9, 10
<i>International Refugee Assistance Project v. Trump</i> , No. 17-cv-00361 (S.D. Md. Mar. 8, 2017), Def’s Mem. In Opp. To Ptf’s.’ Mot. For Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 82.....	9
<i>Japan Whaling Association v. American Cetacean Society</i> , 478 U.S. 221 (1986).....	13

<i>Leedom v. Kyne</i> , 358 U.S. 184 (1958)	11
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	11
<i>Mach Mining, LLC v. E.E.O.C.</i> , 135 S. Ct. 1645 (2015).....	12
<i>McNary v. Haitian Refugee Center, Inc.</i> , 498 U.S. 479 (1991).....	14
<i>Mountain States Legal Foundation v. Bush</i> , 306 F.3d 1132 (D.C. Cir. 2002).....	10
<i>Sackett v. E.P.A.</i> , 566 U.S. 120 (2012).....	12
<i>Sarsour v. Trump</i> , No. 1:17-cv-00120 (E.D. Va.) Complaint for Injunctive and Declaratory Relief and Jury Demand (E.D. Va. Jan. 30, 2017), ECF No. 1	2
Amended Complaint for Injunctive and Declaratory Relief and Jury Demand (E.D. Va. Mar. 13, 2017), ECF No. 11.....	1, 5
Motion for Prelim. Injunction (E.D. Va. Mar. 13, 2017), ECF No. 13.....	2, 3
Order (E.D. Va. Mar. 23, 2017), ECF No. 33	1
Memorandum Opinion (E.D. Va. Mar. 24, 2017), ECF No. 36.....	3, 6, 8
<i>Utah v. Evans</i> , 536 U.S. 452 (2002).....	12
<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017).....	2
<i>Washington v. Trump</i> , No. 2:17-cv-00141 (W.D. Wa. Mar. 16, 2017), Second Amended Complaint, ECF No. 152	5, 10

Statutes

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* *passim*
 5 U.S.C. § 701(a)13
 5 U.S.C. §§ 702-7064
 5 U.S.C. § 7045, 7

Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* *passim*
 8 U.S.C. § 1152..... *passim*
 8 U.S.C. § 1182(a)(5)(C) 12, 13
 8 U.S.C. § 1252(a)(2)(D).....13

Other Authorities

17 STATE 23338, Cable from Secretary of State to All Diplomatic and Consular Posts regarding (SBU) New Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States – Guidance to Visa-Issuing Posts (Mar. 10, 2017) at Section 5, *available at* http://live.reuters.com/Event/Live_US_Politics/7912352537, 8

Executive Order 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).....1

Executive Order 13780, 82 Fed. Reg. 13209 (Mar 6, 2017)2, 7

Jacob Pramuk, Trump May Have Just Dealt a Blow to His Own Executive Order, CNBC, Mar. 15, 2017, <http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html>2

STATEMENT OF FACTS AND INTEREST OF JOHN DOE #8¹

John Doe # 8² is a lawful permanent resident of the United States, living in Phillips County, Missouri and a Muslim of Sudanese national origin. *See* Amend. Compl. for Injunctive and Declaratory Relief and Jury Demand at 28, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 13, 2017), ECF No. 11. He married another Sudanese national, and shortly thereafter, he filed an I-130, Petition for Alien Relative, in order for his wife to travel to the United States to join him. The petition was approved. *Id.* With the hope of finally reuniting after having been separated for nearly a year waiting to obtain lawful status, John Doe #8's wife immediately applied for a visa to enter the United States. *Id.* Her visa application was pending on January 27, 2017, when President Donald J. Trump issued Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States." 82 Fed. Reg. 8977 ("Jan. 27 Order"); J.A. 451-59. The order, *inter alia*, banned entry into the United States for 90 days by citizens or nationals of seven predominantly Muslim countries. Pursuant to Section 2 of the

¹For purposes of Fed. R. App. P. 29(a)(4)(E), no party or party's counsel in *IRAP v. Trump* authored this brief in whole or in part, and no one, other than potential intervenor/*amicus curiae* John Doe #8 or his counsel contributed money intended to fund preparing or submitting this brief.

² On March 23, 2017, the Court granted Plaintiffs' Doe Motion for a Protective Order and to Keep the Names of the John and Jane Doe Plaintiffs Under Seal, allowing John Doe #8 to proceed anonymously. *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 23, 2017), ECF No. 33.

Jan. 27 Order, John Doe #8's wife's visa application was suspended, thereby preventing John Doe #8 from reuniting with his wife.

Along with other plaintiffs, on January 30, 2017, John Doe #8 filed suit in the Eastern District of Virginia seeking to enjoin enforcement of the Jan. 27 Order on several constitutional and statutory grounds. *See* Compl. for Injunctive and Declaratory Relief and Jury Demand at 20-32, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Jan. 30, 2017), ECF No. 1.

Shortly thereafter, on February 9, 2017, the Court of Appeals for the Ninth Circuit upheld a nationwide injunction against operative parts of the Jan. 27 Order. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017). In response, the President issued a “watered down version”³ of the original order on March 6, 2017. 82 Fed. Reg. 13209 (“Mar. 6 Order” or “the Order”). The Order, *inter alia*, banned entry to the U.S. for individuals from six of the seven original Muslim countries for 90 days. Mar. 6 Order § 2. John Doe #8's wife was among those banned.

On March 13, John Doe #8 and other *Sarsour* plaintiffs filed an Emergency Motion for Temporary Restraining Order and/or Preliminary injunction against the entire Order, including § 2. Mot. for Prelim. Inj., *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 13, 2017), ECF No. 13.

³ Jacob Pramuk, Trump May Have Just Dealt a Blow to His Own Executive Order, CNBC, Mar. 15, 2017, <http://www.cnbc.com/2017/03/15/trump-may-have-just-dealt-a-blow-to-his-own-executive-order.html>.

But on March 24, the district court in *Sarsour* declined to enjoin any portion of the Order, reaching opposite conclusions about these statutory claims. *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 24, 2017), ECF No. 36. Specifically, the *Sarsour* court found that John Doe #8’s claim against § 2 of the Order was unlikely to succeed on the merits even if the Order discriminates on the basis of nationality, contrary to the plain language of the Immigration and Nationality Act (“INA”). *Id.* at 16. Additionally, the *Sarsour* court found that the Order was not reviewable under the Administrative Procedures Act (“APA”) because the President is not an “agency” and as a result, that the APA claim was also unlikely to succeed on the merits. *Id.* at 17.

As detailed in John Doe #8’s Motion to Intervene, John Doe #8 has a significant interest in the outcome of this appeal. Because the preliminary injunction at issue is similar to the one he sought in *Sarsour*, both his legal and familial interests will be directly affected by the *en banc* Court’s resolution of this case, and of the statutory INA and APA claims in particular.

SUMMARY

The APA serves as a critical vehicle to safeguard the rights of individuals affected by the actions of executive agencies. While the Order challenged in this case was issued by the President, it expressly requires federal agencies, including the Department of Homeland Security and the Department of State, to take specific actions, many of which have already commenced. Under established case law, it is plainly subject to review under the APA, a point John Doe #8 urges this Court to recognize. Doing so will clarify the law in related, ongoing litigation and affirm the important role of the APA as a check on executive power.

John Doe #8 also has an independent cause of action under the INA that, at a minimum prohibits discrimination in the issuance of resident visas, such as that sought by his wife. To that end, John Doe #8 adopts the arguments advanced in Plaintiff-Appellee's appellate brief (Sec. II.C) on why the Order violates the INA, but writes separately to emphasize the availability of judicial review in this case under both the APA and INA.

ARGUMENT

I. Agency Action Mandated by the Order Is Reviewable under the Administrative Procedure Act

The APA is a mechanism for parties aggrieved by agency action to seek judicial review of that action. 5 U.S.C. §§ 702-706. Here, it provides an independent route to challenge the defendants' visa suspension policy and the

agency defendants' implementation of that policy. The APA directs the courts to grant judicial review in several situations, including: (i) whenever "[a]gency action [is] made reviewable by statute," or (ii) when "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

In this case, the *IRAP* plaintiffs' APA claim concerns "[a]gency action made reviewable by statute." 5 U.S.C. § 704; *see also* J.A. at 255-58. Or in other words, they claim that Order entails agency action that is contrary to law, pointing to § 1152 of the Immigration and Nationality Act, which prohibits discrimination on the basis of nationality and other factors. 8 U.S.C. § 1152(a)(1)(A); J.A. at 255.

In *Sarsour v. Trump*, the plaintiffs, including John Doe #8, made a similar claim ("Count III"), alleging a violation of the APA because of the conflict with the nondiscrimination directive of § 1152. Amended Compl. at 44, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 13, 2017), ECF No. 11. This claim has also been advanced by plaintiffs in at least three other distinct challenges to the Order. *See, e.g.*, First Amended Compl. at 27, *Hawaii v. Trump*, No. 1:17-cv-00050 (D. Haw. Feb. 2, 2017), ECF No. 37; Second Amended Compl. at 58-59, *Washington v. Trump*, No. 2:17-cv-00141 (W.D. Wa. Mar. 16, 2017), ECF No. 152; Pet. For Writ of Habeas Corpus and Compl. for Declaratory and Injunctive Relief at 17, *Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017), ECF No. 1.

In *IRAP*, the district court analyzed the plaintiffs’ standing under the APA, found that they met the relevant “zone of interests” test, and concluded that they “have standing to assert the claim under 8 U.S.C. § 1152.” J.A. 785. But the court did not clarify whether it had found an implied right of action under § 1152, whether plaintiffs had standing under the APA, or both. This may not have been a crucial distinction given that the *IRAP* plaintiffs alleged a violation of the INA and APA in a single count. But APA reviewability was a critical issue in the *Sarsour* case, and one with broad implications that this Court should resolve.

A. The *Sarsour* Case

On March 24, the district court in *Sarsour* declined to enjoin any portion of the Order, finding, *inter alia*, that it is “not reviewable under the APA” because the President is not an “agency.” Memorandum Opinion at 17, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 24, 2017), ECF No. 36 (attached as Appendix B). The district court dismissed Count III on this basis, relying on *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). *Franklin* held that exercise of the president’s “statutory duties” cannot be reviewed for abuse of discretion. *Id.* at 801. But it does not bar courts from reviewing presidential actions more generally, either for their constitutionality or lawfulness. *Id.* The *Sarsour* court ignored these limitations as well as the nature of the plaintiffs’ claims, which challenge the Order as both unconstitutional and contrary to law, including the express Congressional

prohibition on discrimination found in § 1152 of the INA. The Fourth Circuit should not repeat this error, but instead correct it.

Moreover, the *Sarsour* court's conclusion that "the president is not an 'agency' within the meaning of the APA," misses the point. It presumes that John Doe #8 brought his APA claim to challenge "final agency action" alone and that the action targeted was solely the Order itself and not its implementation by agencies. 5 U.S.C. § 704. But the claim was neither limited to the President as the only defendant nor was it limited to the "final agency action" prong of the APA.

John Doe #8's APA claim sought to prohibit the agency defendants, including the State Department, from implementing the Order as directed. *See* Executive Order 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017) at Section 2(g) ("The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order"). Indeed, a government cable issued to State Department offices worldwide directs officials to follow a specific, multi-step process to implement the executive order's visa suspension and otherwise creates the administrative agency framework that the agency defendants would establish upon EO-2 taking effect. *See* 17 STATE 23338, Cable from Sec. of State to All Diplomatic and Consular Posts regarding (SBU) New Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States – Guidance to Visa-Issuing Posts (Mar. 10, 2017) at

Section 5, available at http://live.reuters.com/Event/Live_US_Politics/791235253.

While this type of action may not be “final agency action,” it is “agency action made reviewable by statute,” specifically INA’s § 1152, because it is the agency defendants’ attempt to wield authority in a manner that violates the INA. See *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) (explaining that administrative action based on a presidential executive order “hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.”)

Therefore, an interpretation of the statute which finds that the “the President is not an ‘agency’ within the meaning of the APA” does not end the inquiry. Memorandum Opinion at 17, *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va. Mar. 24, 2017), ECF No. 36. Even if this Court were to conclude, as the district court did in *Sarsour*, that “President Trump’s issuance of [the Order itself] is not reviewable under the APA,” courts still have authority under the APA to enjoin agency action that attempts to implement it. Here, the Order requires federal agencies, including the Department of Homeland Security and the Department of State, to take specific actions to violate § 1152, many of which have already commenced. The district court overlooked this distinction and underestimated the authority the APA gives it.

This Court must not make the same mistake. Instead, it should recognize the APA powers Congress assigned to it, and fulfill the role Congress envisioned for the judiciary when it enacted the APA. In sum, the Fourth Circuit should find that the APA furnishes an independent reason to continue to enjoin the Order.

B. The APA Issue Has Broad Implications That This Court Should Resolve on Appeal

Proper resolution of the APA issue is not only critical to Count III of the *Sarsour* case, but to Count II as well, which cites the APA as the jurisdictional basis for John Doe #8's Equal Protection claim. It is also at issue in aspects of the *IRAP* litigation that have yet to come before this Court. In particular, the *IRAP* plaintiffs have moved the district court to enjoin enforcement of the "refugee provisions" of the Order, which the government has opposed by claiming, *inter alia*, that the Order is not reviewable under the APA. J.A. 693 [TRO Hr'g Tr. at 12:15-17]; Def's Mem. In Opp. To Ptf's.' Mot. For Preliminary Injunction of § 5(d) of the Executive Order at 16-17, *Int'l Refugee Assistance Project v. Trump*, No. 17-cv-00361 (S.D. Md. Mar. 8, 2017), ECF No. 82.

Indeed, the APA functions as an important vehicle for advancing a host of statutory claims that the Order is unlawful. *See, e.g.*, J.A. 257 (alleging a violation of the APA through the Refugee Act); First Amended Compl. at 27 *Hawaii v. Trump*, No. 17-cv-00050 (D. Haw. Feb. 13, 2017), ECF No. 37 (alleging a

violation of the APA through the Establishment Clause and Fifth Amendment of the Constitution); Second Amended Compl. at 59, *Washington v. Trump*, No. 2:17-cv-00141 (W.D. Wa. Mar. 16, 2017), ECF No. 152 (alleging unconstitutional action in violation of the APA). The *Sarsour* court’s holding calls into question the legal basis for these claims, as well as any other APA-based challenges to the implementation of executive orders.

Such a result is contrary to the history and purpose of the APA, which has long served as a check on executive authority where courts have determined that the president’s exercise of discretion is limited by statute or the Constitution. *See, e.g., Mountain States Legal Foundation v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (finding the exercise of the President’s authority reviewable where a “statute places discernible limits on the President’s discretion,” because “judicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did not at all limit the discretion of the President”); *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (recognizing “that under certain circumstances, Executive Orders, with specific statutory foundation, are treated as agency action and reviewed under the Administrative Procedure Act” if they “do not preclude judicial review” and “there is law to apply.”); *see also Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1326-1327 (D.C. Cir. 1996) (denying APA review but noting, “... that

the Secretary’s regulations are based on the President’s Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.”); *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 680 (1986) (the presumption is that Congress “intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.”); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (invalidating an agency action on the basis that it was “an attempted exercise of power that [Congress] specifically withheld” even when the relevant statute did not provide an explicit remedy).

In sum, it is important for this Court to clarify that the APA provides a valid mechanism for challenging implementation of the Order.

II. Federal Courts Have the Power and Responsibility to Remedy Violations of the INA

Section 1152 of the INA provides an implicit right of action that permits judicial review, both independently and in conjunction with the APA.

As a general rule, agency action is subject to “a basic presumption of judicial review.” *Lincoln v. Vigil* 508 U.S. 182, 190 (1993) (internal quotations and citations omitted). Indeed, “only upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Bowen*, 476 U.S. 667, 671 (1986) (citing *Abbott Labs. v. Gardner*, 387

U.S. 136 (1967)). In the absence of an “an express [statutory] prohibition,” the government bears a “heavy burden” in overcoming this “strong” presumption.” *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

Congressional intent to foreclose judicial review of executive action may be evident from a statute’s language or can be inferred from its structure. *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1651 (2015). But explicit language reflecting Congress’s intent regarding judicial review in one part of a statute does not give rise to an inference that it had the same intent in another. *Sackett v. E.P.A.*, 566 U.S. 120, 129 (2012) (“[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA’s presumption of reviewability for all final agency action, it would not be much of a presumption at all.”); *See also, e.g., Utah v. Evans*, 536 U.S. 452, 463 (2002) (statute enacted explicitly authorizing pre-census lawsuits against the Census Bureau’s statistical methodologies did not preclude post-census lawsuits challenging the same).

Here, both the *IRAP* plaintiffs and John Doe #8 allege that the government has violated § 1152 of the INA, which in relevant part prohibits “any preference or priority ... in the issuance of an immigrant visa because of the person’s...nationality.” Nothing in this provision bars judicial review of agency action. *Compare, e.g., with* 8 U.S.C. § 1182(a)(5)(C) (provision of INA explicitly

barring judicial review of certain standardized tests and minimum scores for admission of uncertified foreign health-care workers).

Indeed, some sections of the INA generally barring judicial review – for example, of orders of removal – even carve out procedures for the judicial review of “constitutional claims or questions of law.” 8 § U.S.C 1252(a)(2)(D). Since John Doe #8 challenges an “unconstitutional [practice or policy] used...in processing [visas]” rather than “individual denial” of immigration status, both precedent and institutional competence strongly compel the conclusion that courts must evaluate whether the government has acted outside the scope of its authority, and in violation of the INA, by implementing the Order.

Thus, for APA purposes, the Order is “made reviewable by statute” because there is no “clear and convincing evidence of legislative intent to preclude review” under § 1152. *Japan Whaling Ass’n v. Amer. Cetacean Soc’y*, 478 U.S. 221, 230, n. 4 (1986); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984); *see also* 5 U.S.C. § 701(a) (specifically providing that judicial review is available “except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion).

Likewise, there is an implied right of action to seek judicial review for violations of § 1152, independent of the APA. Indeed, the Supreme Court has already construed the INA to permit judicial review of “general collateral

challenges to unconstitutional practices and policies used by the [government] in processing [immigration] applications.” *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991). In so holding, the Court distinguished the “process of direct review of individual denials of [immigration] status,” which was explicitly barred in another section of the statute, from the above-mentioned challenges to policy more broadly. *Id.*

In summary, § 1152 of the INA operates on its own and in conjunction with the APA to provide independent causes of action for review of the Order. This Court should therefore affirm the district court’s decision in *IRAP* and recognize the validity of the APA claim brought by John Doe #8 in *Sarsour*.

CONCLUSION

For the reasons stated herein, proposed intervenor and *amicus* John Doe #8 respectfully requests this Court to affirm the decision by the U.S. District Court for the District of Maryland and uphold the preliminary injunction.

Dated: April 24, 2017

Respectfully submitted,

/s/ Lena Masri

Lena F. Masri

Counsel of Record for John Doe #8

CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 29(a)(4)(G), I hereby certify that this brief complies with the type-volume requirements of Local Rule 29(a)(5) because it contains 3,296 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Times New Roman font in 14 point.

Dated: April 24, 2017

/s/ Lena Masri

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CERTIFICATE OF SERVICE

I certify that on April 24, 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.

Dated: April 24, 2017

/s/ Lena Masri
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