

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 Appeal from an Entry of a Temporary Restraining Order by the
United States District Court for the Western District of Washington
Case No. 2:17-cv-141, Hon. James L. Robart

BRIEF OF MUSLIM ADVOCATES, AMERICAN MUSLIM HEALTH PROFESSIONALS,
COUNCIL FOR THE ADVANCEMENT OF AMERICAN MUSLIM PROFESSIONALS, ISLAMIC
MEDICAL ASSOCIATION OF NORTH AMERICA, MUPPIES, INC., NATIONAL ARAB
AMERICAN MEDICAL ASSOCIATION, NETWORK OF ARAB-AMERICAN PROFESSIONALS,
AS *AMICI CURIAE*, SUPPORTING APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 & 29(c)(1) and Ninth Circuit Local Appellate Rule 26.1.1, amici curiae state the following:

- (1) They have no parent corporations;
- (2) There are no publicly held corporations that own 10% or more of their stock;
- (3) They are not aware of any publicly held corporations not a party to this proceeding with a financial interest in its outcome.

CONSENT OF THE PARTIES

Counsel for the State of Washington and State of Minnesota parties have consented to the filing of this brief. Counsel for the United States has not fully consented.

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	v
INTRODUCTION	1
ARGUMENT	2
I. The President’s Executive Orders on Immigration Are Subject to Important Constitutional Limitations.....	2
A. The Executive Order Is Not Immune From Judicial Review	2
B. The Court Is Not Prohibited From Reviewing The Executive Branch’s Motives	4
II. The Purpose and Effect of the Executive Order Is Animus Toward Muslims.....	7
A. The Executive Order Is Animated By Overt Animus Toward Muslims.....	7
B. The Executive Order Disproportionately Injures Muslims, Including Longtime U.S. Residents	9
CONCLUSION.....	11

TABLE OF AUTHORITIES

Cases

<i>Arce v. Douglas</i> , 793 F.3d 968 (9th Cir. 2015)	6
<i>Cardenas v. United States</i> , 826 F.3d 1164 (9th Cir. 2016)	4, 7
<i>Chae Chan Ping v. United States</i> , 130 U.S. 581 (1889)	4
<i>Church of Lukumi Babalu v. Hialeah</i> , 508 U.S. 520 (1993)	7
<i>Fong Yue Ting v. United States</i> , 149 U.S. 698 (1893)	4, 5
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88 (1976)	7
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	2
<i>INS v. Pangilinan</i> , 486 U.S. 875 (1988)	7
<i>Kerry v. Din</i> , 135 S. Ct. 2128 (2015)	4, 7, 8
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944)	5
<i>Locke v. Davey</i> , 540 U.S. 712 (2004)	7
<i>McCreary County, Ky. v. Am. Civil Liberties Union of Ky.</i> , 545 U.S. 844 (2005)	5, 6
<i>Nguyen v. INS</i> , 533 U.S. 53 (2001)	3
<i>Sante Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	6
<i>United States v. Windsor</i> , 133 S. Ct. 2675 (2013)	6
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	2, 3

Other Authorities

Donald Trump on Orlando Shooting, FACTCHECK.ORG (June 14, 2016), http://www.factcheck.org/2016/06/donald-trump-on-orlando-shooting/	9
Exec. Order No. 13,769, 82 FR 8977 (2017).....	1, 8
Fed. R. App. P. 29(c)(5)	iv
Kambiz Ghanea Bassiri, A History of Islam in America: From the New World to the New World Order (Cambridge 2010)	12

INTEREST OF THE AMICI CURIAE¹

This amici curiae brief is submitted on behalf of the amici described below in opposition to the Government’s Motion for Stay Pending Appeal. Amici are business, education, finance, healthcare, legal, science, technology, and other professional members of the American Muslim community directly harmed and stigmatized by the Executive Order.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates’ work fighting institutional discrimination against the American Muslim community.

American Muslim Health Professionals (“AMHP”) works to improve the health of Americans. AMHP has three areas of focus: (1) health promotion and education; (2) professional development; and (3) state and national advocacy on public health issues. AMHP has been a leader in expanding healthcare coverage by

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

hiring a team of state liaisons and working with interfaith communities through its “Connecting Americans to Coverage” campaign. Its leadership has been at the forefront of raising awareness about bullying, identity development, and other mental health issues impacting the most vulnerable segments of society – our children and youth. AMHP has also spearheaded many social just initiatives including “EnabledMuslim,” an online platform that provides spiritual and social support for individuals and families impacted by disability.

Council for the Advancement of Muslim Professionals (“CAMP”) is an association of mid- to senior-level Muslim professionals, which works to facilitate and inspire the development of Muslim Professionals across the United States. CAMP currently has a membership base of approximately 7,500 professionals and has a physical presence in Chicago, New Jersey, New York, Philadelphia, and Washington D.C. Founded in 1994 in Chicago as a face-to-face networking organization, CAMP has grown to become a multi-city professional association, which empowers Muslim professionals to advance and excel, not only in their careers, but also in their broader community and philanthropic efforts.

The **Islamic Medical Association of North America** (“IMANA”) was founded in 1967 and represents the largest network of American Muslim physicians, dentists, and allied healthcare professionals in North America. IMANA provides professional networking opportunities for healthcare practitioners; acts as a medical ethics resource for educational institutions, medical professionals and medical students, residents and fellows; and provides continuing medical education. IMANA has

active medical relief programs and emergency relief efforts to respond to disasters and facilitates the transfer of medical knowledge around the world. The mission of IMANA is to provide humanitarian aid and medical relief worldwide and to be an advocate of compassionate, sustainable and quality healthcare policies. Its objectives are to connect and assist Muslim physicians, dentists and allied health professionals in North America with orientation, adjustment, finding appropriate training and job opportunities. IMANA wishes to continue to promote and facilitate medical education, research, publications and improve global healthcare delivery by encouraging American-Muslim diplomacy, through medical relief work and other charitable activities.

Muppies, Inc., also known as Muslim Urban Professionals (“Muppies”), is a nonprofit, charitable organization dedicated to empowering and advancing Muslim business professionals to be leaders in their careers and communities. Its mission is to create a global community of diverse individuals who will support, challenge, and inspire one another by providing a platform for networking, mentorship, and career development. Muppies members are leaders in the fields of finance, consulting, technology, venture capital, healthcare, entrepreneurship and social enterprise. As a condition of acceptance to the organization, members must demonstrate dedication to the development and advancement of themselves and their communities, in addition to outstanding professional achievement. Muppies members contribute to the fabric of the U.S. economy in diverse ways, such as

driving innovation, creating new opportunities for employment, and promoting excellence through diversity and inclusion.

The **National Arab American Medical Association** (“NAAMA”) is the largest international organization of Arab American health care providers, trainees and medical students based in North America. Since its founding, twenty-seven chapters have been established in the United States and Canada. In 1990, NAAMA was created to support international medical assistance projects, educational exchanges, scholarships, research grants, and emergency medical aid in areas of conflict. Members of the association include well-trained clinicians, high ranking university professors, leaders of several medical societies, and scientists involved in cutting edge research and innovation. In the United States, the foundation supports professional and educational activities aimed at Arab American health education and disease prevention in cooperation with community-based organizations. Members have also donated their time and money to help the relief efforts following Hurricanes Katrina and Rita. Internationally, the foundation sponsors projects, focusing on the Arab world. It has sponsored humanitarian projects in Iraq in the wake of the Iraq War. Currently, volunteers from the association conduct periodic missions to countries surrounding Syria to provide humanitarian medical care and establish eye care and dental clinics to benefit local populations and refugees.

Network of Arab-American Professionals (“NAAP”) is a professional organization grounded in the notion that all Arabs in America need to connect to

advance the community. Through collective contribution to strengthen our individual and community standing, NAAP provides a channel for Arab-Americans to realize their passions and pursue their interests through community involvement. NAAP promotes professional networking and social interaction among Arab-American and Arab professionals in the United States and abroad; educates both the Arab-American and non-Arab communities about Arab culture, identity, and concerns; advances the Arab-American community by empowering, protecting and promoting its political causes and interests in the United States and abroad within all levels of society; supports the Arab student movement in the United States; and serves society through volunteerism and community service efforts.

INTRODUCTION

The Government's Motion for Stay Pending Appeal ("Motion") should be denied because the District Court did not abuse its discretion in issuing a temporary restraining order ("TRO") against the implementation of two provisions of President Donald J. Trump's executive order of January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"). The Executive Order is unconstitutional on a number of grounds including because its evident purpose and effect is animus toward Muslims. The Government would have this Court ignore the ample evidence of this unconstitutional purpose in deference to what the Government characterizes as an "*unreviewable authority* of the President to suspend the admission of any class of aliens." Mot. at 2 (emphasis added). To do so, however, would be an abdication of the judicial branch's unique role in protecting suspect classes from unlawful and discriminatory treatment at the hands of the executive branch.

Amici are business, education, finance, healthcare, legal, science, technology, and other professional members of the American Muslim community directly harmed and stigmatized by the Executive Order. Amici urge this Court to deny the Government's Motion for extraordinary interlocutory relief. Given the propriety of judicial review in this case, and the irremediable harms to American citizens, residents, and visa holders from the Executive Order, amici respectfully submit that the TRO should remain in place and continue to protect amici's members pending resolution of the States' motion for a preliminary injunction.

ARGUMENT

I. THE PRESIDENT’S EXECUTIVE ORDERS ON IMMIGRATION ARE SUBJECT TO IMPORTANT CONSTITUTIONAL LIMITATIONS

A. The Executive Order Is Not Immune From Judicial Review

In support of its Motion, the Government repeatedly invokes a supposed “plenary power” of the Government’s political branches with respect to excluding particular groups from entering the United States. *See, e.g.*, Mot. at 12 (citing *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016)). This attempt to shield the Executive Order from any meaningful judicial review fails for several reasons.

First, the Supreme Court’s recent cases have clarified that the political branches’ power over immigration matters is not immune from judicial review. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding that so-called “plenary power” to create immigration law . . . is subject to important constitutional limitations” in the treatment of aliens). In particular, the political branches must use “a constitutionally permissible means of implementing” the relevant policy. *INS v. Chadha*, 462 U.S. 919, 941–942 (1983) (invalidating enforcement action against alien plaintiff on the basis of a structural constitutional limit on governmental power akin to the Establishment Clause).

The operation of constitutional constraints on the executive and legislative branches’ power with respect to regulating immigration is embedded in a number of important recent cases. These cases involve both U.S. citizens and aliens. At stake are both individual antidiscrimination claims and structural constitutional limits on

the government's power. Across diverse contexts, courts have carefully scrutinized constitutional claims, accounting for both their form and context.

For example, in *Zadvydas v. Davis*, the Supreme Court ruled in favor of an alien who had already been found removable, citing Procedural Due Process concerns. 533 U.S. 678, 693 (2001). In *Nguyen v. INS*, 533 U.S. 53, 58 (2001), the Court adjudicated a noncitizen's Equal Protection challenges to gender classifications in the statutory frameworks regulating claims of derivative citizenship. The *Nguyen* Court carefully scrutinized the "important governmental interest[s]" furthered by the gender classification. *Id.* at 64.

Second, as it is commonly applied today, the plenary power doctrine addresses the standard of judicial review of an individual consular officer's discretionary denial of a visa to a specific non-resident alien. *See, e.g., Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (applying consular non-reviewability doctrine to discretionary denial of a visa). Practical concerns of administrability may support insulating the large volume of such discretionary, fact-specific consular-level visa decisions from time-consuming judicial review. Such concerns, though, have no application in the context of the States' challenge to the Executive Order. Rather than making a case-specific determination regarding the appropriateness of allowing a specific individual to enter the United States, the Executive Order bars entire populations and severely impacts longtime residents of the United States who have already been deemed appropriate to reside in the country. Moreover, as discussed in Part I.B below, even were it applicable, the

consular non-reviewability doctrine is not absolute. *See Kerry v. Din*, 135 S. Ct. 2128 (2015).

Third, to the extent the plenary power doctrine historically was given a broader scope of application, it is important to recall the ignominious context in which the doctrine originated. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Supreme Court upheld the overtly racist Chinese Exclusion Acts.² The same sort of animus later led the federal government to intern Japanese-American citizens and aliens on the West Coast, a decision the federal courts did not overturn. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding wartime internment of Japanese-Americans). The Government’s invocation of the doctrine in support of the President’s “Muslim ban” will no doubt be remembered as synonymous with these infamous historical precedents.

B. The Court Is Not Prohibited From Reviewing The Executive Branch’s Motives

The Government contends that any inquiry into “motive” would create “substantial separation of powers problems.” Mot. at 17 (citing *United States v. O’Brien*, 391 U.S. 367 (1968)). This broad assertion of immunity from motive-based judicial review is erroneous and would have startling and disruptive consequences if accepted.

Contrary to the Government’s position, in reviewing the Executive Order, the Court is duty-bound to consider not only the language of the Order but also its

² For example, in *Fong Yue Ting*, the Court upheld a requirement that evidence of residency for aliens of Chinese origin be supported by “one credible *white* witness.” 149 U.S. at 729-30.

“historical context” and the “specific sequence of events leading to [its pronouncement].” *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). As demonstrated in Part II.A, such a review can support only one conclusion — that the Executive Order is motivated by animus toward Muslims and the Islamic faith.

The courts’ duty to examine the context in which the Executive Order was conceived and implemented flows from the nature of the constitutional and statutory violations that the States have alleged.

With respect to the Establishment Clause, the District Court must consider both “historical context” and the “specific sequence of events leading to” issuance of the Executive Order to determine whether it was intended, at least in part, to disfavor one faith over others. *McCreary County, Ky.*, 545 U.S. at 866; *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that courts have a “duty . . . to distinguish a sham secular purpose from a sincere one”).

With respect to Equal Protection, the District Court must address the States’ credible allegations and evidence that the Executive Order was intended to discriminate against Muslims. *See Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). Equal Protection challenges to federal action require judicial consideration of both the “avowed *purpose* and practical effect of the law” to test its constitutionality. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (emphasis added).

Yet another example is the Free Exercise Clause, which is closely related to the Establishment Clause argument raised by plaintiff states. The Free Exercise

Clause requires a determination of whether “animus toward religion” motivated a state action. *Locke v. Davey*, 540 U.S. 712, 725 (2004). Doing so means that judges must look closely at a measure’s “history” and “operation.” *Id.* They also look closely at public statements made by the enacting body. *Church of Lukumi Babalu v. Hialeah*, 508 U.S. 520, 541 (1993) (examining “minutes and taped excerpts” of city council meeting that produced challenged ordinance, and finding “significant hostility” toward a religious minority).

Nor does a different rule apply in the immigration context. In previous antidiscrimination challenges to executive immigration-related action by noncitizens, the Court has looked to “the historical record” to determine whether “the actions at issue ... were motivated by any racial animus.” *INS v. Pangilinan*, 486 U.S. 875, 886 (1988). Moreover, the Court has exercised especially searching review of executive action when an action appeared not to rest on relevant policy expertise. *See e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976).

Finally, even if the plenary power doctrine were properly invoked here (it is not), Justice Kennedy’s controlling opinion in *Kerry v. Din*, 135 S. Ct. 2128 (2015)³ directs that courts should “look behind” the government’s stated reasons for an immigration decision if the plaintiff “plausibly alleged with sufficient particularity” “an affirmative showing of bad faith.” *Din*, 135 S. Ct. at 2131. Here, the States have alleged that the Executive Order reflects implementation of a bad faith effort to target Muslims. ECF 18 ¶¶ 42–61. As demonstrated below, those allegations are more than plausible in light of the publicly available evidence.

³ *See Cardenas*, 826 F.3d at 1171–72 (holding that Justice Kennedy’s concurrence in *Kerry v. Din* “represents the holding of the Court”).

II. THE PURPOSE AND EFFECT OF THE EXECUTIVE ORDER IS ANIMUS TOWARD MUSLIMS

A. The Executive Order Is Animated By Overt Animus Toward Muslims

Among the stated purposes of the Executive Order is “to protect Americans . . . [by] ensur[ing] that those admitted to this country do not bear hostile attitudes toward it and its founding principles.” Executive Order Section 1. Statements by the President and his advisors leave no doubt that the unstated premise of the Executive Order is the false proposition that Muslims, by virtue of their religious faith, are more likely than non-Muslims to “bear hostile attitudes toward [the United States] and its founding principles.” This unfounded and irrational animus toward all Muslims has permeated the conception, promulgation, and implementation of the Executive Order, as demonstrated by the below chronology of public pronouncements by the President and his advisors.

On November 18, 2015, Mr. Trump claimed that he believed that the United States will have “absolutely no choice” but to close down mosques and pledged that, if he won the presidency, “[Syrian refugees are] going out.” Ware Decl. Ex. A.

On December 7, 2015, following the terror attack in San Bernardino, California, then-candidate Mr. Trump called for a “complete shutdown of Muslims entering the United States.” Ware Decl. Ex. B. Mr. Trump justified this call by claiming, without evidence, that “large segments of the Muslim population” favor Sharia (Islamic law) over U.S. law and violence against Americans. Ware Decl. Ex. C.

On December 8, 2015, Mr. Trump defended his proposed “Muslim ban,” and falsely accused Muslims of failing to report the San Bernardino plot:⁴ “The Muslim community is not reporting what’s going on. They should be reporting that their next-door neighbor is making pipe bombs and they’ve got them all over the place. The mother’s in the apartment, other people, his friend was buying him rifles. Nobody was reporting that.” Ware Decl. Ex. D.

On January 14, 2016, during a Republican Candidate Debate in North Charleston, South Carolina, Mr. Trump answered “No” when asked whether he had heard anything that made him want to rethink his position on banning Muslims from entering the country. Ware Decl. Ex. E.

On March 9, 2016, Mr. Trump told CNN’s Anderson Cooper that “Islam hates us.” Ware Decl. Ex. F. Asked whether he made a distinction between Islam and radical Islam, Mr. Trump asserted that, “It’s very hard to separate, because you don’t know who is who.” Ware Decl. Ex. F.

On June 13, 2016, in a speech responding to the terror attack in Orlando, Florida, Mr. Trump pledged to suspend immigration from areas of the world where there is a proven history of terrorism against the United States, Europe, or our allies. Ware Decl. Ex. G. According to public statements by Mr. Trump’s advisor, Rudolph Giuliani, on the day the Executive Order was signed, this new formulation reflected an instruction by Mr. Trump to his advisors to find a way to implement

⁴ Donald Trump on Orlando Shooting, FACTCHECK.ORG (June 14, 2016), <http://www.factcheck.org/2016/06/donald-trump-on-orlando-shooting/> (“There is no evidence for Trump’s claim that “many people,” including neighbors of the San Bernardino shooters, saw “bombs all over the floor” of the apartment, but did not report it to authorities because of concerns about racial profiling.”).

the “Muslim ban” “legally.” Ware Decl. Ex. H. During the same June 13, 2016 speech, Mr. Trump accused Muslims of “trying to take over our children and convince them how wonderful ISIS is and how wonderful Islam is.” Ware Decl. Ex. G.

On August 10th, 2016, Mr. Trump’s National Security Adviser Michael Flynn called Islam “a cancer” during remarks at an ACT for America event in Dallas, Texas. Ware Decl. Ex. I. Mr. Flynn made similar remarks again during the same month at a speech to the Ahavath Torah Congregation in Stoughton, Massachusetts, saying, “This is Islamism, it is a vicious cancer inside the body of 1.7 billion people on this planet and it has to be excised.” Ware Decl. Ex. J.

At a campaign rally in Canton, Ohio, on September 14, 2016, Mr. Trump, while discussing Syrian refugees, claimed that, “We don’t know where these people come from. We don’t know if they have love or hate in their heart, and there’s no way to tell.” Ware Decl. Ex. K.

On January 27, 2017, Mr. Trump said that Christian refugees would be given priority in the refugee program. Ware Decl. Ex. L. On February 3, 2017, Mr. Trump posted on Twitter “We must keep ‘evil’ out of our country.” Ware Decl. Ex. M.

B. The Executive Order Disproportionately Injures Muslims, Including Longtime U.S. Residents

In the First Amended Complaint, the States have identified a number of concrete harms that residents of the States have suffered and are suffering as a result of the Executive Order. First Amended Complaint, State of Washington v. Trump et al., No. 2:17-cv-00141 (JLR) (W.D. Wash. Feb. 1, 2017), ECF No. 18. As

American Muslim professionals, Amici have suffered and are suffering these injuries to a disproportionate degree.⁵ Moreover, Amici are suffering an additional injury as a result of the stigma that has attached to Muslims, unfairly and irrationally, as a result of the Executive Order and the public pronouncements of the President and his advisors in connection therewith.

Contrary to the misperception spread by the “Muslim ban,” the presence of Muslims in America is not a threat to American security. Muslims have been a part of America since its founding, when 10–15% of slaves forcibly brought to America were Muslim. Muslims have expended their blood, sweat, and tears building and defending the United States. In fact, today, more than 5,000 Muslims serve in the U.S. military, and many have given their lives in recent wars in defense of US interests. They also provide necessary healthcare, educate our nation’s children, create jobs, and contribute innovation that is an essential driver of our nation’s economic growth. Today, Muslims represent 1% of the US population. *See generally* Kambiz Ghanea Bassiri, *A History of Islam in America: From the New World to the New World Order* (Cambridge 2010).

The intentional and false stigmatization of Muslims as potential terrorists — even if supposedly limited to Muslims from the 7 majority-Muslim countries expressly included in the Executive Order — will, if not restrained, continue to irreparably harm Amici.

⁵ At the appropriate time, Amici intend to seek leave of the District Court to submit supporting evidence.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court deny the Government's Motion.

Respectfully submitted,

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CERTIFICATION UNDER FEDERAL & LOCAL APPELLATE RULES

I certify that the text of this brief, as electronically filed, is identical to the paper copies submitted to the Clerk of the Court.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B). Excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 4,552 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using the Century font in 12 point.

I also certify that the electronically filed PDF version of this brief has been analyzed by the web-based virus scan service Virus Total and that no viruses were detected.

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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.

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