APPEAL NO. 17-15589

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF HAWAI`I AND ISMAIL ELSHIKH,
Plaintiffs-Appellees.

v.

DONALD J. TRUMP, in his official capacity
as President of the United States; et al.,
Defendants-Appellants,

On Appeal from the United States District Court
for the District of Hawai`i
Case No. 17-00050 DKW-KSC
District Judge Derrick K. Watson

BRIEF OF AMICUS CURIAE ALLIANCE DEFENDING FREEDOM IN SUPPORT OF APPELLANTS AND REVERSAL

Kevin H. Theriot
Jonathan A. Scruggs
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jscruggs@ADFlegal.org

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 amicus curiae Alliance Defending Freedom states that it has no parent corporation and issues no stock.

Dated April 21, 2017

/s/Jonathan A. Scruggs
Jonathan A. Scruggs

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Alliance Defending Freedom ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect First Amendment freedoms. Since its founding in 1994, ADF has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, this Court, and in hundreds of cases before the federal and state courts across the country, as well as in tribunals around the world.

Among the cases ADF has litigated, many involve issues under the Establishment Clause. ADF commonly represents individuals, churches, religious organizations, and other entities affected by Establishment Clause jurisprudence. ADF's clients will therefore be impacted by any modification of Establishment Clause principles. For this reason, ADF has an interest in promoting accurate establishment clause jurisprudence so that ADF's clients can rely on this precedent to protect their religious freedoms and acknowledge their religious heritage in the future. To protect these interests, ADF submits this brief of amicus curiae to highlight some concerning implications of the district court's Establishment Clause analysis.

Pursuant to FED. R. APP. P. 29(a)(2), ADF has the authority to file this brief because counsel for ADF contacted counsel for the parties and the parties consent to the filing of this brief.

FED. R. APP. P. 29(a)(4)(E) CERTIFICATION

No party or party's counsel participated in, or provided financial support for, the preparation and filing of this brief, nor has any entity other than Amicus and its counsel participated in or provided financial support for the brief.

INTRODUCTION

The court below incorrectly applied the *Lemon* test's purpose prong to enjoin an executive order that is religiously-neutral on its face. *See Hawaii v. Trump*, (*Hawaii I*), No. 17-00050 DKW-KSC, 2017 WL 1011673, at *12 (D. Haw. Mar. 15, 2017) ("It is undisputed that [Executive Order No. 13,780] does not facially discriminate for or against any particular religion, or for or against religion versus non-religion.").[1] Although courts cannot "turn a blind eye to the context in which [an executive order] arose" under the test established in *Lemon v. Kurtzman*, the *Lemon* test does not give courts a blank check to decipher purpose from any external source obtainable through a Google search. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000). Presidential interviews and improvident tweets on the campaign trail do not and should not matter as much as formal acts and statements of government officials. To discern purpose from the former increases the risk that courts will manufacture a non-existent purpose or will proof-text to invalidate a constitutional law, thereby depriving policymakers of the deference due them. *See Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (Where the government "expresses a

[1] The district court issued a temporary restraining order on March 15, 2017 and then converted that restraining order into a preliminary injunction on March 29, 2017. *See Hawaii v. Trump*, (*Hawaii II*) No. 17-00050 DKW-KSC, 2017 WL 1167383, at *5 (D. Haw. Mar. 29, 2017). In its subsequent March 29 ruling, the district court incorporated its prior analysis explaining why the court found the challenged executive order to have an impermissible purpose under the Establishment Clause. *Id*.

plausible secular purpose" for a law, "courts should generally defer to that stated intent" so long as it is not a sham.).

In this respect, the district court's Establishment Clause analysis went astray because of its overbroad scope and hyper-selectivity. While looking beyond a statute or other official act to discern purpose is not without its critics, even courts that discern purpose this way do not treat all evidence equally. Official acts and contemporaneous statements should count for something and should definitely count more than campaign tweets. *See McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 845 (2005) ("Scrutinizing purpose makes practical sense in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact set forth in a *statute's text, legislative history, and implementation or comparable official act*.") (emphasis).

By favoring unreliable evidence over reliable evidence and by combing through a government actor's tweets, media interviews, speeches, and even statements made while he or she was not an official government actor and on the campaign trail, the district court stretched the *Lemon* test too far. This Court should therefore reject the district court's Establishment Clause analysis and should instead defer more substantially to formal government acts and statements in the Establishment Clause context.

FACTUAL SUMMARY

ADF relies on the factual recitation presented in Appellants' brief.

ARGUMENT

I. The district court's Establishment Clause analysis incorrectly relied on unreliable media statements and did not defer to formal government acts and statements to discern government purpose.

The purpose prong of the *Lemon* test requires that a challenged state action have a secular purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In *Lemon*, the U.S. Supreme Court was careful to avoid requiring state action to be wholly secular to satisfy the Establishment Clause. *See id.* In fact, the U.S. Supreme Court later explained that a "governmental action [will be invalidated] on the ground that a secular purpose was lacking…only when [this Court] has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (emphasis added).

While the Court has invalidated government action with the predominant purpose of advancing religion, *see McCreary*, 545 U.S. at 860, the Court has never required government action to be void of any religious purpose. For example, in *Lynch v. Donnelly*, the Court upheld the constitutionality of a public display on government property that included a crèche. 465 U.S. at 681. Even though the crèche was indisputably religious in nature, celebrating Christmas and its historical origin was a "legitimate secular purpose" underlying the government action. *Id*. Thus, the

existence of religious purpose is not a constitutional problem. The degree of religious purpose is determinative.

Pronouncing the rule, however, has proven much easier than applying it. Because divining the purpose of official action is challenging, courts ordinarily defer to the government's "articulation of a secular purpose" so long as it is "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). Courts may not "psychoanaly[ze]…a drafter's heart of hearts" to determine whether government action has an improper purpose. *McCreary*, 545 U.S. at 862. While the Court has permitted inquiry into the "statute's text, legislative history, and implementation or comparable *official* act," *id.* at 845 (emphasis added), the Court has never approved the method used by the district court — inspecting social media content like tweets and Facebook posts or traditional media interviews, speeches, and statements made *before* relevant government decision makers take their oaths of public office.

This procedure is both novel and dangerous. Courts should only review sources that reliably and meaningfully evince official purpose. "[A] statute's text, legislative [or executive] history, and implementation" are paradigmatic examples of such reliable evidence. *McCreary*, 545 U.S. at 845. As this Court has explained in the context of legislation, "when a statute is at issue, we must defer to Congress's stated reasons if a 'plausible secular purpose…may be discerned from *the face of the statute*.'" *Trunk v. City of San Diego*, 629 F.3d 1099, 1108 (9th Cir. 2011) (emphasis

added and citation omitted). This Court has therefore already articulated its preference for formal government acts (like a statute) when evaluating purpose.

Other courts agree and have consistently given greater weight to formal acts over officials' off-the-cuff remarks. In *Lynch v. Donnelly*, for example, the Supreme Court upheld that crèche on government property even though it was part of the mayor's "crusade to keep Christ in Christmas…." 465 U.S. at 726 (Blackmun, J., dissenting) (quotation marks omitted). And in *Clayton v. Place*, the Eighth Circuit upheld a school board's decision to ban a school dance even though school employees indicated their religious motives for the ban. 884 F.2d 376 (8th Cir. 1989).

Indeed, in *Clayton*, one board member "stated that he opposed changing the rule because his church preached that it was wrong and immoral to dance," while another said that "he had voted to permit dances in the past but caught so much 'flak' from the ministers that he would vote against it this time," and still another "declared that his church was opposed to dancing." 889 F.2d 192, 193-94 (8th Cir. 1989) (dissent from denial of rehearing en banc). When asked about the separation of church and state, the school board president responded during the meeting, "you'd better hope there's never separation of God and school." *Id*.

Despite these blatant statements indicating the board members' religious motives, the Eighth Circuit found that there was a secular purpose for the no dancing

rule precisely because the rule — the formal government act — was neutral on its face. *See Clayton*, 884 F.2d at 380 ("We also find no support for the proposition that a rule, which otherwise conforms with *Lemon*, becomes unconstitutional due only to its harmony with the religious preferences of constituents or with the personal preferences of the officials taking action."). As *Clayton* shows, courts do not allow individuals' statements to overshadow formal government acts.

A 140 character tweet, in contrast, does not come close to a formal government act. Social media posts, traditional media interviews, speeches, and unofficial statements come after less thoughtfulness and less vetting, less review and less deliberation. As such, they bear less indicia of relevant official action (or any official action at all). Courts should give greater weight to acts that government officials thoroughly think about and review.

Moreover, such social media posts and informal statements bear even less relevance when made *before* a government decisionmaker takes the oath of public office. Candidates running for office have different motives, responsibilities, and powers than Presidents. The law does not and should not ignore those differences. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 694 (1997) (distinguishing presidential immunity arising out of official acts versus immunity for unofficial conduct).

But the district court broke with this principle. Take the district court's reliance on President Donald Trump's campaign speeches and statements. *See, e.g.*,

Hawaii I, 2017 WL 1011673, at *13-*14 & n.14 (citing traditional media interviews and campaign press releases, speeches, and debates). Because President Trump made those speeches and statements before he took the oath of office, they do not offer a reliable basis for determining the government's official purpose, especially when contrasted with formal acts or even contemporaneous statements made by a sitting President. For one thing, formal acts and contemporaneous statements are more reliable because they are "temporally connected to the challenged activity." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 560 (10th Cir. 1997). Someone's purpose can change after all, particularly once a new administration is in place and they are surrounded by the vast government apparatus.

For another thing, formal acts and contemporaneous statements better reflect a new set of conditions, motives, responsibilities, and powers of individual government actors. Candidate Trump had a duty to no one. He was simply trying to win an election. President Trump has a duty to uphold the Constitution. He is trying to faithfully execute the Office of President of the United States. While some may doubt his motives and efforts, deference to the government means giving the benefit of the doubt to individuals *once they take office*. The change in status carries both practical and legal significance.

Perhaps most importantly, delving into a candidate's or official's Twitter feed to discern government purpose has dangerous implications going forward. Courts

may be tempted to invalidate laws they dislike simply by combing through a government actor's tweets, Facebook posts, speeches, and other similar statements to find evidence supporting a superimposed purpose. If courts can do this, then almost any Presidential act may become suspect. Every statement, every campaign speech, every press conference would become fair game for psycho-analysis.

In late 2014, for example, President Obama took executive action to reform immigration policy.[2] As part of that executive action, President Obama expanded the Deferred Action for Childhood Arrivals ("DACA") program, which allowed eligible undocumented persons to remain in the United States without fear of removal so long as the program continued. In the wake of this executive action, President Obama delivered several speeches supporting his unilateral immigration reforms, one of which was addressed to a group of people assembled for a "town hall" event in Nashville, Tennessee on December 9, 2014.

At that event, President Obama appealed to the Bible in support of his executive immigration actions. First, he stated: "It's worth considering the Good Book when you're thinking about immigration."[3] Alluding to the birth of Jesus,

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[2] *FACT SHEET: Immigration Accountability Executive Action*, The White House, Office of the Press Secretary (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action.

[3] *Remarks by the President in Immigration Town Hall – Nashville, Tennessee*, The White House, Office of the Press Secretary (Dec. 9, 2014, 2:26 PM),

President Obama continued: "This Christmas season there's a whole story about a young, soon-to-be-mother and her husband of modest means looking for a place to house themselves for the night, and there's no room at the inn."[4] Then, explaining his motivation for executive action on immigration, he tied it all together: "And as I said the day that I announced these executive actions, we were once strangers too. And part of what my faith teaches me is to look upon the stranger as part of myself. And during this Christmas season, that's a good place to start."[5]

President Obama's remarks in Nashville corresponded with a nationally televised speech he made only a few weeks earlier introducing his executive actions. Addressing a prime-time audience on November 20, 2014, President Obama appealed: "Scripture tells us that we shall not oppress a stranger, for we know the heart of a stranger — we were strangers once too."[6]

Expressly motivated by his religious faith, President Obama took religious-neutral executive action to change immigration policy. Specifically, President Obama purposed to embrace the stranger (i.e. undocumented children), which was

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https://obamawhitehouse.archives.gov/the-press-office/2014/12/09/remarks-president-immigration-town-hall-nashville-tennessee.

[4] *Id*.

[5] *Id*.

[6] *Remarks by the President in Address to the Nation on Immigration*, The White House, Office of the Press Secretary (Nov. 20, 2014, 8:01 PM) https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

an overtly Christian ideal. Thus, in accord with his religious faith, President Obama took official action to expand DACA. Yet no one believed President Obama violated the Establishment Clause when he took that action.

But under the district court's analysis in this case, religious-neutral laws like President Obama's executive action on immigration could be invalidated. Partisans skilled in collaging statements made by government decisionmakers in media interviews, speeches, tweets, and Facebook posts could manufacture religious animus or partiality that would make the most neutral law susceptible to scuttling. If the district court were correct, "the passing comments of every government official" — even when made as a private citizen and before taking an oath of office — would become fodder for an Establishment Clause claim. *McCreary*, 545 U.S. at 908 (Scalia, J., dissenting). Campaign rhetoric, speeches made to religious audiences, and holiday tweets must now be bowdlerized for fear of one day having them extracted to suggest the speaker wished to establish a religion through his or her sponsorship of a religious-neutral law. Expanding the scope of official purpose review "to [include] such minutiae trivializes the [Establishment] Clause's protection[.]" *Id.* (Scalia, J., dissenting).

The district court's analysis realizes some of these fears. For the district court succumbed to the temptation of selectively plucking statements outside of their

context to support its holding. For example, the district court relied on the following allegation to show President Trump's religious animus was not secret:

> Rudolph Giuliani explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

Hawaii I, 2017 WL 1011673, at *13. But within the same interview, Mr. Giuliani explained further that, in response to President Trump's request, he assembled a "whole group of other very expert lawyers on this," including former U.S. Attorney General Michael Mukasey, Rep. Mike McCaul (R-Tex.), and Rep. Peter T. King (R-N.Y.).[7] Mr. Giuliani continued,

> And what we did was, we focused on, instead of religion, danger — the areas of the world that create danger for us…Which is a *factual* basis, not a religious basis. Perfectly legal, perfectly sensible. And that's what the ban is based on. It's not based on religion. It's based on places where there are substantial evidence that people are sending terrorists into our country.

Id. The "reasonable observer…must be deemed aware of the history and context" of the relevant circumstances surrounding the enactment of a law. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment). He or she would be familiar not only

[7] Amy B. Wang, *Trump asked for a 'Muslim ban,' Giuliani says — and ordered a commission to do it 'legally'*, Washington Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.c80be86c7de4.

with the excerpt used by the district court to support its holding, but also with the full interview where Mr. Giuliani expressly disclaims the religious basis for the law and explains the measures taken to ensure the law would comply with the Constitution. The purpose for President Trump's Executive Order No. 13,780 begins to appear far less sinister when reviewed in light of statements ignored by the district court.

One more example illustrates this point. In support of its holding, the district court also relied on the following allegation:

> In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

Hawaii I, 2017 WL 1011673, at *5. But a report from the Refugee Processing Center revealed only a fraction of the 10,801 refugees accepted into the United States from Syria during fiscal year 2016 were Christians. In fact, although the government has estimated Christians compose roughly ten percent of the Syrian population, only 56

Christians were admitted under the refugee program (0.5% of total Syrian refugee admissions).[8]

So once again, if the district court considered other evidence — evidence the reasonable observer is assumed to know — the district court may have reached a different conclusion. This point highlights the dangers in letting a court rummage through an official's media interviews while discounting formal government acts to decipher the government's purpose.

While ADF takes no position on the merits of President Trump's immigration policy, it fears the implications of embracing the district court's methodology to discern purpose under the Establishment Clause. That method, if approved, creates too great a risk that courts will invalidate disfavored, but constitutional laws on a gerrymandered record. Consistency and coherence in Establishment Clause jurisprudence demands that courts defer to the government's stated purpose as discerned from relevant and reliable sources. For constitutional matters, formal government statutes and orders carry more weight than hashtags.

[8] Adam Shaw, *'Gross injustice': Of 10,000 Syrian refugees to the US, 56 are Christian*, FoxNews.com (Sept. 2, 2016), http://www.foxnews.com/politics/2016/09/02/gross-injustice-10000-syrian-refugees-to-us-56-are-christian.html.

II. The district court's Establishment Clause analysis incorrectly attached an unconstitutional taint to individual government decisionmakers.

Courts should not prevent government actors from lawmaking in a field after they take an initial misstep. Or to use the district court's terminology, an improper purpose should not forever taint and invalidate government action on a topic. *See Aziz v. Trump*, No. 1:17-cv-116 (LMB/TCB), 2017 WL 580855, at *9 (E.D. Va. Feb. 13, 2017) (finding that Executive Order No. 13,769, the predecessor to Executive Order No. 13,780, violated the Establishment Clause under the purpose prong). What is more, unconstitutional taint should not attach to *individual government actors*, making every religious-neutral law susceptible to invalidation because of its connection to a particular government actor's stroke of the pen, vote on the record, or public support.

Here, the district court invalidated a religious-neutral executive order because of *who* signed it, not because of *what* the law prescribes. The decision in *Aziz*, on which the district court's decision in this case is based in large part, admitted as much. It reads, "[a]bsent the direct evidence of animus presented by [Virginia], singling out these countries for additional scrutiny might not raise Establishment Clause concerns…." *Id.* In other words, if President Obama had executed the same order, it would have been constitutional. But the constitutionality of policy decisions affecting substantial state interests should not turn on turgid campaign rhetoric or improvident tweets.

To illustrate, suppose a Catholic businesswoman heard President Obama on the campaign trail in 2008 disparage those who "cling to … religion."[9] Later, after President Obama signed the Affordable Care Act ("ACA") into law and authorized what would become known as the contraceptive mandate, that businesswoman felt stigmatized and singled out by the mandate because it contradicted her Catholic belief against the use of contraceptives. Contemporaneous with the unveiling of the contraceptive mandate and exacerbating the businesswoman's concern, President Obama's campaign published a post on Tumblr mocking business owners who object to the mandate because of "personal beliefs."[10] Based on these campaign statements and Tumblr posts ostensibly singling out Catholics who oppose contraceptive use, the businesswoman filed a lawsuit claiming President Obama's action violated the Establishment Clause.

In response, the government would claim (1) that the ACA and contraceptive mandate were religiously-neutral and thus did not violate the Establishment Clause

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[9] Mayhill Fowler, *Obama: No Surprise That Hard-Pressed Pennsylvanians Turn Bitter*, Huffington Post (Nov. 17, 2008, updated May 25, 2011), http://www.huffingtonpost.com/mayhill-fowler/obama-no-surprise-that-ha_b_96188.html.

[10] *See* Becket Adams, *Did Obama Camp Flat-Out Lie About the Contraception Mandate by Posting This 'Permission Slip?'*, The Blaze (Mar. 2, 2012, 9:01 AM) (depicting a fake "permission slip" posted on Tumblr by President Obama's campaign team), http://www.theblaze.com/news/2012/03/02/did-obama-camp-flat-out-lie-about-the-contraception-mandate-by-posting-this-permission-slip/.

and (2) that the law did not affect most Christians and thus could not be deemed discriminatory.

But under the district court's analysis, such arguments would fail. First, the fact that the law is religious-neutral does not matter. *See Hawaii I*, 2017 WL 1011673, at *12. Second, that the government did not discriminate against all Christians does not save the ACA and contraceptive mandate from invalidation on this record because "the notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed." *Id*. Indeed, the "illogic of [these] contentions is palpable." *Id.* Although President Obama may find some comfort in knowing that the court did not decide his "past actions forever taint any effort on [his] part to deal with [health care]," *id.* at *15, for a duration of time only known to the court, any attempt by *President Obama* to regulate health care would be tainted by his past "religious animus" and thus be rendered unconstitutional under the Establishment Clause. This cannot be the law.

At bottom, applying the principle of "unconstitutional taint" to individual decisionmakers inflates the significance of the lawmaker, rather than the law. Not only does this application of "unconstitutional taint" look past the text of the challenged law, it also looks past the purpose of the current law to the perceived purpose of a preceding law or worse — the "veiled psyche" and "secret motive[s]" of government decisionmakers. *McCreary*, 545 U.S. at 863. This practice hardly

affords lawmakers the deference they are owed and is unworkable to boot. *See Wallace*, 472 U.S. at 74-75 (1985) (Where the government "expresses a plausible secular purpose" for a law, "courts should generally defer to that stated intent" so long as it is not a sham.).

CONCLUSION

The district court invalidated a religiously neutral law based in part on statements that are neither found in official records nor made while officials held public office. That conclusion is contrary to precedent and principle, stretching the purpose prong beyond its moorings. The district court also applied an unconstitutional taint to a person and not an action. That too breaks with Establishment Clause jurisprudence and potentially hamstrings proper government policies. On these two scores, the district court's Establishment Clause analysis is not workable and will inevitably lead to unpredictable and incorrect results. It will plunge us deeper into "Establishment Clause purgatory" than we were before. *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005). For these reasons, no matter what this Court ultimately decides about President Trump's executive order, this Court should reject the Establishment Clause analysis adopted below.

Respectfully submitted this the 21st day of April, 2017.

By: s/Jonathan A. Scruggs

Jonathan A. Scruggs

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4141 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Times New Roman.

Dated: April 21, 2017

s/Jonathan A. Scruggs

Jonathan A. Scruggs

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/Jonathan A. Scruggs
Jonathan A. Scruggs

Attorney for Amicus Curiae