No. 11-57187

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COURTHOUSE NEWS SERVICE,

Plaintiff-Appellant,

v.

MICHAEL PLANT,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California, Case No. 10-cv-08083-R The Honorable Manuel Real

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFF-APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), *amicus* states that The Reporters Committee for Freedom of the Press is an unincorporated association of reporters and editors with no parent corporation and no stock.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae The Reporters Committee for Freedom of the Press ("The Reporters Committee" or "*amicus*") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970. *Amicus* has a strong interest in ensuring the continued availability of federal courts as a forum for challenging state court policies that systemically restrict the news media's right of access to state judicial proceedings and records. *Amicus* requests that this Court find that the abstention doctrine enunciated in *O'Shea v. Littleton*, 414 U.S. 488 (1974) — which addresses the concern that federal courts not unduly interfere with pending and future state court proceedings — should not be applied to federal actions for injunctive relief directed at state courts' denial of media access to a court system. Accordingly, the Court should reverse the lower court's dismissal of Plaintiff-Appellant's complaint.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellant and Defendant-Appellee consented to the filing of this brief *amicus curiae*.

FED. R. APP. P. 29(c)(5) STATEMENT

Amicus states that:

(A) no party's counsel authored this brief in whole or in part;

(B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) no person — other than the *amicus curiae*, its members or its counsel — contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The implications of applying the abstention doctrine enunciated in *O'Shea v. Littleton*, 414 U.S. 488 (1974) — which addresses the concern that federal courts not unduly interfere with pending and future state court proceedings — to federal court actions for injunctive relief directed at state courts' systemic denial of media access to court proceedings and records are deeply troubling. Under the District Court's interpretation of the previously seldom-used doctrine, federal courts would be unable to adjudicate the media's First Amendment rights in challenges to various state court policies that infringe the public's access rights and severely curtail journalists' ability to do their jobs. Numerous federal courts, including the U.S. Supreme Court, have declined to abstain in these cases after recognizing the weight of the constitutional right involved. Indeed, these courts' reluctance to abstain ensures that the news media's constitutional right of access is safeguarded through the availability of federal courts as a forum for the adjudication of these rights.

The right of public access to newly filed civil actions is arguably not as well-established as the public's right of access to criminal proceedings, but many federal and state courts have held that the public and media have a constitutional right of access to civil proceedings — a right that is infringed by procedures that impose an undue delay. A lack of prompt access to judicial records also

significantly burdens the news media's right to gather and disseminate information about matters of public interest and concern in a manner that best benefits the public.

ARGUMENT

I. Federal courts have not abstained from adjudicating the media's First Amendment rights in challenges to states' systemic court access policies, recognizing that such review is necessary to safeguard constitutional rights.

Complaints against a state court system's access policies primarily raise a question of First Amendment jurisprudence. *Courthouse News Serv. v. Jackson*, No. H-09-1844, 2009 WL 2163609, at *2 (S.D. Tex. July 20, 2009). For that reason, numerous federal courts have confronted the constitutional issue in these cases, providing members of the news media a forum in which to adjudicate its right of access to judicial proceedings and records. In fact, the U.S. Supreme Court's decision to grant review of a state court procedure that denied access to court proceedings demonstrates both federal courts' willingness to weigh in on these challenges, as well as the importance of the ability to seek relief from such orders in the federal courts.

Under the District Court's interpretation of *O'Shea*, federal courts would not have been able to grant injunctive relief in any of a number of cases[1] that

[1] Pursuant to the instruction that *amici* briefs should not repeat arguments or factual statements made by the parties, *amicus* does not repeat the examples listed

challenged state court orders, rules or policies that infringed the public access right and severely curtailed the news media's ability to fulfill its constitutionally protected role of gathering and disseminating information about matters of public interest and concern. *The Boston Globe*, for example, would have been unable to challenge the constitutionality of a state statute that authorized the sealing of criminal court records in cases that did not result in a conviction. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 499 (1st Cir. 1989). In that case, the reporters sought access to records in two completed criminal cases: one involving a Boston police officer in which allegations were made that the trial judge initially found the officer guilty of possession of cocaine but reversed his finding after learning that a guilty verdict would cost the officer his job, and the other involving a series of prosecutions initiated in Suffolk County in 1986 alleging sexual offenses against juveniles. *Id.* The newspaper brought an action in federal district court, asserting that the commonwealth's statutory scheme impermissibly burdened its constitutional right of access — a right that was particularly strong because "the subject of press attention is the performance of the judicial system itself," according to the district court's order finding that the records sought implicated First Amendment concerns. *Id.* at 501.

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by Plaintiff-Appellant in Part III.C (pages 46–48) of its opening brief, docket No. 7, but hereby incorporates by reference that discussion. 9th Cir. R. 29-1 Circuit Advisory Committee Note.

In ruling that a blanket prohibition on the disclosure of the records at issue implicated the First Amendment, the U.S. Court of Appeals for the First Circuit noted that the media and public's interests in the openness of criminal trials "seem clearly implicated in this age of investigative reporting and of continuing public concern over the integrity of government and its officials." *Id.* at 503. The court concluded that the portion of the statute authorizing the sealing of records in which a defendant had been found not guilty by a court or jury and those in which the court made a finding of no probable cause was unconstitutional because the statute was not the least restrictive method of promoting the commonwealth's interest in preventing the public disclosure of records that defendants did not want released. *Id.* at 507.[2] Specifically, the statute's requirement that the public initiate an administrative or legal action to obtain the records of closed cases "delays access to news, and delay burdens the First Amendment … far greater, too great, we believe, to survive First Amendment scrutiny. . . . Moreover, to the extent that the press must obtain counsel to argue for the release of records, the statute imposes an economic burden on the public." *Id.*; *see also Johnson Newspaper Corp. v. Morton*, 862 F.2d 25, 30 (2d Cir. 1988) (reversing the district court's finding that a

[2] The court found that the portion of the statute authorizing the sealing of records in cases in which a grand jury returned a "no bill" against a defendant survived constitutional scrutiny because there is no First Amendment right of public access to such proceedings and records. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 509 (1st Cir. 1989).

state court judge's closure of a pretrial suppression hearing violated the First Amendment right of access to criminal proceedings not on abstention but mootness grounds where a transcript of the suppression hearing became available to the media); *Billings Gazette v. Justice Court*, 771 F. Supp. 1062, 1064 (D. Mont. 1987) (finding a Montana statute that required closure of a preliminary examination in a criminal prosecution upon request by the defendant unconstitutional under *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)).

Open court advocates and members of the news media are currently involved in a case that, like *Globe Newspaper Co.*, demonstrates the serious threat to public awareness of significant matters of interest and concern implicated by the District Court's holding in this case. The Delaware Coalition for Open Government brought suit in federal court challenging as facially unconstitutional state Chancery Court rules that allow blanket confidentiality in arbitration proceedings and records, including court-supervised settlement agreements. *Delaware Coalition for Open Government, Inc. v. The Delaware Court of Chancery*, No. 1:11-cv-01015-MAM (D. Del. filed Oct. 25, 2011).[3] Were the

[3] *Amicus* filed a brief *amici curiae* on behalf of itself and six news organizations. Brief for The Reporters Committee for Freedom of the Press *et al.* as *Amici Curiae* Supporting Plaintiff, *Delaware Coalition for Open Government, Inc. v. The Delaware Court of Chancery*, No. 1:11-cv-01015-MAM (D. Del. filed Oct. 25, 2011).

district court to apply the *O'Shea* doctrine to this action,[4] it would not be able to grant injunctive relief in a case that raises serious concerns about the public's ability to participate in and serve as a check upon the judicial process that oversees private agreements in a court that describes itself as "widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted." Delaware Court of Chancery, http://courts.delaware.gov/chancery/ (last visited June 5, 2012).

This inability to challenge confidential settlement agreements, which often reveal serious questions about health, safety and other important issues that affect the public, denies consumers important information that could alert them to potential dangers posed by products and services they use. It also undermines the public's interest in monitoring the conduct of courts that oversee, approve or enforce these private settlement agreements. Indeed, secret settlement agreements prevent health and safety issues from becoming public, thereby masking dangers that the public, had it known of their existence, could have more effectively guarded against. As just one example, U.S. Department of Transportation officials said the sealing of documents in settled lawsuits related to rollover deaths in Ford

[4] It is important to note that the case has been fully briefed, and oral arguments held, and neither party nor the judge has made any reference to abstention.

Explorers equipped with Firestone tires that failed was one reason they did not identify the pattern of scores of such deaths. Matthew L. Wald & Keith Bradsher, *Judge Tells Firestone to Release Technical Data on Tires*, N.Y. Times, Sept. 28, 2000, at C2, *available at* 2000 WLNR 3207540.[5] The tires were linked to more than 270 deaths nationwide. Keith Bradsher, *S.U.V. Tire Defects Were Known in '96 but Not Reported*, N.Y. Times, June 24, 2001, at A11, *available at* 2001 WLNR 3356280. However, members of the public and media would have no means to challenge the blanket confidentiality and thereby exercise their right to monitor and evaluate a judicial process and be informed of significant risks to public health and safety if the federal court overseeing the plaintiff's challenge to the Chancery Court's policy applied the *O'Shea* doctrine.

Perhaps the strongest example of federal courts' reluctance to abstain from adjudicating constitutional rights in challenges to states' systemic court access policies is the U.S. Supreme Court's ruling in *Presley v. Georgia*, 130 S. Ct. 721 (2010). *Amicus* recognizes that *Presley* is highly distinguishable from this case and thus not controlling precedent.[6] However, it is an instructive allegory of the

[5] To facilitate access to secondary sources, "WLNR," or Westlaw NewsRoom, citations are provided whenever possible.

[6] *Presley* reiterates the constitutional right under the Sixth Amendment's public trial guarantee. It also involves a criminal proceeding to which the high Court had held more than 25 years earlier that a constitutional right of public access attaches and mandates certain procedures state courts must follow before restricting that

interests at stake when court procedures deny the public its constitutional right of access to judicial proceedings.

In *Presley*, a Georgia trial court, citing a lack of space in the courtroom gallery, excluded members of the public and the criminal defendant's family from *voir dire* proceedings. *Id.* at 722. After his conviction, Presley moved for a new trial, claiming that the exclusion violated his Sixth and Fourteenth Amendment rights to a public trial and presenting evidence showing that adequate room would have been available to the public had the court reconfigured seating in the courtroom. *Id.* The court denied the motion, noting that "[i]t's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation." *Id.* The intermediate appellate court agreed, finding "[t]here was no abuse of discretion here, when the trial court explained the need to exclude spectators at the *voir dire* stage of the proceedings and when members of the public were invited to return afterward." *Id.* at 722–23. The Supreme Court of Georgia, with two justices dissenting, also agreed — an "affirmance [that] contravened this Court's clear precedents," the U.S. Supreme Court later stated. *Id.* at 722. Noting that "the United States Supreme Court [has]

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right. Finally, the appellant in *Presley* exhausted all available remedies for review in the state court system before seeking federal review of his case. *Presley v. Georgia*, 130 S. Ct. 721, 722–23 (2010).

not provide[d] clear guidance regarding whether a court must, sua sponte, advance its own alternatives to [closure],” the Georgia high court ruled that “Presley was obliged to present the court with any alternatives that he wished the court to consider.” *Id.* at 723. In the absence of any alternatives offered, “there is no abuse of discretion in the court’s failure to sua sponte advance its own alternatives,” the court concluded. *Id.*

After a brief discussion of its well-established precedent recognizing the right to a public trial under both the First and Sixth Amendments, the Supreme Court stated, “[t]here could be no explanation for barring the accused from raising a constitutional right that is unmistakably for his or her benefit.” *Id.* at 724. As for the Georgia Supreme Court’s conclusion that the high Court had not provided any guidance about the need to consider alternatives to closure absent suggestions offered by the party opposing closure, the Court noted that the Georgia Supreme Court arrived at its conclusion

> despite our explicit statements to the contrary[.] … The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court’s precedents but also from the premise that [t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system. The public has a right to be present whether or not any party has asserted the right.

Id. at 724–25(citation and internal quotation marks omitted).

In observing that nothing in the record indicated that the trial court could not have accommodated the public at Presley's trial had it chosen to do so, the Court reminded trial courts that they "are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 725. That is, where a constitutional right of public access is implicated, concerns beyond a court's interest in managing its cases or docket flow as it sees fit must inform any decision that restricts this right; *see also Courthouse News Serv.*, 2009 WL 2163609 at *5 (order granting preliminary injunction) (finding, in a case with similar facts to this one, that the 24- to 72-hour delay in providing public access to newly filed civil court records, a procedure defendants said was necessary to achieve their "administrative goal of getting online and not in line" was not a reasonable limitation on access).

Presley strongly demonstrates that even in those cases where relief from state court procedures that deny access to a court system is sought through the state courts, relief is not always available. The problem is even more acute where the law is less explicit and produces an amalgam of different standards governing the inquiry at the state and federal levels. As a result, "[d]ifferent courts have almost arbitrarily relied upon different bodies of law to resolve common issues of access, often arriving at different results." Eugene Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L. Rev.

237, 270 (1995). For that very reason, the news media and others asserting their right of public access to judicial proceedings and records must have an avenue by which federal guidance is available to adjudicate these constitutional rights in a manner consistent with well-established access jurisprudence.

II. A court policy that delays public disclosure of newly filed civil actions by five days or longer violates the First Amendment-based right of public access, as well as the news media's constitutional right to gather and disseminate news.

The right of public access to newly filed civil actions is arguably not as well-established as the public's right of access to criminal proceedings, but many federal and state courts have held that the public and media have a constitutional right of access to civil proceedings — a right that is infringed by procedures that impose an undue delay in its immediacy. A lack of prompt access to judicial records also significantly burdens the news media's right to gather and disseminate information about matters of public interest and concern, and severely curtails journalists' ability to do so in a manner that best benefits the public.

Although the Supreme Court has not directly addressed whether the public and media have a constitutional right of access to civil proceedings, a plurality found that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality opinion). And many federal and state courts subsequently have recognized a right of public access to proceedings and documents in civil cases,

though they have differed on the origin and scope of the right. *See, e.g.*, *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) ("we agree … that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers*"); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984) ("the First Amendment does secure a right of access to civil proceedings"); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1984) (ruling that the First Amendment access right extends to contempt proceedings); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (holding that the First Amendment and common law limit judicial discretion to seal documents in civil litigation); *Newman v. Graddick*, 696 F.2d 796, 801–03 (11th Cir. 1983) (finding a constitutional right of access to proceedings and a common-law right of access to documents in a civil case involving prison conditions).

The Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted). As such, federal review of state court policies that infringe the public access right is necessary because state court challenges to the procedures impose unnecessary delays in rulings that often do not resolve the issue correctly under constitutional standards. *See, e.g.*, *Presley*, 130 S. Ct. at 721 (involving a lapse of nearly three years

between the defendant's conviction in state court and the U.S. Supreme Court's ruling). Indeed, courts have found that the "irreparable injury" caused by the loss of the First Amendment right to free speech extends to the constitutional right of access, which "should be immediate and contemporaneous. … The newsworthiness of a particular story is often fleeting. To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (citations omitted), *superseded by rule on other grounds*, *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009); *see also In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (finding that a magistrate judge's closure order "unduly minimizes, if it does not entirely overlook, the value of 'openness' itself, a value which is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure"). Moreover, the First Circuit stated that the "inordinate length of time" that the matter had been pending before Puerto Rico commonwealth authorities was an "extraordinary reason[] … which militate[d] against our restraining federal court action" in a federal court action challenging the constitutionality of a court rule closing all criminal preliminary hearings. *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 320 (1st Cir. 1992).

Prompt access to judicial records is not only constitutionally required by access jurisprudence but also by the First Amendment's free press guarantee. To be sure, delaying review of new civil complaints for such a long period of time that "new" cases are no longer news by the time the court clerk allows members of the media to view them implicates interests well beyond those invoked by a state court's system of managing its cases. Such a delay constitutes an impermissible burden on the media's right to collect and disseminate the news. Perhaps more significantly, though, a lack of prompt access severely curtails journalists' ability to do their job in a manner that best serves the public interest.

A lack of access to court documents — the records on which members of the news media rely daily to responsibly report matters of public interest and concern — inevitably leads to reporting rumors rather than facts. Such information is often highly newsworthy and likely to be reported but not as reliably had official documents been available. The problem is further exacerbated in states that do not extend the absolute litigation privilege to out-of-court statements attorneys make in connection with pending litigation. *Hearst Corp. v. Skeen*, 130 S.W.3d 910, 926 (Tex. Ct. App. 2004) ("Although libelous statements made in connection with a judicial proceeding [by the judges, jurors, counsel, parties, or witnesses in open court] are absolutely privileged and will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made,

re-publication of such statements outside of the judicial context waives the privilege."), *rev'd on other grounds*, 159 S.W.3d 633 (Tex. 2005). In these cases, journalists are unable to rely on attorneys' oral statements or written republications of complaints or the allegations contained therein to fairly and accurately pass on information that affects the public interest. At the opposite end of the spectrum, in jurisdictions that provide lawyers an absolute privilege to communicate outside the courtroom about pending litigation, so long as their statements are fair and accurate reports of judicial documents or proceedings, *see, e.g.*, N.Y. Civ. Rights Law § 74 (McKinney 2012), a lack of access to judicial records incentivizes such extrajudicial statements, leaving courts to later address their impact on the underlying proceedings.

One need only consider cases from the headlines to realize the dangerous effects of such a system of reporting. In March 2006, the "Duke lacrosse rape case" made front-page news nationwide, due in large part to sensational accusations and inflammatory statements made by then-district attorney Michael B. Nifong, who "served up salacious sound bites affirming a certain crime with chilling racial overtones." Rachel Smolkin, *Justice Delayed*, Am. Journalism Rev., Aug.–Sept. 2007, at 18, *available at* 2007 WLNR 26779949. The coverage tended to focus on the conflict between an elite, largely white school and the working-class, racially mixed southern city that surrounded it. *Id.* "University rape

highlights racial divisions in South," proclaimed London's *Sunday Telegraph*, while a *Los Angeles Time* headline stated that "Lax Environment; Duke lacrosse scandal reinforces a growing sense that college sports are out of control, fueled by pampered athletes with a sense of entitlement." *Id.*

By late April, however, news organizations' reporting became more skeptical as questions about the case deepened in light of revelations that DNA tests found no link between the accuser and the athletes, one of the defendants had a solid alibi and a botched lineup included no filler pictures of people unconnected to the case. *Id.* In October, "60 Minutes" journalist Ed Bradley aired a piece that was a scathing indictment not of the athletes but of the prosecution. *Id.* "Over the past six months, '60 Minutes' has examined nearly the entire case file," Bradley said in the Award-winning broadcast. *Id.* "The evidence we've seen reveals disturbing facts about the conduct of the police and the district attorney and raises serious concerns about whether or not a rape even occurred." *Id.* Nifong dropped rape charges in December, the state attorney general officially cleared the athletes the following April, and a disciplinary panel of the North Carolina State Bar disbarred the prosecutor two months later. *Id.*

In the aftermath, journalists asked themselves what the media should learn from its coverage of the case. *Id.* Stuart Taylor, a *National Journal* columnist who was among the first to proclaim a miscarriage of justice and the author of a book

about the case, advised, "Read the damn motions. If you're covering a case, don't just wait for somebody to call a press conference. Read the documents." *Id.* Taylor, who is also a lawyer, warned reporters against buying into attorneys' rhetoric. *Id.* "We should never take a prosecutor's word as fact," nor should journalists disregard defense assertions as necessarily false, he said. *Id.* "Yes, many defense lawyers will say almost anything to get their clients off most of the time, but don't just ignore what they say. Look at what they're telling you. And do they have the evidence to back it up?" *Id.* When those documents are unavailable, however, journalists are deprived of valuable tools they use to fulfill this constitutionally protected watchdog role.

The constitutional right of access to civil proceedings and records, though arguably not as well-established as the right to criminal proceedings, is nonetheless infringed by procedures that unduly delay its immediacy. In such instances, interests well beyond those invoked by a state court's system of managing its cases or docket flow as it sees fit are at stake. Such delays constitute an impermissible burden on the media's right to collect and disseminate the news and severely curtail journalists' ability to do so in a manner that best serves the public interest.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that the Court reverse the lower court's dismissal of Plaintiff-Appellant's complaint.

Dated: June 5, 2012
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[7] *Amicus* thanks Rutgers School of Law – Newark student Raymond Baldino for his valuable contribution to this brief.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing brief *amicus curiae*:

1) Complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,479 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-processing system used to prepare the brief; and

2) 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 it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: June 5, 2012
Arlington, VA

s/ Lucy A. Dalglish

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2012, I electronically filed in searchable Portable Document Format the foregoing brief *amicus curiae* with the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system, thereby affecting service on the following counsel of record, all of whom are registered for electronic filing:

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