No. 12-17558

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD ARIZONA INC., et al.,

Plaintiffs-Appellees,

v.

TOM BETLACH, et al.,

Defendants-Appellants.

On Appeal from the District of Arizona, No. 12-01533
(Hon. Neil V. Wake)

AMICUS CURIAE BRIEF OF 29 ARIZONA SENATORS, REPRESENTATIVES, AND REPRESENTATIVES-ELECT IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT OF ARIZONA

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae Representative Justin Olson (sponsor); Senators Sylvia Allen, Nancy Barto, Andy Biggs, Rich Crandall, Linda Gray, John McComish, Al Melvin, Rick Murphy, Don Shooter, and Steve Yarbrough; Representatives Andy Tobin (Speaker of the House), Brenda Barton, Chester Crandell, Karen Fann, Doris Goodale, David Gowan, Rick Gray, John Kavanagh, Debbie Lesko, Phil Lovas, J.D. Mesnard, Justin Pierce, Terri Proud, Carl Seel, David Stevens, Jim Weiers, and Kimberly Yee; and Representative-Elect Paul Boyer are legislators or legislators-elect who support HB 2800, codified at A.R.S. § 35-196.05 (the Act).

As Legislators who sponsored, voted for, and/or support the Act, *Amici* have a special interest in the outcome of this case. First, *Amici* have an interest in ensuring that a statutorily permissible and constitutional law enacted by the Legislature is upheld and enforced.

Second, *Amici* are interested in ensuring that public funding does not indirectly subsidize abortions, in contravention of established Arizona public policy.

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[1] In accordance with Fed. R. App. P. 29, the parties have consented to the filing of this *amicus* brief. No party's counsel has authored the brief in whole or in part. No party or party's counsel has contributed money intended to fund preparing or submitting this brief. No person other than *Amici*, their members, or their counsel has contributed money that was intended to fund preparing or submitting the brief.

Amici seek to demonstrate to this Court that the U.S. Supreme Court has repeatedly upheld state restrictions on public funding for abortions, and that it logically follows that an Act preventing abortion providers from subsidizing their businesses with public funding does not violate the United States Constitution. Further, the increasing emphasis that abortion providers place on the provision of abortion services validates the existing public policy justifications for the Act.

ARGUMENT

In keeping with Arizona's established public policy[2] that taxpayer funds should not pay for abortions or subsidize abortion providers, the state enacted HB 2800 to, *inter alia*, preclude abortion providers from receiving taxpayer funding for family planning services.[3] Through this restriction, the State acknowledged that an abortion business benefits from taxpayer funding when the business' proprietor receives such funds to pay for healthcare services (in this case, family planning services).

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[2] *See, e.g.*, A.R.S. § 35-196.02 (2011) (comprehensive prohibition on the use of public funding for abortions or abortion training); A.R.S. § 15-1630 (2011) (prohibition on abortions at public universities); A.R.S. § 43-1088 (2011) (denial of tax credits for charitable donations made to organizations that provide, pay for, promote, provide coverage of, or provide referrals for abortion or financially support any other entity that does so); 2007 Ariz. ALS 255 (organizations that receive state funds through women's services programs may not use those funds to provide abortions or abortion referrals.).

[3] A.R.S. § 35-196.05 (B) (2012) (the restriction excludes abortions where the pregnancy is the result of rape or incest or threatens the life of the mother).

While the Act applies to *any* and *all* sources of taxpayer funding designated for family planning services, the district court only addressed the Act's application to *Medicaid* family planning funding. As discussed below, federal law does not preclude a state from enacting a restriction like HB 2800 on Medicaid family planning funding. Further, the Act is clearly constitutional and established public policy weighs heavily in favor of the Act.

I. THE LIMITATION ON FAMILY PLANNING FUNDING IN HB 2800 IS NOT PRECLUDED UNDER STATUTORY LAW.

The district court erroneously held that 42 U.S.C. § 1396a(a)(23), referred to by the court as the "freedom of choice provision," likely precludes Arizona from applying the restriction on family planning funding found in HB 2800 to Medicaid funding.[4] However, the "freedom of choice provision" in the Medicaid Act does not require that Arizona deem every *willing* or *desired* provider as "qualified" to participate in its Medicaid program. Rather, Medicaid recipients' free choice of providers only extends to those providers a state has determined are *qualified*. The United States Supreme Court has held that while the free choice of provider provision "gives [Medicaid] recipients the right to choose among a range of

[4] *Planned Parenthood Arizona Inc. v. Betlach*, 2012 U.S. Dist. LEXIS 150596 at *21(D. Ariz. Oct. 19, 2012). A provision of the Medicaid Act specifically requires that a state must protect a Medicaid recipient's free choice of family planning providers (42 U.S.C. 1396a(a)(23)(B)); however, the state may still "[set] reasonable standards relating to the qualifications of the providers" (42 C.F.R. 431.51 (2011)).

qualified providers, without government interference,"[5] this right only applies if a provider "continues to be qualified."[6] The Medicaid Act "does not confer a right on a recipient to continue to receive benefits for care [from a provider] that has been decertified."[7]

The court below acknowledged that "a state may establish 'reasonable standards relating to the qualifications of providers'" and may "exclude health care providers under certain circumstances: '[i]n addition to any other authority, a State may exclude an individual or entity . . . for any reason for which the Secretary could exclude the individual or entity from participation.'"[8]

Through HB 2800, Arizona has made the well-reasoned determination that abortion providers are not *qualified* to provide family planning services with taxpayer funds, including Medicaid funds. (The Legislature's justifications for this determination are discussed in more detail *infra*.)

Further, the legislative history behind the exclusion provision of the Medicaid Act clearly demonstrates that states have the legal authority to exclude

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[5] *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980) (emphasis in original).

[6] *Id*.

[7] *Id.*

[8] *Betlach*, 2012 U.S. Dist. LEXIS 150596 at **7-8 (*citing* 42 C.F.R. § 431.51(c)(2); 42 U.S.C. § 1396a(p)(1)).

providers under *any basis*: "This provision is not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program."[9] As the First Circuit has held, the language of Medicaid's exclusion provision "was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law."[10]

Fundamentally, abortion providers in Arizona, including the Plaintiffs, will not be prohibited by the Act from receiving family planning funding from the state if they choose to refrain from performing abortions. The State of Arizona has chosen to enact laws that promote childbirth over abortion—a public policy determination that is entirely constitutional (see discussion *infra*). If Plaintiffs wish to receive public funding, they may simply bring their businesses in line with the state's public policy.

II. THE LIMITATION ON FAMILY PLANNING FUNDING IN HB 2800 IS CONSTITUTIONAL.

HB 2800 is clearly constitutional. The United States Supreme Court has held that it is permissible for a state to engage in unequal subsidization of abortion and other medical services to encourage alternative activity deemed in the public

[9] S. Rep. No. 100-109, at 20 (1987).

[10] *First Medical Health Plan v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (emphasis in original).

interest.[11] Further, the decision not to fund abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.[12]

In fact, the Court has repeatedly affirmed the constitutionality of federal and state restrictions on public funding for abortions.[13] Stating that the government may rationally distinguish between abortion and other medical procedures because "no other procedure involves the purposeful termination of a potential life," the Supreme Court in *Harris v. McRae* upheld the constitutionality of the Hyde Amendment, a federal appropriations rider that restricts the use of federal and state

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[11] *See Rust v. Sullivan*, 500 U.S. 173, 201 (1991).

[12] *Id.*

[13] *See Beal v. Doe*, 432 U.S. 438 (1977) (holding that Pennsylvania's refusal to extend Medicaid coverage to "nontherapeutic abortions" was not inconsistent with the Social Security Act); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding the constitutionality of a state welfare regulation under which Medicaid recipients received payment for services related to childbirth, but not for "nontherapeutic abortions"); *Poelker v. Doe*, 432 U.S. 519 (1977) (holding that the Constitution did not forbid a state or city from expressing a preference for childbirth over nontherapeutic abortions by providing services for childbirth and not abortions); *Harris v. McRae*, 448 U.S. 297 (1980) (holding that a state that participates in Medicaid is not obligated to continue to fund "medically necessary abortions" for which federal reimbursement is unavailable under the Hyde Amendment. Also, the funding restrictions of the Hyde Amendment are constitutional); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding the state's restrictions on the use of public employees and facilities for the performance or assistance of "nontherapeutic abortions"); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that federal regulations prohibiting recipients of Title X funds from engaging in abortion-related activities were a permissible construction of the underlying legislation and were constitutional).

matching Medicaid funds for abortions. The Court held that a "[s]tate that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment . . . [and] that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment."[14]

While most applicable Supreme Court decisions primarily uphold restrictions on *direct* public funding for abortions (*i.e.*, public funds pay for actual abortion procedures), it logically follows that a state may similarly prohibit *indirect* public funding for abortions. Left unrestricted or unregulated, federal and state funds for family planning services, for example, can effectively and indirectly subsidize contractors, individuals, organizations, or entities performing or inducing abortions, referring for abortions, or counseling in favor of abortions by paying for shared costs, overhead, employee salaries, rent, utilities, and various other expenses. Arizona, with its strong public policy opposing public funding for abortions, understandably wants to close this loophole in its law.

In *Planned Parenthood of Indiana, Inc. v. Commissioner of the Indiana State Dept. of Health*, the Seventh Circuit Court of Appeals recently upheld portions of an Indiana law that similarly prohibited abortion providers from

[14] *Harris*, 448 U.S. at 325-326.

receiving public funding.[15] In describing Indiana's law, the court wrote: The Act "**fills a gap in Indiana law regarding public funding of abortion . . . [by] aim[ing] to prevent the indirect subsidization of abortion by stopping the flow of all state-administered funds to abortion providers.**"[16]

While the Seventh Circuit held that Indiana's law likely violates the "free choice of provider" provision in the Medicaid statute, the court held:

> It is settled law that **the government's refusal to subsidize abortion does not impermissibly burden a woman's right to obtain an abortion.** If a ban on public funding for abortion does not *directly* violate the abortion right, **then Indiana's ban on other forms of public subsidy for abortion providers cannot be an unconstitutional condition that *indirectly* violates the right**."[17]

The court further held that:

> As [Supreme Court precedent] make[s] clear, **the government need not be neutral between abortion providers and other medical providers,** and this principle is particularly well-established in the context of governmental decisions regarding the use of public funds. As long as the difference in treatment does not unduly burden a woman's right to obtain an abortion, **the government is free to treat abortion providers differently.**
>
> **…**

[15] 699 F.3d 962 (7th Cir. 2012) (emphasis added).

[16] *Id.* at 9. Indiana's law is written more broadly than Arizona's law, in that it prohibits abortion providers from receiving any public funding, not just family planning funding.

[17] *Id.* at 6 (bold emphasis added; italics in the original).

> If, as [Supreme Court precedent] hold[s], the government's refusal to subsidize abortion does not unduly burden a woman's right to obtain an abortion, **then Indiana's ban on public funding of abortion providers—even for unrelated services—cannot indirectly burden a woman's right to obtain an abortion.**[18]

The State of Arizona wants to fill a "gap" in their laws regarding public funding of abortion by ensuring that public funds do not subsidize abortion businesses within the state. In so doing, the Act does not create an "undue burden" on a woman's ability to obtain an abortion.

III. THE STATE OF ARIZONA HAS STRONG PUBLIC POLICY JUSTIFICATIONS FOR ENACTING AND ENFORCING HB 2800.

The district court erroneously dismissed the Defendants' argument in support of the Act demonstrating that taxpayer funds are currently being used to subsidize abortions, and that this subsidization harms the state. Clearly, the Act is necessary to guard against a growing entanglement between the abortion industry and taxpayer dollars.

A. Abortion is a central part of Plaintiff Planned Parenthood Arizona's business.

According to the Guttmacher Institute, a former special affiliate of Planned Parenthood, Arizona's 19 abortion providers performed 19,500 abortions in 2008.[19]

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[18] *Id.* at 61-62 (emphasis added).

[19] *See* Guttmacher Institute, *State Facts About Abortion: Arizona* (2011), *available at* http://www.guttmacher.org/pubs/sfaa/pdf/arizona.pdf (last visited Dec. 31, 2012).

A substantial portion of Arizona's abortions are performed by Plaintiff Planned Parenthood Arizona's (PPAZ) clinics. According to its most recent annual report, PPAZ performed 10,259 abortions in 2011.[20]

That PPAZ is the largest abortion provider in Arizona is not the primary rationale for the Act's prohibition on the use of taxpayer dollars to subsidize abortion providers. In fact, Arizona does not specifically target PPAZ. However, a careful examination of PPAZ aptly demonstrates why Arizona has serious cause for concern that taxpayer dollars spent on healthcare and family planning programs are subsidizing abortion businesses.

Abortion plays a significant and increasing role in PPAZ's practice. PPAZ has reported a drastic cut in its overall patient visits, from 112,053 patient visits in fiscal year 2010 to just 64,148[21] in fiscal year 2011.[22] PPAZ has simultaneously increased its abortion business. PPAZ reported performing 10,259 abortions in

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[20] *Planned Parenthood Arizona Annual Report 2010-2011*, *available at* http://www.plannedparenthood.org/ppaz/files/Arizona/PPAZ_Noticias_AnnualReport_WEB_0612.pdf (last visited Dec. 31, 2012).

[21] *See Planned Parenthood Arizona Annual Report Fiscal Year 2010*, *available at* http://www.plannedparenthood.org/ppaz/files/Arizona/PPAZ_Noticias_AnnualReport_WEB.pdf (last visited Dec. 31, 2012).

[22] *See Planned Parenthood Arizona Annual Report 2010-2011*, *supra*.

fiscal year 2011.[23] That is 659 more abortions than it reported performing in fiscal year 2010.[24] According to PPAZ's 2010-2011 annual report, an abortion was performed at nearly one out of every six PPAZ patient visits.[25]

Notably, the Planned Parenthood Federation of America's (PPFA) own directives make clear that the organization is intentionally becoming more abortion-centric. In December 2010, PPFA issued a new mandate: by 2013, every Planned Parenthood affiliate must have at least one clinic performing abortions.[26] The complaint filed against the State of Texas in *Planned Parenthood Ass'n Tex. v. Suehs*, confirms that it is a PPFA choice that affiliates *must* be abortion providers to be part of Planned Parenthood:

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[23] *Id.*

[24] *See Planned Parenthood Arizona Annual Report Fiscal Year 2010*, *supra*.

[25] *See Planned Parenthood Arizona Annual Report 2010-2011*, *supra*.

[26] *See* Carey, *Planned Parenthood plans to expand abortion services nationwide,* THE DAILY CALLER (Dec. 23, 2010), *available at* www.dailycaller.com/2010/12/23/planned-parenthood-plans-to-expand-abortion-services-nationwide/ (last visited Dec. 21, 2012). *See also* Foley, *Local PP chapter drops affiliation*, CORPUS CHRISTI CALLER TIMES (Dec. 20, 2010), *available at* www.caller.com/news/2010/dec/20/local-planned-parenthood-chapter-drops/ (last visited Dec. 21, 2012) (reporting that a Corpus Christi, Texas clinic planned to drop PPFA affiliation because of mandate); Livio, *Planned Parenthood may double the number of N.J. abortion clinics while expanding nationwide,* NJ.COM (Jan. 16, 2011), *available at* www.nj.com/news/index.ssf/2011/01/planned_parenthood_to_double_t.html (last visited Sept. 23, 2012).

> Plaintiffs all are affiliates of, or ancillary organizations of affiliates of, Planned Parenthood Federation of America ("PPFA"), which also advocates for women's access to comprehensive reproductive healthcare, including abortion, and requires that its affiliates do the same. PPFA does not provide abortion care itself, but its member affiliates offer that service throughout the United States and as of January 2013, all member-affiliates will be required to do so. [27]

PPFA's **choice to require its affiliates to provide abortion** is what excludes the possibility of its affiliates from receiving public funds under the Act.

Planned Parenthood's intentional increase in its abortion business is not limited to expanding the number of its affiliates and/or clinics where abortions are performed. Abby Johnson, the former director of Planned Parenthood's clinic in Bryan, Texas, reports that, in 2009, her clinic was given an increased abortion quota in order to raise revenue.[28] According to Ms. Johnson, "the assigned budget always included a line for client goals under abortion services."[29] Ms. Johnson has said that her superiors gave her "the clear and distinct understanding that [she] was

[27] Complaint at ¶ 30 (d), *Planned Parenthood Ass'n Tex. v. Suehs*, 2012 U.S. Dist. LEXIS 62289 (W.D. Tex., Apr. 30, 2012) (No. 1:12-CV-00322).

[28] Johnson & Lambert, UNPLANNED: THE DRAMATIC TRUE STORY OF A FORMER PLANNED PARENTHOOD LEADER'S EYE-OPENING JOURNEY ACROSS THE LIFE LINE 114 (2010).

[29] *Id.*

to get [her] priorities straight, that abortion was where [her] priorities needed to be because that's where the revenue was."[30]

The expanding abortion business at Planned Parenthood runs counter to a two-decade national trend of decreasing abortion numbers. Likewise, the growing abortion business at PPAZ appears to run counter to a decreasing abortion rate in Arizona. The Guttmacher Institute reports that the abortion rate in Arizona fell five percent between 2005 and 2008.

B. Public funding increases abortion rates, and cannot be entirely segregated from other services in an abortion business.

Critically, studies confirm the relationship between public funding and the incidence of abortion. The Guttmacher Institute conducted a Literature Review in 2009 that demonstrates the strong consensus that abortion rates are reduced when public funding is restricted.[31] Specifically, Guttmacher reported:

> The best studies are the five that used detailed data from individual states and compared the ratio of abortions to births before and after Medicaid restrictions took effect. These found that 18–37% of pregnancies that would have ended in Medicaid-funded abortions were instead carried to term when funding was no longer available.[32]

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[30] *Id* at 115.

[31] Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review* (Guttmacher Inst. June 2009), *available at* http://www.guttmacher.org/pubs/MedicaidLitReview.pdf (last visited Mar. 21, 2011). The review cites 20 academic studies documenting this relationship and only four that found the impact of public funding on the abortion rate inconclusive.

[32] *Id*. at 27.

Although these studies examined *direct* abortion funding, it is reasonable to conclude that prohibiting government healthcare programs from indirectly funding or subsidizing abortion—through, for example, shared overhead—likewise coincides with the position of the majority of Americans who do not want their tax-dollars paying for elective abortions,[33] and helps achieve the shared goal of reducing the incidence of abortion.

Federal law, even before *Roe v. Wade*, has been concerned about abortion providers misusing taxpayer funds to support their abortion businesses. In the case of Title X family planning funding, for example, the law does not merely say that these funds are barred from being used for abortion *directly*, but also that these funds are not supposed to be used in "programs where abortion is a method of family planning."[34] The U.S. Department of Health and Human Services (HHS)

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[33] *See e.g.* Quinnipiac University, *U.S. Voters Oppose Health Care Plan by Wide Margin, Quinnipiac National University Poll Finds; Voters Say 3-1, Plan Should Not Pay for Abortions* (Dec. 22, 2009), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1408 (last visited Dec. 21, 2012).

[34] 42 U.S.C §300a-6 (Title X, §1009, as added Dec. 24, 1970, Pub. L. No. 91-572, §6(c), 84 Stat. 1508). Since its inception, Title X has reflected popular opinion that abortion is not "family planning" and should not be funded at taxpayers' expense.

notes that this restriction is one of the "five major provisions of [Title X],"[35] and reiterates in its program policy guide that the "broad range of services" required by Title X "does not include abortion as a method of family planning."[36]

Problematically, PPFA, whose affiliated clinics perform a substantial portion of the abortions in Arizona, encourages abortion as a means of "planning" a family. Indeed, PPFA tells women that "Am I ready to become a parent?" is first among the questions to ask when considering an abortion.[37] Other questions PPFA proposes, which indicate that it considers abortion as a legitimate means of family planning, include: "Would I prefer to have a child at another time?" and "What would it mean for … my family's future if I had a child now?"[38]

Statements from former Planned Parenthood employees and audited financial statements raise additional concerns that healthcare and family planning

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[35] *See* U.S. Dep't of Health & Human Servs., Office of Population Affairs, *Policy and Planning: Title X Statute and Regulations*, *available at* http://www.hhs.gov/opa/title-x-family-planning/title-x-policies/statutes-and-regulations/ (last visited Dec. 21, 2012).

[36] *See* U.S. Dep't of Health & Human Servs., Office of Population Affairs, *Program Priorities*, *available at* http://www.hhs.gov/opa/title-x-family-planning/title-x-policies/program-priorities/ (last visited Dec. 21, 2012).

[37] *See* Planned Parenthood Fed'n of Am., *Thinking About Abortion*, *available at* http://www.plannedparenthood.org/health-topics/pregnancy/thinking-about-abortion-21519.htm (last visited Dec. 21, 2012).

[38] *Id.*

funds are subsidizing its abortion business. For example, Abby Johnson, former director of a Planned Parenthood clinic in Bryan, Texas, has said, "As clinic director, I saw how money received by Planned Parenthood affiliate clinics all went into one pot at the end of the day—it isn't divvied up and directed to specific services."[39]

Ms. Johnson's account, that Planned Parenthood provides no meaningful separation of funds to ensure tax dollars do not subsidize its abortion business, is supported by the Commissioner of the Indiana State Department of Health's analysis of Planned Parenthood of Indiana's commingling of funds with regards to Medicaid. In the case challenging Indiana's abortion-funding restriction, the Commissioner notes that "[Planned Parenthood of Indiana]'s audited financial statements for 2009 and 2010 give rise to a reasonable inference that it commingles Medicaid reimbursements with other revenues it receives."[40]

Given Arizona's strong public policy in opposition to public funding for abortion, the Act is critically necessary to ensure that public funds do not subsidize abortion.

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[39] *See, e.g.*, Johnson, *Opinion: Defund Planned Parenthood*, AOL NEWS (Mar. 8, 2011), *available at* http://www.aolnews.com/2011/03/08/opinion-defund-planned-parenthood/ (last visited Dec. 21, 2012).

[40] Def's Mem. In Opp'n to the Mot. for Prelim. Inj. at 1, Exhibit A-B at 21 (FY 2009 Audit); Exhibit A-C at 22 (FY 2010 Audit).

CONCLUSION

For the reasons set forth above, the decision of the District of Arizona should be reversed.

Respectfully Submitted,

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Dated January 4, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **3,651** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Further, 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman font, size 14.

s/ Denise M. Burke
Counsel for Amici

Dated January 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 4, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Denise M. Burke
Counsel for Amici

CERTIFICATION OF FILING IDENTICAL VERSION

I hereby certify that the foregoing brief is an identical version of that filed electronically with this Court on January 4, 2013.

s/ Denise M. Burke
Counsel for Amici

Dated: January 4, 2013