APPEAL NO. 12–15403

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARY FRUDDEN AND JON E. FRUDDEN,
PLAINTIFF-APPELLANTS,
V.
KAYANN PILLING, ROY GOMM UNIFORM COMMITTEE, HEATH MORRISON, LYNN RAUH, WASHOE COUNTY SCHOOL DISTRICT, AND DEBRA BIERSDORFF,
DEFENDANT-APPELLEES.

Appeal from the United States District Court for the District of Nevada
Civil Case No. 3:11–cv–00474–RCJ–VPC

MOTION FOR LEAVE TO FILE BRIEF OF*AMICUS CURIAE* ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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Pursuant to Fed. R. App. P. 29, the Alliance Defense Fund respectfully requests leave to file the accompanying Brief *Amicus Curiae* in support of reversal.

INTEREST OF *AMICUS CURIAE* AND REASONS WHY *AMICUS* BRIEF IS DESIRABLE AND RELEVANT

The Alliance Defense Fund ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect First Amendment liberties to speech and religious freedom. 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.

Included in these cases are a significant number of cases that involve compelled speech issues. In fact, ADF's clients commonly invoke the compelled speech doctrine as a means to protect their consciences. This is no surprise since ADF represents religious clients who often need judicial protection (via the compelled speech doctrine) because government officials often do not understand the religious objections of ADF or may consider the religious objections of ADF's clients to be "trivial."[1]

[1] Indeed, the two seminal compelled speech cases involved religious litigants invoking religious objections that probably appeared "trivial" to others. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977); *Board of Education v. Barnette*, 319 U.S. 624 (1943). Even now, ADF is currently litigating the case of *Cressman v.*

Just as the objections of ADF's client may appear "trivial" to others, the objections of the plaintiffs in this case no doubt appeared "trivial" to the district court. Indeed, the district court found no compelled speech because it deemed the compelled speech at issue --- and the harm inflicted on the plaintiffs --- to be "innocuous." This logic will no doubt be used against ADF's religious clients in the future to dismiss their religious objections as "trivial" or "innocuous."

Recognizing that this interpretation of the compelled speech doctrine --- one distinguishing innocuous from significant speech --- will potentially have a significant impact on the landscape of ADF's clients in the Ninth Circuit and elsewhere, ADF wishes to address this important issue that will re-appear in future compelled speech cases. Specifically, ADF wishes to address what role the content of compelled speech plays in the compelled speech doctrine and whether courts should uphold or deny a compelled speech claims based upon their determination that the compelled speech at issue is or is not "innocuous."

Because the brief ADF tenders for filing herewith gives particular and careful attention to the details of the Supreme Court's compelled speech jurisprudence with respect to this "innocuous" issue, and raises considerations the

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Thompson before the Tenth Circuit. This *Cressman* case raises somewhat similar compelled speech issues as this case and involves a religious objector whose objections may seem trivial to others. For the district court decision in *Cressman*, see No. CIV–11–1290–HE, 2012 WL 1795210 (W.D.Okla. May 16, 2012). Cressman has just recently filed his notice of appeal from this decision with the Tenth Circuit.

district court overlooked in designing its decision below, ADF submits that the brief it proffers for filing is both desirable to aid this Court in the evaluation required by this appeal, and so relevant to the disposition of this case.

For the foregoing reasons, ADF respectfully requests leave to file the Brief of *Amicus Curiae* in Support of Reversal submitted concurrently with this motion.

Respectfully submitted this the 13th day of June, 2012.

By: s/ Jonathan Scruggs
Jonathan Scruggs

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, 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 who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Word Count: Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing motion was produced using a 14-point Times New Roman font and contains 712 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CORPORATE DISCLOSURE STATEMENT

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

Dated June 13, 2012

/s/Jonathan Scruggs
Jonathan Scruggs

Counsel for Amicus Curiae

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INTEREST OF *AMICI CURIAE*

The Alliance Defense Fund ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect First Amendment liberties to speech and religious freedom. Since its founding in 1994, ADF has played a role, either directly or indirectly, in numerous cases involving compelled speech claims before federal and state courts across the country. For this reason, ADF has an interest in ensuring the viability of the compelled speech doctrine so that ADF's clients can rely on this doctrine to protect their religious freedoms in the future.

Indeed, ADF is presently litigating a case --- *Cressman v. Thompson*, No. CIV–11–1290–HE, 2012 WL 1795210 (W.D.Okla. May 16, 2012) --- that raises somewhat similar compelled speech issues as this case. Therefore, as an amicus, ADF is seeking to protect its *Cressman* client, as well as other clients, who are relying on the compelled speech doctrine to protect their important free speech rights and religious liberties.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed contemporaneously with a motion seeking leave of the Court to appear as Amicus.

FED. R. APP. P. 29(C)(5) 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 construed this Court's *Jacobs* decision as allowing compelled speech if that speech were "innocuous." *Frudden v. Pilling*, No. 3:11–cv–00474–RCJ–VPC, 2012 WL 292474, *6 (D.Nev. Jan 31, 2012). Though the district court never defined "innocuous" speech or how it came to its conclusion about innocuousness in this case, the district court did contrast the motto and image in this case with the "religious message" prohibited in *Jacobs*. *Id*. Therefore, the district court apparently made a content based judgment: some content and some viewpoints are "innocuous" and can be compelled, while some content and some viewpoints --- apparently political, religious, and other ideological viewpoints --- are not innocuous and cannot be compelled.[1]

[1] In addition to its "innocuous" theory, the district court also relied on a misattribution theory to find no compelled speech --- i.e. there is no compelled speech because listeners would not attribute the compelled speech to the students; they would instead attribute the speech to the school. *See Frudden*, 2012 WL 292474 at *6 Not only have appellants thoroughly negated this theory in their

ADF suggests that this "innocuous" or "ideological" distinction is both incompatible with governing case law and bad policy. Indeed, nothing in the case law supports this distinction. The *Jacobs* case --- the case on which the district court relied --- never mentioned much less relied on content to justify compelled speech. It simply found no message communicated "whatsoever" when students were forced to wear the solid-colored tops and bottoms. *See Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008). In other words, there was no compelled speech in *Jacobs* because there was no speech in *Jacobs*.

Even more importantly, the Supreme Court's jurisprudence precludes any innocuous/ideological distinction because this jurisprudence protects the "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). *See also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-98, (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). Now, if a person has a right to refrain from speaking at all, then that person

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brief, prior Supreme Court cases do not support such a theory, as the secondary literature abundantly emphasizes. *See, e.g.*, Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 Cal. W. L. Rev. 329, 367-69 (2008) (noting scholars who explain conflict between cases and misattribution theory). In light of such abundant literature on this point, ADF has chosen to discuss the district court's more novel yet less discussed "innocuous" theory.

necessarily has a right to avoid speaking any message he finds objectionable, regardless of that message's content or ideology.[2]

Indeed, this right to refrain from speaking any message flows logically from the purpose behind the compelled speech doctrine --- to protect the autonomous choice of the individual in deciding whether to speak and what to say. *See, e.g.*, *Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995) (noting that "a speaker has the autonomy to choose the content of his own message"); *Id.* at 575 (explaining that "choice of a speaker not to propound a particular point of view…is presumed to lie beyond the government's power to control."). Infringement on this choice occurs no matter what message the government foists on a speaker. Therefore, it is no surprise that cases explicitly confirm the individual's right to avoid speaking any message, regardless whether that message is political, religious, artistic, or trivial.

This outcome makes good policy-sense as well. Courts will be hard pressed to consistently and coherently distinguish ideological and innocuous messages

[2] This is not to say that the government may never compel speech. The government may compel all sorts of speech if it can justify compelling that speech in a given context. For example, in the commercial context, the government may compel "purely factual and uncontroversial information" unless it is "unjustified or unduly burdensome." *Zauderer v. Office of Disciplinary Counsel of Sup.Ct. of Ohio*, 471 U.S. 626, 651 (1985). But the point is that the level of scrutiny required to justify compelled speech never turns on the ideological or innocuous nature of the speech at issue. The level of scrutiny depends on the context of the speech and/or the commercial/non-commercial nature of the speech.

from non-ideological and important messages. Indeed, in this very case, the district court branded a message innocuous that appears to be very much ideological.[3] Moreover, this Court should not encourage officials to sit in judgment over and determine which messages are "innocuous" to non-speakers. This analysis will no doubt create a sort of majority rule in which objections to compelled speech based on minority, uncommon, or poorly understood beliefs are deemed irrelevant while objections based on common beliefs are sustained.

For these reasons, the case law coincides perfectly with sound logic in refusing to distinguish innocuous/non-ideological messages from important/ideological messages in the compelled speech context. ADF merely asks this Court to abide by this case law and by this logic. Therefore, ADF asks this Court to avoid any decision accepting the spurious innocuous/non-ideological versus important/ideological distinction.

FACTUAL SUMMARY

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

[3] Appellants expand on this point in their brief.

ARGUMENT

I. The First Amendment Prohibits Compelled Speech Regardless of the Ideology of the Message Compelled

Because courts have prohibited the government from compelling non-ideological messages and because courts have expressly rejected the ideological/non-ideological distinction in the compelled speech context, this Court should follow suit and reject this distinction as well.

Indeed, Supreme Court precedent entails this conclusion since the Supreme Court has already found compelled speech when the government compelled a non-ideological, frivolous message. In *United States v. United Foods, Inc.*, the government created a program mandating assessments on handlers of fresh mushrooms in order to fund generic advertising to promote mushroom sales. 533 U.S. 405, 409 (2001). One mushroom grower then objected to being forced to pay for (i.e. endorse) an objectionable message in this advertising. *Id.* at 410-11.

It is important to note the basis of the grower's objection. The grower did not object because the advertising message was ideological or promoted some fundamental yet objectionable religious, political, or moral message. No, the grower objected because the advertising promoted mushrooms as a whole rather than his specific mushrooms. *Id*. at 411. Though the Supreme Court acknowledged this disagreement to be minor, it still found a violation of compelled speech principles:

> Here the disagreement could be seen as minor: Respondent wants to convey the message that its brand of mushrooms is superior to those grown by other producers. It objects to being charged for a message which seems to be favored by a majority of producers. The message is that mushrooms are worth consuming whether or not they are branded. First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

Id. at 411 (emphasis added).

It is hard to imagine a less ideological and more innocuous message for a mushroom seller to make than "mushrooms are worth consuming." *Id*. Indeed, the Supreme Court even acknowledged this point, admitting that "the mandated scheme does not compel the expression of political or ideological views." *Id*. (emphasis added). Nevertheless, the Supreme Court still found a violation of the compelled speech principles established in *Wooley* and *West Virginia Bd. of Ed. v. Barnette*. *Id* at 410 (citing those cases). In so doing, the *United Foods* decision confirms the reach of the compelled speech doctrine to non-ideological and innocuous messages. The government simply may not compel such messages.

And this conclusion makes sense given the positive protection that speakers have to express a wide variety of non-ideological and/or innocuous messages. *See, e.g., United States v. Stevens*, 130 S.Ct. 1577, 1591 (U.S. 2010) ("*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic,

historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (extending First Amendment protections to videogames); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (noting that movies are protected speech even if their purpose is to entertain); *Winters v. New York*, 333 U.S. 507, 510 (1948) (rejecting "suggestion that the constitutional protection for a free press applies only to the exposition of ideas" and extending protection to documents even "[t]hough we can see nothing of any possible value to society in these magazines."). If speakers have the right to speak inane, irrelevant messages, then they likewise have the right to avoid being compelled to speak such messages. *See, e.g.*, *Wooley*, 430 U.S. at 714 ("[t]he right to speak and the right to refrain from speaking <u>are complementary components</u> of the broader concept of 'individual freedom of mind."') (emphasis added).[4]

Recognizing this logic and relying on the cases specified above, the Tenth Circuit has explicitly disavowed any ideological/non-ideological distinction in the compelled speech context: "First Amendment protection does not hinge on the

[4] Indeed, at least viscerally, the government's compelling inane speech seems even more problematic than the government's censoring inane speech. See Steven H. Shiffrin, *Freedom of Speech and Two Types of Autonomy*, in 27 Const. Comment. 337, 344 (2011) (noting that "there is something deeply wrong with forcing someone like the school child in *Barnette* or the driver in *Wooley* to be a forced courier of, or megaphone for, a government message…[because it] simply does not appropriately respect the speaker's human dignity.").

ideological nature of the speech involved… This harm [on the right to remain silent] occurs regardless of whether the speech is ideological." *Axson–Flynn v. Johnson*, 356 F.3d 1277, 1284 n. 4 (10th Cir. 2004).

To understand the significance of this language though, it is important to see the logic the Tenth Circuit was rejecting. In *Axson–Flynn*, a public university flunked a student who refused to say certain vulgar words while acting in the university's acting class. *Id*. at 1280-81. When the student sued the university for compelling her speech, the district court denied the student's claim because the compelled message was non-ideological:

> …the logic of the *Wooley* and *Barnette* opinions suggest that a student cannot be required to espouse an ideological point of view on behalf of the State… The difference between that case and the present is that the ATP faculty are not requiring Plaintiff to espouse an ideological position at all; they merely asked her to read some lines which she finds offensive.

Axson-Flynn v. Johnson, 151 F.Supp.2d 1326, 1335 (D.Utah 2001).

This logic should sound familiar because it is the exact logic adopted by the district court in this case. Just as the *Axson-Flynn* district court attempted to divide the compelled speech universe into ideological versus non-ideological categories, the district court here tries to divide compelled speech universe into religious (and assumingly political, philosophical, etc) versus innocuous categories. Both these district courts were attempting to distinguish important political, religious, and

philosophical messages from those "innocuous" messages that litigants find "offensive" for no legitimate reason.

But this attempt to distinguish valuable from innocuous messages is doomed to failure and should be rejected in the compelled speech context just as the Supreme Court has rejected such distinctions in the positive speech context. This is exactly why the Tenth Circuit found such a distinction improper in the compelled speech context and rejected the logic that the district court in this case urges upon this Court.[5]

This Court should follow the lead and the logic adopted by the Tenth Circuit. But this path is by no means strange. It flows directly and necessarily from principles announced by the Supreme Court in its compelled speech jurisprudence. Therefore, this Court stands on solid footing in rejecting the distinction proposed by the district court in this case.

[5] Were this Court to uphold the ideological/non-ideological distinction, then the government could theoretically force citizens to display a host of inane commercial and non-commercial images on their cars, clothing, and other property. For example, upon a sufficient size donation from an entity, would not a government be tempted to force citizens to display that entity's logo, motto, or catchphrase? The Nike Swoosh or the Mazda "Zoom Zoom" motto might communicate an inane message, but forcing someone to express that message still violates their First Amendment rights.

II. Courts Practically Cannot and Should Not Distinguish Ideological and Innocuous Messages from Non-Ideological and Important Messages in the Compelled Speech Context

Even if this Court thinks that it may, under Supreme Court precedent, distinguish ideological and important messages from non-ideological and innocuous messages in the compelled speech doctrine, it should not do so because this distinction is conceptually and practically unworkable. Therefore, following this impossible tract will only lead to confused, ad-hoc decisions and encourage government officials to make judgments based on their subjective values.

Indeed, this Court already reached this conclusion outside the compelled speech context in *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011). In *Hunt*, a Los Angeles ordinance prohibited the sale of various merchandise on the Venice Beach Boardwalk, but the ordinance allowed persons to sell "merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise." *Id*. at 706-07. When an individual selling shea butter challenged this ordinance as vague, this Court agreed and invalidated the ordinance because it did not clearly define what it meant to make a religious, political, philosophical or ideological message. *Id*. at 711. This decision has import because it analyzed the ordinance's attempt to distinguish ideological from non-ideological messages:

> Section 42.15 (2004) is ambiguous in at least two respects. First, it fails to define or provide any examples of when merchandise carries a

> "religious, political, philosophical or ideological" message, and these terms have such amorphous meanings that it makes it difficult, if not impossible, for an individual to determine whether his conduct is proscribed by the ordinance. For example, one modern source defines "ideology" as, among other things, "the body of doctrine, myth, belief, etc., that guides an individual, social movement, institution, class, or large group," "the study of the nature and origin of ideas," or "theorizing of a visionary or impractical nature." Dictionary.com, http:// dictionary. reference. com/ browse/ ideology (defining "ideology") (last accessed March 15, 2011)….These broad definitions cast correspondingly broad nets of what conduct is permissible and § 42.15 (2004) provides no limiting examples to illustrate when an individual's sale of merchandise falls within these definitions.

Id. at 711. Clearly, this Court was worried that the word "ideology" was so vague in the speech context that no one could distinguish ideological from non-ideological messages, which would in turn force police officers enforcing the statue to make determinations based on their "subjective judgment." *Id*. at 713.

But this same concern applies here since the district court in this case proposed the same distinction the *Hunt* Court found so vague and unworkable: a distinction between innocuous messages (non-ideological, non-philosophical, non-religious, non-political) and important messages (ideological, philosophical, religious, political). There is no reason to think that this distinction is conceptually more workable in the compelled speech context than it is in the speech context. In fact, the Tenth Circuit has already condemned the ideological/non-ideological distinction as unworkable in the compelled speech context: "it is difficult to imagine a standard by which a court could determine whether non-commercial

speech is or is not ideological." *Axson-Flynn*, 356 F.3d at 1284 n. 4. The Tenth Circuit did nothing strange here. It merely applied the same logic this Court adopted in *Hunt*.

And the fears of the *Hunt* Court and the *Axson-Flynn* Court are quite well founded. The razor hair difference between ideological/important messages and non-ideological/innocuous messages --- if there is any difference at all --- is simply too small for any court to slice. For example, Wikipedia contains a list of mottos from various businesses, religions, countries, governments and sports teams.[6] And a small sampling of these mottos provides numerous examples that could simultaneously be considered ideological or non-ideological, political or non-political, religious or non-religious, important or innocuous:

- Salvation Army: "Blood and Fire"
- Adidas: "Impossible is Nothing"
- IBM: "Think"
- LG: "Life's Good"
- United Methodist Church: "Open hearts, Open minds, Open doors"
- California Institute of Technology: "The truth shall make you free"
- Samsung: "Everyone's invited"
- Wal-Mart: "Save Money. Live Better"
- Nova Scotia Agricultural College: "mens agitat molem" --- (mind over matter")
- Nike: "Just do It"
- University of Central Florida: "Reach for the Stars"

[6] http://en.wikipedia.org/wiki/List_of_mottos (last visited June 7, 2012).

- Northwestern University: "Quaecumque Sunt Vera" --- (Whatsoever things are true)
- Stanford University: "Die Luft der Freiheit weht" --- (The wind of freedom blows)

Certainly this Court does not want to begin parsing these phrases --- and others like it --- to determine which of them the government may force citizens to display (because the phrases are "innocuous" or non-ideological) and which of them the government may not force citizens to display (because the phrases are "important" or ideological). The difficulty of this determination begs for officials to rely on subjective judgments and (at least unconsciously) on their own biases to distinguish important from innocuous messages.

In turn, the parties hurt most by this process will be those different from the decision makers --- those with uncommon objections to messages they the minority consider "important" yet the vast majority considers "innocuous." Although officials will no doubt reject the validity of these minority objections if given the power to brand messages "innocuous," these minority objectors really do object to messages others consider "innocuous," and speaking such messages truly does harm the consciences of these minority objectors.[7]

[7] This harm is very real as the case of *Cressman v. Thompson* shows. 2012 WL 1795210 (W.D.Okla. May 16, 2012). The plaintiff in *Cressman* objected to displaying the standard Oklahoma license plate from his car on religious grounds because this plate contains an objectionable image of a Native American sculpture. *Id.* at *1-2. But the *Cressman* Court rejected this claim on the theory that the plate

Thus, the conceptual difficulty of distinguishing ideological/important messages from non-ideological/innocuous messages can only lead to harm. This Court should not start down this difficult conceptual path at all. Instead, this Court should adopt the view of the *Hunt* Court and *Axson-Flynn* Court and reject the attempt to distinguish ideological/important messages from non-ideological/innocuous messages in the compelled speech context.

CONCLUSION

The district court's decision to distinguish ideological/important messages from non-ideological/innocuous in the compelled speech context is contrary to precedent and is unworkable. A speaker compelled to speak even inane messages is harmed, as both the Supreme Court and Tenth Circuit has recognized. Therefore, this Court should avoid any decision accepting the spurious ideological/important versus non-ideological/innocuous distinction in this compelled speech case.

Respectfully submitted this the 13th day of June, 2012.

By: s/ Jonathan Scruggs
Jonathan Scruggs

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communicated no "ideological" message. *Id*. at *7. Thus, the *Cressman* Court --- like the district court here --- enforced an ideological/non-ideological distinction that simply does not exist in the compelled speech context. ADF intends on appealing this *Cressman* decision to combat the dangerous conceptual errors adopted in that case.

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 3,648 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 2007 in 14-point Times New Roman.

Dated: June 13, 2012

s/Jonathan Scruggs
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Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, 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 who are registered CM/ECF users will be served by the appellate CM/ECF system.

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