Case No. 13-14590

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EARL E. GRAHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF FAYE DALE GRAHAM,

Plaintiff-Appellee,

v.

R.J. REYNOLDS TOBACCO COMPANY, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida,
D.C. No. 3:09-cv-13602

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE, P.C., IN SUPPORT OF PLAINTIFF'S PETITION FOR REHEARING EN BANC

Leslie A. Brueckner
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland CA 94607
(510) 622-8205
lbrueckner@publicjustice.net

F. Paul Bland Jr.
Public Justice, P.C.
1825 K Street, N.W., Suite 200
Washington DC 20006
(202) 797-8600
pbland@publicjustice.net

Counsel for *Amicus Curiae* Public Justice, P.C.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11TH Circuit R. 26.1-1, the undersigned certifies that *amicus curiae* Public Justice, P.C. does not have a parent company or issue stock, and that no publicly-held company has an ownership interest (such as stock or partnership shares) in Public Justice, P.C.

The undersigned further certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Altria Group, Inc. (Publicly held parent corporation of Defendant Philip Morris USA, Inc.)

2. Arnold & Porter, LLP (Counsel for Defendant Philip Morris USA, Inc.)

3. Arnold, Keri (Counsel for Defendant Philip Morris USA, Inc.)

4. Bancroft, PLLC (Counsel for Defendant R.J. Reynolds Tobacco Company)

5. Baringer, Randal S. (Counsel for Defendant R.J. Reynolds Tobacco Company)

6. Barnett, Kathryn E. (Former counsel for Plaintiff)

7. Bedell, Dittmar, DeVault, Pillans & Coxe, PA (Counsel for former Defendant Lorillard Tobacco Company)

8. Bernstein-Gaeta, Judith (Counsel for Defendant Philip Morris USA, Inc.)

9. Blasingame, Janna M. (Counsel for Plaintiff)

10. Bradford II, Dana G. (Counsel for Defendant Philip Morris USA, Inc.)

11. British American Tobacco p.l.c. (Through its ownership interest in Brown & Williamson Holdings, Inc., the indirect holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company)

12. Brannock & Humphries, PA (Counsel for Plaintiff)

13. Brannock, Steven (Appellate Counsel for Plaintiff)

14. Brown, Joshua Reuben (Counsel for Defendant Philip Morris USA, Inc.)

15. Brown & Williamson Holdings, Inc. (Holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company)

16. Browne, Mallori C. (Counsel for Defendant Philip Morris USA, Inc.)

17. Budner, Kevin (Counsel for Plaintiff)

18. Burnette, Jason T. (Counsel for Defendant R.J. Reynolds Tobacco Company)

19. Byrd, Kenneth S. (Counsel for Plaintiff)

20. Cabraser, Elizabeth Joan (Counsel for Plaintiff)

21. Clement, Paul D. (Counsel for Defendant R.J. Reynolds Tobacco Company)

22. Coll, Patrick P. (Counsel for former Defendant Lorillard Tobacco Company)

23. Council for Tobacco Research, USA, Inc. (former Defendant)

24. Crane, Eliza S. (Counsel for Defendant Philip Morris USA, Inc.)

25. Daboll, Bonnie C. (Counsel for Defendant Philip Morris USA, Inc.)

26. DeVault III, John Andrew (Counsel for former Defendant Lorillard Tobacco Company)

27. Dorsal Tobacco Corp. (former Defendant)

28. Elias, Jordan (Counsel for Plaintiff)

29. Farah & Farah, PA (Counsel for Plaintiff)

30. Farah Jr., Charles Easa (Counsel for Plaintiff)

31. Farah, Eddie Easa (Counsel for Plaintiff)

32. Geraghty William Patrick (Counsel for Defendant Philip Morris USA, Inc.)

33. German, Michael C. (Counsel for Defendant Philip Morris USA, Inc.)

34. Gillen, Jr., William A. (Counsel for Defendant Philip Morris USA, Inc.)

35. Goldberg, Richard W. (Judge of the U.S. Court of International Trade, sitting by designation)

36. Goldman, Lauren Rosenblum (Counsel for Defendant Philip Morris USA, Inc.)

37. Gross, Jennifer (Former counsel for Plaintiff)

38. Grossi, Jr., Peter T. (Counsel for Defendant Philip Morris USA, Inc.)

39. Hamelers, Brittany E. (Counsel for Defendant Philip Morris USA, Inc.)

40. Hartley, Stephanie J. (Counsel for Plaintiff)

41. Heimann, Richard M. (Counsel for Plaintiff)

42. Homolka, Robert D. (Counsel for Defendant Philip Morris USA, Inc.)

43. Hughes, Hubbard & Reed, LLP (Counsel for former Defendant Lorillard Tobacco Company)

44. Humphries, Celene Harrell (Counsel for Plaintiff)

45. Invesco Ltd. (Holder of more than 10% of the stock of Reynolds American Inc., parent company of Defendant R.J. Reynolds Tobacco Company)

46. Issacharoff, Samuel (Counsel for Plaintiff)

47. Jones Day (Counsel for Defendant R.J. Reynolds Tobacco Company)

48. Kamm, Cathy A. (Counsel for Defendant Philip Morris USA, Inc.)

49. Kasowitz, Benson, Torres & Friedman, LLP (Counsel for former Defendants Liggett Group, LLC and Vector Group, Ltd.)

50. Katsas, Gregory (Counsel for Defendant R.J. Reynolds Tobacco Company)

51. Knight, II, Andrew J. (Counsel for Defendant R.J. Reynolds Tobacco Company)

52. Kouba, David E. (Counsel for Defendant Philip Morris USA, Inc.)

53. Kreiner, Christopher A. (Counsel for Defendant R.J. Reynolds Tobacco Company)

54. Laane, M. Sean (Counsel for Defendant Philip Morris USA, Inc.)

55. Lantinberg, Richard Jason (Counsel for Plaintiff)

56. Lawson, L. Christine (Counsel for Defendant R.J. Reynolds Tobacco Company)

57. Lieff, Cabraser, Heimann, & Bernstein, LLP (Counsel for Plaintiff)

58. Lifton, Diane Elizabeth (Counsel for former Defendant Lorillard Tobacco Company)

59. Liggett Group, LLC (former Defendant)

60. London, Sarah R. (Counsel for Plaintiff)

61. Lorillard Tobacco Company (former Defendant)

62. Luther, Kelly Anne (Counsel for former Defendants Liggett Group, LLC and Vector Group, Ltd.)

63. Mayer Brown, LLP (Counsel for Defendant Philip Morris USA, Inc.)

64. Mayer, Theodore V.H. (Counsel for former Defendant Lorillard Tobacco Company)

65. Mayer-Cantú, Jerome P. (Counsel for Plaintiff)

66. Michael, Geoffrey (Counsel for Defendant Philip Morris USA, Inc.)

67. Molony, Daniel F. (Counsel for Defendant Philip Morris USA, Inc.)

68. Monroe, Aulica Lin (Counsel for Defendant R.J. Reynolds Tobacco Company)

69. Morse, Charles Richard Allan (Counsel for Defendant R.J. Reynolds Tobacco Company)

70. Motley Rice LLC (Counsel for Plaintiff)

71. Murphy, Jr., James B. (Counsel for Defendant Philip Morris USA, Inc.)

72. Nelson, Robert J. (Counsel for Plaintiff)

73. Parker, Stephanie Ethel (Counsel for Defendant R.J. Reynolds Tobacco Company)

74. Parker, Terri L. (Counsel for Defendant Philip Morris USA, Inc.)

75. Parrish, Robert B. (Counsel for Defendant R.J. Reynolds Tobacco Company)

76. Patyrk, Robb W. (Counsel for former Defendant Lorillard Tobacco Company)

77. Persinger, Morgan E. (Counsel for Defendant R.J. Reynolds Tobacco Company)

78. Philip Morris International, Inc. (Parent corporation to Defendant Philip Morris USA, Inc.)

79. Philip Morris USA, Inc. (former Defendant)

80. Pitchford, Tyler (Appellate counsel for Plaintiff)

81. Prichard, Jr., Joseph W. (Counsel for Defendant R.J. Reynolds Tobacco Company)

82. Rabil, Joseph Matthew (Counsel for Defendant R.J. Reynolds Tobacco Company)

83. Reeves, David C. (Counsel for Defendant R.J. Reynolds Tobacco Company)

84. Reilly, Kenneth J. (Counsel for Defendant Philip Morris USA, Inc.)

85. Reynolds American Inc. (Publicly held parent corporation of Defendant R.J. Reynolds Tobacco Company)

86. R.J. Reynolds Tobacco Company (Defendant)

87. Ruiz, Maria Helena (Counsel for former Defendants Liggett Group, LLC and Vector Group, Ltd.)

88. Sankar, Stephanie S. (Counsel for Defendant Philip Morris USA, Inc.)

89. Sastre, Hildy M. (Counsel for Defendant Philip Morris USA, Inc.)

90. Sears, Connor J. (Counsel for Defendant Philip Morris USA, Inc.)

91. Sexton, Terrence J. (Counsel for Defendant Philip Morris USA, Inc.)

92. Shook Hardy & Bacon, LLP (Counsel for Defendant Philip Morris USA, Inc.)

93. Smith, Gambrell & Russell, LLP (Counsel for Defendant Philip Morris USA, Inc.)

94. Sprie, Jr., Ingo W. (Counsel for Defendant Philip Morris USA, Inc.)

95. Sullivan, Thomas C. (Counsel for Defendant R.J. Reynolds Tobacco Company)

96. Swerdloff, Nicolas (Counsel for former Defendant Lorillard Tobacco Company)

97. Tayrani, Amir C. (Counsel for Defendant Philip Morris USA, Inc.)

98. Tepikian, Bruce R. (Counsel for Defendant Philip Morris USA, Inc.)

99. The Tobacco Institute, Inc. (Former Defendant)

100. Toomey, Joel B. (United States Magistrate Judge for the Middle

District of Florida)

101. The Tobacco Institute, Inc. (former Defendant)

102. Tye, Michael S. (Counsel for Defendant Philip Morris USA, Inc.)

103. Vector Group, Ltd. (former Defendant)

104. Weiner, Daniel H. (Counsel for former Defendant Lorillard Tobacco Company)

105. Wernick, Aviva L. (Counsel for former Defendant Lorillard Tobacco Company)

106. William, Cecily C. (Counsel for former Defendant Lorillard Tobacco Company)

107. Williams, Jack (Counsel for Defendant R.J. Reynolds Tobacco Company)

108. The Wilner Firm (Counsel for Plaintiff)

109. Wilner, Norwood (Counsel for Plaintiff)

Date: May 7, 2015

Respectfully submitted,

/s/ F. Paul Bland, Jr.

F. Paul Bland, Jr.
Public Justice, P.C.
1825 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 797-8600

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RULE 35-5(c) CERTIFICATE

Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005); *English v. General Electric Co.*, 496 U.S. 72 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

Dated: May 7, 2015

/s/ F. Paul Bland, Jr.
F. Paul Bland, Jr.

Attorney of Record for Public Justice, P.C.

STATEMENT OF THE ISSUE WARRANTING EN BANC CONSIDERATION

The Panel committed a fundamental error of law and fact in equating tort liability against cigarette manufacturers with a "ban" on cigarette sales. If permitted to stand, this error will put this Circuit in conflict with decisions of the U.S. Supreme Court on the preemptive effect of state-law damages claims. Rehearing is warranted in order to correct the Panel's misapplication of core preemption principles.

SUMMARY OF ARGUMENT

Rehearing is necessary to correct a serious error at the core of the Panel's decision in this case: specifically, the Panel's conclusion that the class-action findings affirmed in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), "operate[ ], in essence, as a ban on cigarettes." Opn. 43. The Panel construed the *Engle* findings—which this Court previously accepted as consistent with due process in rejecting appeals from these same Defendants two years ago, *see Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013)—as creating liability against all cigarette companies, regardless of brand or conduct, which they breached every time they placed a cigarette on the market. Opn. 43. The Panel then concluded that this threat of liability amounts to a ban on the sale of cigarettes—a ban that, in the Panel's view, impermissibly conflicts with Congress' *implicit* desire not to ban the sale of cigarettes. *Id.*

Putting aside the fact that Congress has never expressed any desire to stop the states from banning cigarette sales, *see* Plaintiff-Appellee's Pet. for Reh'g En Banc (April 28, 2015) at 7-12, the Panel's conclusion that the *Engle* findings effectively ban such sales in Florida is wrong both as a matter of law and a matter of fact.

As a legal matter, the Panel's holding violates numerous decisions of the U.S. Supreme Court holding that state tort claims do not "ban" anything; rather, at most, "a jury verdict . . . merely motivates an optional decision" on the defendant's part. *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). Notably, the Court has reached this conclusion even under circumstances where federal law affirmatively preempted the entire *field* of state positive law. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). The Panel's assumption that tort liability effectively bans cigarette sales runs directly afoul of these teachings—and for that reason alone, rehearing is warranted.

The Panel's conclusion that the *Engle* findings effectively ban cigarette sales in Florida is also wrong as a matter of fact. What the Panel failed to understand (among other things) is that *Engle* is a closed system: the statute of limitations for new cases expired in 2008, and a finite number of cases remain pending against defendants. Despite favorable verdicts in many *Engle*-progeny cases, cigarettes

are still being sold in Florida. As a result, *Engle* has not produced a ban as a matter of fact—and there is no realistic possibility of it doing so.

Either error, standing alone, would be sufficient basis to grant rehearing. But when viewed together, the upshot of the Panel's decision is truly remarkable. In the Panel's view, the mere threat of a jury verdict in a product liability case can constitutes a ban on the product for preemption purposes—even where, as here, the *actual* imposition of tort liability has not produced anything remotely resembling a ban. Under this logic, implied conflict preemption becomes effectively boundless; far from being a "tough row to hoe," to use the Panel's wording (Opn. 27), any federally regulated industry that is subject to tort liability could use conflict preemption to evade liability for its misconduct. The Supreme Court's teachings do not permit this result. *See Bates*, 444 U.S. at 1807 (noting the Court's "increasing reluctance to expand federal statutes beyond their terms through doctrine of implied pre-emption.") (Thomas, J., concurring in the judgment and dissenting in part).

ARGUMENT

A. The Panel's Conclusion that the *Engle* Findings Impose a "Ban" on Cigarette Sales is Contrary to Applicable Supreme Court Precedent.

1. The Panel's conclusion that the *Engle* findings operate as a ban on all cigarette sales in Florida is contrary to teachings of the U.S. Supreme Court. For decades, the Court has distinguished between the regulatory effect of state

"positive law," such as statutes and regulations, and state common-law tort rules, finding that state tort law merely exerts an indirect regulatory effect that does not compel defendants to alter their conduct. *See, e.g., Silkwood*, 464 U.S. at 256 (finding no conflict between state punitive damages award and federal occupation of field of nuclear safety, concluding that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (distinguishing positive state enactments from general remedial law, and holding that "effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects" of a provision enhancing a worker's compensation award); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990) (permitting state tort claim against producer of nuclear fuel despite federal occupation of field, noting that the tort claim's impact on conduct was "neither direct nor substantial enough to place petitioner's claim in the preempted field.").

The Court's most recent—and arguably most emphatic—pronouncement on the distinction between the regulatory effect of state positive law and state tort claims was in *Bates*, 544 U.S. at 431. There, the Court considered whether peanut farmers could bring tort claims against a herbicide manufacturer based on common law theories of failure to warn and defective design, notwithstanding the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act, 7

U.S.C. §§ 136 *et seq*. The Court observed that the prohibitions in the statute "apply only to 'requirements,'" and reasoned that the deterrent effect achieved by the application of tort law is not a "requirement." 544 U.S. at 443. A requirement, the Court continued, "is a rule of law that must be obeyed; *an event, such as a jury verdict, that merely motivates an optional decision is not a requirement*." *Id.* at 446 (emphasis added). *Bates* went on to state that "[t]he proper [preemption] inquiry calls for an examination of the elements of the common law duty at issue . . . *[I]t does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action* . . . (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants.)" *Id.* (emphasis added).

Bates' conclusion that the risk of tort liability does not compel defendants to change their conduct makes perfect sense. As one source notes, "[p]ositive enactments, such as statutes or regulations, involve general and prospective rules establishing standards of conduct." Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 Stetson L. Rev. 793, 802 (2011). "[T]ort law," in contrast, "derives from adjudication involving individuals in retrospective and personal dispute resolution processes," and thus does not establish any generalized standards for future conduct. *Id.* And unlike state statutes or regulations, tort law

serves a compensatory as well as a deterrent function. When the application of state law would directly conflict with a federal standard or objective, the state interest in providing compensation to injury victims must yield. But when state tort law would merely operate in a field subject to extensive federal regulation, there is no basis for overriding the state's interest in applying its own common-law tort system to compensate injury victims and deter misconduct.

2. The Panel's decision turns these principles on their head. The Panel began by speculating that "*Engle* strict-liability and negligence claims have imposed a duty on every cigarette manufacturer that they breached every time they placed a cigarette on the market." Opn. 38. The Panel went on to find that "[s]uch a duty operates, in essence, as a ban on cigarettes. Accordingly, it conflicts with Congress' clear purpose and objective of regulating—not banning—cigarettes . . ." Opn. 43.

This conclusion rests on exactly the sort of speculative inquiry that *Bates* prohibited outright. As noted above, *Bates* held that "[t]he proper [preemption] inquiry . . . *does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action*." 544 U.S. at 446 (emphasis added). But in the Panel's view, the reason the *Engle* findings operate as a ban is because they will impel cigarette companies to "take a particular action" (*id.*)—*i.e.*, to not sell cigarettes. Regardless of whether this is true as a factual matter (and it is not,

as explained below), it was wrong as a matter of law for the Panel to even engage in this inquiry, let alone to make this conclusion the centerpiece of its ruling.[1]

B. The Panel's Conclusion that the *Engle* Findings Impose a "Ban" on Cigarette Sales is Wrong as a Matter of Fact.

Legal errors aside, the Panel's conclusion that the *Engle* findings effectively "ban" cigarett sales is wrong as a matter of fact, for two distinct reasons.

First, the Panel failed to understand that the cigarette manufacturers named as defendants in *Engle* did not need to stop selling their product in order to avoid future tort liability. To the contrary, the defendants were always free to alter cigarette design to reduce the risks of smoking—for example, by ceasing to "manipulate the design and composition of cigarettes in order to sustain nicotine addiction." *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 27 (D.D.C. 2006), *aff'd in part*, 566 F.3d 1095 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010); *see also id.* at 309 (finding that cigarette companies "have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction."). Because the *Engle*

[1] Notably, the Panel did not attempt to reconcile its approach with *Bates*. Instead, it principally relied on *Geier v. Am. Honda Motor. Co.*, 529 U.S. 861, 882 (2000), as establishing that, for preemption purposes, courts must "assume compliance with the state law duty in question." Opn. 45. What the Panel failed to understand is that *Geier* predated *Bates*, 544 U.S. at 31, which affirmatively rejected the idea that state tort law has the same regulatory effect on conduct as a state positive-law requirement. *Id.* at 446. *Geier*, moreoever, is readily distinguishable on its facts, as explained in more detail below.

defendants had the option of altering the design of their product, it was illogical for the Panel to assume the *Engle* findings effectively ban all cigarette sales in Florida.

This is in contrast to the situation in *Mutual Pharm. Co. v. Bartlett*. 133 S. Ct. 2466 (2013), where the Supreme Court found federal preemption of tort claims against the manufacturers of generic prescription drugs on the ground that the drug companies were legally *compelled* to copy the design and labeling of the brand-name manufacturer under federal law. *Id*. at 2476-77. Likewise, in *Geier*, the plaintiffs sought a design change—airbags in all vehicles—that would have conflicted with the federal government's deliberate choice to foster a mix of passive restraint technologies on the road, including airbags. *See* 529 U.S. at 879. In this case, in contrast, the *Engle* defendants could have avoided future tort liability by changing the design of their product without even arguably running afoul of federal law. That being so, there was no factual reason for the Panel to assume that the threat of liability posed by the *Engle* findings effectively bans all future cigarette sales in Florida.

Second, theory aside, the Panel failed to understand that *Engle* has not produced a ban *as a matter of fact*—and there is no realistic possibility of it doing so. In truth, *Engle* is a closed system: the *Engle* verdict was issued in 1999, and the class findings were upheld nearly 10 years ago. *See Engle*, 945 So.2d at 1255, 1269. The class cutoff date was determined to be November 21, 1996, and any

individual actions needed to be filed within one year of the mandate, leaving a deadline of January 2008 for such actions. *See id.* at 1277. Since that time, only about 9,000 plaintiffs filed cases in the wake of *Engle*, and only about 1,100 remain in the federal courts. *See* Wikinvest, Engle Class Action, http://www.wikinvest.com/stock/Altria_Group_(MO)/Engle_Class_Action. And despite favorable verdicts in many of those cases, *see id.*, cigarettes *are still being sold in Florida*. This means that there is no *de facto* or *de jure* ban on cigarettes stemming from *Engle*. Because there is no ban, there is necessarily no conflict.

In short, because the Panel assumed a ban where none exists, its ruling is flawed at its core. For this reason, too, en banc rehearing is waranted.

CONCLUSION

The Court should grant the Petition for Rehearing En Banc because the Panel's conclusion that the *Engle* findings effectively "ban" cigarette sales in Florida conflicts with decisions of the U.S. Supreme Court on the preemptive effect of state-law damages claims.

Date: May 7, 2015

Respectfully submitted,

s/ F. Paul Bland, Jr.

F. Paul Bland, Jr.
Public Justice, P.C.
1825 K Street, N.W., Suite 200
Washington, D.C. 20006
(202) 797-8600

pbland@publicjustice.net

Leslie Brueckner
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland CA 94607
(510) 622-8205
lbrueckner@publicjustice.net

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief contains [x] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

3. L.A.R.31.1(c) Certification: The text of the electronic version of this brief is identical to the text in the paper copies of this brief. A virus detection program (Symantec Endpoint Corporate Anti-virus version 12.1.3001.165) has been run on the file of this brief and no virus was detected.

Dated: May 7, 2015

/s/ F. Paul Bland, Jr.

F. Paul Bland, Jr.
Public Justice, P.C.
1825 K Street, N.W., Suite 200
Washington DC 20006
(202) 797-8600
pbland@publicjustice.net

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that the foregoing document was filed via the Court's Appellate PACER system on May 7, 2014, which will serve electronic notice to

all parties of record.

Dated: May 7, 2015

s/ F. Paul Bland, Jr.
F. Paul Bland, Jr.