Nos. 14-16601 & 14-17068

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD O'BANNON, JR.,
ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellee,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,
and
ELECTRONIC ARTS, INC.; COLLEGIATE LICENSING COMPANY,
Defendants.

Appeals from the United States District Court
for the Northern District of California

The Honorable Claudia Wilken, Senior Judge
Case Nos. 09-cv-1967 CW& 09-cv-3329 CW

BRIEF FOR THE ALSTON KINDLER GROUP AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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I. INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Alston Kindler Group is composed of Shawne Alston, Nick Kindler, and their legal representatives from the law firm of Hagens Berman Sobol Shapiro LLP ("HBSS"). Alston and Kindler are former NCAA Division I football players from West Virginia University, and are plaintiffs and putative class representatives in a multidistrict antitrust class action currently pending before Judge Wilken, who issued the permanent injunction order at issue in this appeal, captioned *In re: National Collegiate Athletic Assoc. Grant-in-Aid Cap Antitrust Litig.* ("*GIA*").[2] As explained herein, the Court's decision in the present appeal may impact *GIA.*

Alston and Kindler are represented in *GIA* by Hagens Berman Sobol Shapiro LLP ("HBSS"), a law firm based in Seattle, Washington with numerous offices across the country.[3] HBSS represents, and has represented, current and former NCAA college athletes in numerous pending and resolved class action cases

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus curiae* the Alston Kindler Group states that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person contributed money that was intended to fund preparing or submitting the brief.

[2] Case No. 14-md-02541-CW (N.D. Cal.).

[3] Information on HBSS is available on the firm's website at http://www.hbsslaw.com.

against the NCAA. Several of those cases include classes that overlap with the class represented by Appellees in this appeal. District courts have appointed HBSS as plaintiffs' lead or co-lead class counsel in numerous of those class action cases, charging HBSS with a heightened duty to zealously protect the interests of class members. Those cases include *Keller* (including the appeal decided by this Court in 2013[4]), two pending antitrust class action cases including *GIA*,[5] and a pending class action case against the NCAA regarding its handling of concussion issues.[6]

HBSS on behalf of its clients and class members has served, or is serving, as Court-appointed lead class counsel in numerous antitrust and other cases cited by the parties, and can provide the Court with further relevant information related to

[4] *Keller v. Electronic Arts Inc.*, 724 F.3d 1268 (9th Cir. 2013).

[5] The other pending antitrust class action is *Rock v. Nat'l Collegiate Athletic Ass'n*, Case No.12-cv-01019-JMS-DKL (S.D. Ind.) (challenging NCAA's now abandoned rule prohibiting multiyear athletic scholarships).

[6] *Arrington, et al. v. Nat'l Collegiate Athletic Ass'n*, Case No. 11-cv-06356 (N.D. Ill.). The detailed publicly-available record in *Arrington* casts significant doubt on whether Appellant has lived up to one of the core reasons for its formation: to address the "'large number of serious injuries and even fatalities to players.'" Appellant's Br., at 6. *See, e.g.*, *Arrington.*, Proffer of Common Facts in Support of Motion for Class Certification (ECF No. 176). *See also GIA* Consolidated Amended Complaint ("*GIA* Complaint"), at 62 n.10 (ECF No. 60) ("the NCAA stated in a court filing early that month [in 2013], in response to a wrongful death lawsuit filed by a college football player's family, that '"[t]he NCAA denies that it has a legal duty to protect student-athletes.'").

those cases.[7] That information includes: (1) the NCAA *expressly allowing* multiple forms of cash payments to current college athletes in amounts comparable to what is at issue in the present appeal, for example, via the $20 million cash settlement in *Keller* recently entered into by HBSS and the NCAA; and (2) the NCAA *expressly* allowing thousands of athletes in 2011 to receive $2,000 cash stipends that were actually paid out, not merely provisionally approved.

As described herein, the plaintiffs in *GIA* represent putative classes of current and former NCAA college athletes, and challenge the NCAA's financial aid restrictions that limit the value of athletic scholarships to amounts far below the actual cost of attending school. The Alston Kindler Group seeks a limited damages award for that delta, distinguishing them from amicus *Jenkins*, who seeks only injunctive relief in *GIA.* The NCAA argued in *GIA* that Judge Wilken's injunction order in *O'Bannon* (at issue in this appeal) somehow required dismissal of *GIA* at the pleading stage,[8] while at the same time (in the same brief) contending

[7] The cases include *Agnew v. NCAA*, 683 F. 3d 328 (7th Cir. 2012); *Keller*; *GIA*; *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005); *In re NCAA Student-Athlete Name Image & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013); and *Rock.*

[8] *See, e.g.*, *GIA*, ECF No. 89 at 1-2, 5, 6, 8, 9, 14, 16, 17 (motion to dismiss); ECF No. 100 at 1-10, 12 (reply in support of motion to dismiss).

in *GIA* that *O'Bannon* was wrongly decided.[9] Judge Wilken rejected the NCAA's confusing contentions, and *GIA* has proceeded into discovery.[10]

The class members that the Alston Kindler Group represents have a very significant interest in any continuing examination and interpretation of *O'Bannon* that may impact *GIA*. Moreover, those class members have a substantial interest in ensuring the proper application of the federal antitrust laws to the NCAA, in preventing the NCAA from obtaining its desired *de facto* immunity from those laws,[11] and in receiving the benefits of a competitive market.

Additionally, the class members represented by the Alston Kindler Group have a heightened interest in urging a narrowly-circumscribed opinion from this Court, with any necessary dicta precisely identified and clarified. This is to prevent the NCAA from, as it does here, arguing that any stray dicta it perceives as favorable somehow establishes for it broad and permanent antitrust immunity, as it similarly does with the fragment of dicta from *Board of Regents* that undergirds its

[9] *See GIA*, ECF No. 89, at 1 n.2 ("the NCAA and its member conferences and schools respectfully disagree with the Court's ruling in *O'Bannon* . . .").

[10] *See GIA*, ECF No. 131 (order denying motion to dismiss).

[11] *See, e.g.*, Appellant's Br., at 2, 3, 5.

appeal.[12] The class members represented by the Alston Kindler Group have a very significant interest in preventing the inefficiencies, confusion and delays that could result, including in *GIA.* The Alston Kindler Group presents herein further legal support undercutting the NCAA's reliance on dicta.[13]

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant's "just trust us" argument deserves short shrift. *See, e.g.*, Appellant's Br. at 2, 3, 5, 53, 54. Appellant seeks blanket immunization for anticompetitive conduct far beyond simply the narrow licensing restraints at issue in the present appeal. *See* Appellant's Br., at 18 ("the challenged amateurism rules are valid as a matter of law because they are designed to preserve the amateur character of college sports."). The district court correctly declined to provide that immunization. After meticulously evaluating the ample record evidence after a 15-day bench trial, the district court found that the ***actual, real-world market evidence*** before it did not support Appellant's theoretical pronouncements and justifications about its role in college sports. Appellant in the instant appeal again seeks a

[12] *See, e.g.*, Appellant's Br., at 2, 14, 18, 24, 27, 52 (all quoting the same dictum "'athletes must not be paid.'")

[13] The interests described are sufficient for *amicus curiae* status. *See Miller-Wohl Co. v. Com'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982); *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986).

special protection not available to thousands of other businesses that manage to compete, innovate and thrive without special subsidies. *See id.* And Appellant seeks this protection not only in regards to the present case, but to thwart plaintiffs in other pending or future antitrust cases, including in *GIA.*

The NCAA's dominant reliance on a sentence fragment of dicta from *Board of Regents* illustrates the legal and factual infirmities of its positions. *See*, note 12, *supra*. The NCAA's ***actual market conduct***, in regards to matters at issue in, for example, *Keller* and *GIA*, illustrates a host of permissible and morphing cash payments to players.

The Alston Kindler Group respectfully requests that, for the reasons stated herein and in Appellees' brief, the Court affirm the district court's orders.

III. ARGUMENT

A. The Claims in *GIA* Are Distinct From Those at Issue Here

The Alston Kindler Group herein apprises the Court of the pendency and status of *GIA*. Appellant should not be allowed to bootstrap a loss here (or even a win) into a claimed "win" in *GIA*, as is Appellant's proclivity. This Court can assist by issuing a narrowly-tailored opinion in the present appeal. In *GIA*, the plaintiffs allege that "[t]he NCAA and its members have unlawfully agreed that no college will pay an athlete any amount for his or her [athletic services] that exceeds

the value of a grant-in-aid, and have agreed that the allowed grant-in-aid does not compensate for the full cost of attendance." *GIA* Complaint, ¶ 1.

Plaintiffs in *GIA* further state that "[t]he value of a grant-in-aid is often several thousand dollars below the actual cost of attending a school (the 'Cost of Attendance,' an amount published by each school). In the highly competitive marketplace of Division I FBS football and basketball, every player unquestionably would receive a grant-in-aid that actually covers the Cost of Attendance." *Id.*, ¶8. Moreover, "as shown in great detail [in the *GIA* Complaint], each of the Defendants stated that if they were not bound by the collusive agreement among themselves and their co-conspirators that comprise Division I, they would implement such an increase. Moreover, if collusion among conferences were eliminated, every player likely would receive further additional compensation above the Cost of Attendance." *Id.*

The proposed class definitions in the *GIA* Complaint do not rely on – or even mention – licensing, sales, the right of publicity or use of players' name, image and likeness ("NIL"). Plaintiffs will develop a full factual record in *GIA* tied to the distinct restraints, relevant markets, less restrictive alternatives, and affirmative defenses set forth in that case. And this Court will have the benefit of that record if it is called upon to examine the precise limited issues in *GIA*.

B. Appellant's "Just Trust Us" Arguments Are Not Persuasive, As Demonstrated in *GIA* and *Rock*

Appellant's "just trust us" request does not hold water. Appellant's Br. at 2, 3, 5, 53, 54. The *GIA* Complaint sets forth nearly 100 paragraphs of material reciting Appellant's (and its members') copious public admissions on the issue of the shortfall between the athletic grants-in-aid and the cost of attendance. *GIA* Complaint, ¶¶ 331-428. Plaintiffs plead in great detail Defendants' public statements claiming to *support* the concept of grants-in-aid that cover the full cost of attendance. But Plaintiffs also plead, and document, that "[t]he NCAA has made a litany of public comments seemingly *supporting* the concept of a stipend. Each one seems potentially promising in a vacuum, until one realizes they go back to at least as early as 2003 (leaving aside that these stipends were provided prior to 1976-77 and only stopped by action of the NCAA), with little change ever following the statements." *Id.*, ¶331.

Moreover, HBSS is lead counsel in the *Agnew*/*Rock* cases cited by the parties, both pertaining to Appellant's former ban on multiyear athletic scholarships, defended on the basis of "amateurism" and other standard NCAA defenses. As the Seventh Circuit stated in *Agnew*, the NCAA changed course mid-

litigation, after a decades-long ban on the practice since the 1970s.[14] Far from promoting the demise of college sports, Appellant now even touts multiyear scholarships as a positive.[15] And needless to say, there is no evidence of any loss of consumer demand or any other deleterious effect. But it does further illustrate that Appellant's "just trust us" approach is scattershot, *ad hoc*, and unsupportable, and repeatedly comes at the expense of powerless college athletes and no one else.

Given Appellant's documented failure, as detailed above, to implement even those reforms that it has been publicly championing for at least a decade, Appellant does not deserve the broad-ranging trust and immunity that it seeks.[16]

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[14] *Agnew* v. *Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 332 n.1 (7th Cir. 2012) (citation omitted).

[15] *See, e.g.*, *NCAA President Mark Emmert Calls for 'Scholarships for Life,' Other Reforms*, NCAA.org (July 9, 2014), http://www.ncaa.com/news/ncaa/article/2014-07-09/ncaa-president-mark-emmert-calls-scholarships-life-other-reforms.

[16] *Amicus Curiae*'s views are shared by Walter Byers, who served for nearly 40 years as the Executive Director of the NCAA. In his book *Unsportsmanlike Conduct: Exploiting College Athletes*, available in the district court record, he wrote in 1995: "Today the NCAA's structure with layer upon layer of administrators and managers is designed to obscure responsibility. It is difficult even to identify the wily saboteurs who work from inside to subvert real reform. Their determined efforts are facilitated by the very organization of the NCAA – diffused responsibilities, a complicated governance process that lends itself to manipulation, and rules upon rules based on abandoned principles." *Keller*, ECF No. 352-4, at 35-36.

C. Appellant's Arguments Regarding Amateurism Are Belied By Appellant's Real-World Conduct

Appellant's and Appellees' briefs both reference "pay for play."[17] Precise definition of terms is critical. "The treatment of Pell Grants reflects the malleable, *ad hoc* nature of what the NCAA defines as 'pay.'" Appellees' Br., at 7 n.1. *GIA* presently is addressing the somewhat baffling and irreconcilable issues about what Appellant considers pay, what Appellant does not consider pay, whether any of it actually matters to consumers of college sports entertainment, and now perhaps Appellant's new contention that college athletes might leave college sports altogether in droves on principle rather than even accept a "minor" payment.

Appellees' brief references two related items of interest for which the Alston Kindler Group can provide additional relevant information. *First,* Appellees state that, in regards to the right of publicity class action case that HBSS brought against the NCAA and others, "[t]he NCAA subsequently settled all claims brought separately by the *Keller* Plaintiffs for another $20 million." Appellees' Br., at 20 n.7. There is a very notable and relevant fact regarding this settlement to be paid by the NCAA. On June 9, 2014, the NCAA issued a press release about this settlement and stated the following: "'Consistent with the terms of a court-

[17] *See, e.g.*, Appellees' Br., at 24, 31; Appellant's Br. at 3, 22, 25, 27, 41, 52, 53, 58.

approved settlement, the **NCAA will allow a blanket eligibility waiver for any currently enrolled student-athletes who receive funds connected with the settlement**.'"[18] The NCAA dubiously added "[i] n no event do we consider this settlement pay for athletics performance." *Id*.

The NCAA's statement above, allowing cash payments to current players, was announced on the first day of trial in the related *O'Bannon* litigation. To state the obvious, there is no record evidence, nor any subsequent indication, that the settlement stated above has had a negative impact whatsoever on the viewing preferences of college sports fans, on college athletes, nor on any other aspect of college sports.

Second, Appellees state that "[s]everal years ago, some schools sought the ability to pay a $2,000 'stipend' to college athletes. That was provisionally enacted, but was later overridden in a vote by all schools." Appellees' Br., at 6. Before the override, however, it appears that several thousand college athletes may have actually received stipend payments, and yet did not lose their amateur status. As explained in the *GIA* Complaint, after the override vote, the NCAA "explicitly

[18] *NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA.org (June 9, 2014), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit (last visited January 26, 2015) (emphasis added).

announced that ***'[a]ny allowances offered in writing during the November [2011] early signing period will be honored,*** according to Division I Vice President David Berst. Nearly 10,000 prospective Division I student-athletes signed National Letters of Intent for next year during the early signing period in November.'"[19] Appellant even issued a press release, identifying a specific college athlete that had received the stipend and detailing how helpful it was to that athlete.[20]

There is no record evidence, or any other information, demonstrating that these cash stipend payments caused harm to consumers or to athletes by (in Appellant's words), somehow depriving them of a choice between professional and collegiate athletics. Appellant's Br., at 57.

D. Appellant Is Not Entitled to An Antitrust Exemption

Appellant's plea for relief from the normal strictures of the antitrust laws is not new. *See, e.g.*, Appellant's Br., at 2, 3, 5. As the United States Department of Justice's Antitrust Division ("DOJ") explained in a recent antitrust case about the pricing of Apple Inc.'s electronic books ("e-books"):

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[19] *GIA* Complaint, ¶ 359. Full NCAA press release available at http://fs.ncaa.org/Docs/NCAANewsArchive/2011/december/implementation%2Bof%2Bmiscellaneous%2Bexpense%2Ballowance%2Brule%2Bsuspended%2Buntil%2Bjanuarydf30.html (last visited January 27, 2015) (emphasis added).

[20] *Stipend Eased Alabama Gymnast's Transition to College*, NCAA.org (Sept. 16, 2013), http://www.ncaa.org/about/resources/media-center/news/stipend-eased-alabama-gymnast%E2%80%99s-transition-college.

> While e-books are a relatively new arrival on the publishing scene, a plea for special treatment under the antitrust laws is an old standby. Railroads, publishers, lawyers, construction engineers, health care providers, and oil companies are just some of the voices that have raised cries against "ruinous competition" over the decades. Time and time again the courts have rejected the invitation to exempt particular businesses from the reach of the Sherman Act.[21]

The DOJ's words, and its numerous cited Supreme Court authorities, are readily applicable here.

Appellant instead claims that the district court's actions "would blur the clear line between amateur and college sports and their professional counterparts and thereby deprive *athletes* of a genuine choice between the two endeavors." Appellant's Br., at 57. That sentence bears re-reading. In Appellant's view, it is the *athletes* that are going to be harmed because of the district court's ruling.[22]

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[21] *See* Reply Memorandum in Support of the United States' Motion for Entry of Final Judgment, *United States vs. Apple Inc., et al*., No. Case 12-cv-02826-DLC (S.D.N.Y. Aug. 22, 2012), ECF No. 105 (citing and quoting numerous Supreme Court decisions) (footnote omitted).

[22] College athletes could of course refuse the "minor" payment at issue should they find it unpalatable (as unlikely as that may be). Moreover, NCAA rules already expressly allow amateurs and professionals to compete together in a variety of contexts. *See, e.g.*, *GIA*, ECF No. 90-1, NCAA Division I Rule 12.2.3.1 ("Competition Against Professionals. An individual may participate singly or as a member of an amateur team against professional athletes or professional teams."); Rule 12.2.3.2.2 ("Professional Player as Team Member. An individual may participate with a professional on a team, provided the professional is not being

That contention likely does not pass the laugh-test, let alone provide a bulwark against antitrust liability.

Notably, Appellant admits that "payment for NILs would be, at most, a minor element of the full bundle of education goods and services that schools provide the relevant college-education market. . . ." Appellant's Br., at 20. *See also* Appellant's Br., at 47 ("at most, the challenged rules would have a *de minimis* effect in the relevant market because they would limit only one minor (or non-existent) component of the bundle"). That admission well-captures Appellant's view of the dollar value at issue, particularly compared to the multi-billion dollar revenue streams enjoyed by Appellant and its members. Appellant's "minor element" statement further illustrates the utter lack of any future likely impact from the district court's ruling on college sports fans' viewing preferences., or detrimental effects on the choices of college athletes. Appellant's Br., at 20, 47, 57.

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paid by a professional team or league to play as a member of that team (e.g., summer basketball leagues with teams composed of both professional and amateur athletes)."); Rule 12.2.3.2.5 ("Exception—Olympic/National Teams. It is permissible for an individual (prospective student-athlete or student-athletes) to participate on Olympic or national teams that are competing for prize money or are being compensated by the governing body to participate in a specific event, provided the student-athlete does not accept prize money or any other compensation (other than actual and necessary expenses).

As illustrated in the *GIA* Complaint, however, Appellant and its members repeatedly recognized, and then disregarded, the critical importance of similar amounts *to college athletes*. And Appellant further disregarded the critical importance of *cash* amounts, to be utilized for out-of-pocket expenses, as opposed to in-kind amounts that are simply accounting transfers across various school departments such as tuition, room and board.

Nothing in the district court's ruling, as Appellant contends, "invites an interminable series of lawsuits demanding small changes in basic NCAA rules" such as demanding "that the minimum GPA be decreased one-tenth of a point at a time. . . ." Appellant Br., at 59. That Appellant must reach for such absurd examples is telling. Nothing in the district court's rationale, if endorsed by this Court, would deprive district courts from rigorously proceeding in accordance with their traditional gatekeeping role. Moreover, it has now been nearly six months since the district court issued its permanent injunction. Appellant offers not a single example of any subsequently filed antitrust lawsuit against it, let alone any raising the dubious claims that it fears. Additionally, antitrust litigation is widely-known as one of the paradigms of complex, expensive, and highly-specialized

litigation.[23] It is extremely improbable that litigants would repeatedly initiate such cases on the frivolous basis that Appellant posits.

E. Appellant Inappropriately Relies on Dicta

Appellant relies heavily on dicta from *Board of Regents*. *See, e.g.*, Appellant's Br., at 2, 14, 18, 24, 27, 55 (all quoting the same dictum "'athletes must not be paid'"). The inappropriateness of doing so has repeatedly been recognized by the Supreme Court. Moreover, Justice Stevens himself, author of the dicta at issue, stated this in another decision in 2006:

> For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 5 L.Ed. 257 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated. *See id.*, at 399-400 ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision").[24]

Appellant does not, and cannot, contend that the issue of any form of payments to college athletes was "fully debated" in *Board of Regents*. *See also, e.g., Kirtsaeng v. John Wiley & Sons, Inc.*, _U.S._, 133 S. Ct. 1351, 1368-69 (2013) ("Is the Court

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[23] *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546, (2007); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 223 (1997). *See also* Manual for Complex Litigation (Fourth) § 30 (2004).

[24] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006).

having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after? To the contrary, we have written that we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.").[25]

Moreover, this Court also has noted that it is not bound by Supreme Court dicta, particularly that which is, as here, "outdated" and "only half a sentence."[26]

IV. CONCLUSION

The Alston Kindler Group respectfully requests affirmance.

DATED: January 28, 2015

HAGENS BERMAN SOBOL SHAPIRO LLP

By s/ Steve W. Berman
STEVE W. BERMAN

[25] *See also, e.g., Pac. Operators Offshore, LLP v. Valladolid*, _U.S._, 132 S. Ct. 680, 688 (2012) ("the ambiguous comment was made without analysis in dicta and does not control this case"); *CIGNA Corp. v. Amara*, _U.S._, 131 S. Ct. 1866, 1884, (2011) (J. Scalia and J. Thomas, concurring in the judgment ("The Court's discussion of the relief available under § 502(a)(3) and *Mertens* is purely dicta, binding upon neither us nor the District Court.").

[26] *See United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) ("In a brief dictum consisting of only half a sentence, the [Supreme] Court went on to state, however, that ethnic appearance could be a factor in a reasonable suspicion calculus. In arriving at the dictum suggesting that ethnic appearance could be relevant, the Court relied heavily on now-outdated demographic information.") (Footnotes omitted.)

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 4,555 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point, proportionally spaced Times New Roman font.

s/ Steve W. Berman
STEVE W. BERMAN

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for the Alston Kindler Group as *Amici Curiae* in Support of Plaintiffs-Appellees to be served on all counsel of record via the appellate CM/ECF system on this 28th day of January 2015.

s/ Steve W. Berman
STEVE W. BERMAN