No. 10-56971

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD PERUTA, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California, Hon. Irma E. Gonzalez
Case No. CV-02371-IEG (BGS)

BRIEF OF AMICI CURIAE ALABAMA, ALASKA, ARKANSAS, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, & WISCONSIN IN SUPPORT OF REVERSAL

Luther Strange
Attorney General
Andrew L. Brasher
Solicitor General
Brett J. Talley
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
(334) 242-4891 (fax)
abrasher@ago.state.al.us
btalley@ago.state.al.us

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

As states, all *amici* are governmental entities with no reportable parent companies, subsidiaries, affiliates or similar entities under Fed. R. App. P. 26.1(a).

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IDENTITY OF *AMICI CURIAE*

The *amici* States file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.[1] Alabama and the other *amici* States have a profound interest in protecting the fundamental constitutional rights of their citizens. Among these fundamental rights is the Second Amendment right to keep and bear arms. The *amici* States believe that the fundamental rights of their citizens and others should receive the highest protection. The San Diego County sheriff's prohibition on the possession of a handgun outside the home, with limited exceptions, "makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *District of Columbia v. Heller*, 554 U.S. 570, 630, 128 S. Ct. 2783, 2818 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 787, 130 S. Ct. 3020 (2010). This brief addresses how the licensing scheme at issue in San Diego County destroys the Second Amendment right to bear arms and is thus invalid.

[1] Although *amici* file this brief pursuant to Fed. R. App. P. 29(a), they also certify pursuant to Rule 29(c)(5) that no party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No other person contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

1. The licensing scheme in San Diego County should be subjected to strict scrutiny. It prevents the vast majority of residents from legally bearing a handgun for self-defense outside the home. In fact, the combination of California's near outright ban on "open carry" and the sheriff's interpretation of the "good cause" requirement for a concealed carry permit render it impossible for the typical San Diegan to legally possess a handgun in public.

2. The Second Amendment applies to conduct outside the home. The Second Amendment protects the rights of citizens to possess and carry handguns for self-defense. Supreme Court precedent as well as the text and history of the Second Amendment extend that core right beyond the home. Because San Diego County's scheme implicates the core Second Amendment right and places a substantial burden on its citizens' right to bear arms, it is subject to strict scrutiny.

3. The licensing scheme fails strict scrutiny. The design of similar licensing procedures in the vast majority of states demonstrates that the San Diego County sheriff's policy is neither narrowly tailored nor the least restrictive means for achieving the compelling government interest of maintaining public safety.

ARGUMENT

I. The San Diego County sheriff's licensing scheme is subject to strict scrutiny.

The San Diego County sheriff's concealed weapons licensing scheme, in conjunction with California's restrictive laws on open carry, is subject to strict scrutiny under *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). A policy that effectively destroys the Second Amendment right—such as the one in place in San Diego County—fails *any* level of scrutiny. But, at the very least, this scheme substantially burdens the right to bear arms and fails strict scrutiny. Although this Court, sitting *en banc*, is not bound to apply the *Chovan* framework, the San Diego County sheriff's scheme should be subject to strict scrutiny under any framework the Court might adopt.

A. A law that places a substantial burden on a core Second Amendment right is subject to strict scrutiny.

A law that substantially burdens or effectively bans the core Second Amendment right to bear arms must be subject to strict scrutiny. This Court has previously applied a two-part test to Second Amendment challenges that looks to the nature of the regulated right and the severity of the burden imposed by the challenged regulation. *Chovan*, 735 F.3d at 1138. In developing this approach, the court has looked to First Amendment jurisprudence, concluding that "the level of scrutiny in the Second Amendment context should depend on 'the nature of the

conduct being regulated and the degree to which the challenged law burdens the right.'" *Id.* (citations omitted). Under this test, the government may regulate the manner in which a core Second Amendment right is exercised, but it cannot ban the exercise of the right altogether. *Id.* A regulation that both implicates the core Second Amendment right and places a substantial burden on that right is subject to strict scrutiny. *Id.*

B. San Diego's licensing scheme substantially burdens and effectively bans the core right to bear arms.

By barring both open carry and concealed carry, San Diego's licensing schemes effectively renders the Second Amendment a nullity. Open carry in California is all but illegal, whether the handgun in question is loaded or unloaded. *See* Cal. Penal Code §§ 25850, 26350. California has exceptions to this rule, but they are so narrow as to reach the point of absurdity. For example, the relevant self-defense exception allows for the possession of a firearm if a citizen "reasonably believes that any person or the property of any person is in immediate, grave danger," and only then during the "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." *Id.* § 26045. Where an otherwise unarmed civilian would obtain a weapon in such a circumstance is, as the panel noted, "left to Providence." *Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1147 fn.1 (9th Cir. 2014).

Thus a citizen who wishes to exercise his or her right to bear arms must apply for a concealed carry permit. A California resident may receive a concealed carry permit if the applicant has "good moral character," completes a training course, and can establish "good cause." Cal. Penal Code §§ 26150, 26155. The San Diego County sheriff interprets this "good cause" requirement to mean that an applicant must submit "documentation to support and demonstrate their need." (Statement of Undisputed Facts, Appellants' Excerpts of Record, Vol. IV, Tab 37 at 848). Applicants must provide "documented threats, restraining orders, and other related situations where an applicant can demonstrate they are a specific target at risk." (Pelowitz Decl. ¶ 3, Appellants' Excerpts of Record, Vol. III, Tab 31 at 437).

The sheriff's department admits that, under this system, the typical person cannot qualify for a concealed carry permit for personal protection. In fact, an applicant must specifically demonstrate "a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way. Simply fearing for one's personal safety alone is not considered good cause." (Pelowitz Decl. ¶ 7, Appellants' Excerpts of Record, Vol. III, Tab 31 at 439). Under this scheme, bearing arms in self-defense is not a right, but a privilege granted by the government to those it deems most in danger from a specific, previously documented threat.

The licensing scheme also creates an unusual dichotomy of rights. San Diego County residents may also seek a license if they are members of "a diversity of businesses & occupations, such as doctors, attorneys, CEOs, managers, employees and volunteers whose occupation or business places them at high risk of harm." (Pelowitz Decl. ¶ 3, Appellants' Excerpts of Record, Vol. III, Tab 31 at 437). No specific threat is apparently necessary under this category. Thus, the San Diego County sheriff allows someone who works in a dangerous area to attain a license, but not someone who lives in one. The sheriff will issue a license to the owner of a business so that he may protect himself, but not to the customers who travel to that business.

If *Heller* concerned a near prohibition on the right to *keep* arms, the San Diego County sheriff's licensing scheme is a near prohibition on the right to *bear* arms. The Supreme Court in *Heller* noted that such severe restrictions are few, and that "some of those few have been struck down." *Heller*, 554 U.S. at 629, 128 S. Ct. at 2818. Those "few" the Court cited were *State v. Reid*, 1 Ala. 612 (1840), *Nunn v. State*, 1 Ga. 243 (1846), and *Andrews v. State*, 50 Tenn. 165 (1871), all cases in which state courts struck down prohibitions on carrying firearms for self-defense. *Heller*, 554 U.S. at 629, 128 S. Ct. at 2818.

Similarly, the regulation at issue here leaves *no* means for most individuals to legally exercise their right to bear arms for self-defense outside of the home.

This Court has previously indicated that just such a regulation would trigger the highest scrutiny. In *Jackson v. City & Cnty. of San Francisco*, the court distinguished a law regarding firearm storage with one from the Seventh Circuit in which "the government was obliged to meet a higher level of scrutiny than intermediate scrutiny to justify a blanket prohibition on carrying an operable gun in public." 746 F.3d 953, 964 (9th Cir. 2014) (citations omitted). "By contrast," the court noted, "section 4512 does not constitute a complete ban, either on its face or in practice, on the exercise of a law-abiding individual's right to self-defense." *Id.*

The same cannot be said for the regulatory scheme in place in San Diego County which, on its face and in practice, does constitute such a ban.[2]

[2] In Appellee's initial brief, the county of San Diego repeatedly emphasized that the licensing policy "leaves 'reasonable alternative means' to bear a firearm sufficient for self-defense purposes." Doc. 49 at 27 (citing *Nordyke v. King*, 644 F.3d 776, 787 (9th Cir. 2011) on reh'g en banc, 681 F.3d 1041 (9th Cir. 2012)). Appellee supported this contention by noting, "Open carry of unloaded firearms is lawful without a CCW license and the ammunition may be carried in a clip ready for instant loading. This allows for the 'bearing' of arms for self-defense and offers an adequate 'alternative method of carrying.'" Doc. 49 at 27 (citations omitted). But even this alternative means is no longer available to citizens of San Diego. In 2011, California banned the open carry of unloaded handguns. Patrick McGreevy and Nicholas Riccardi, *Brown Bans Open Carrying of Handguns*, L.A. TIMES, October 10, 2011, at http://articles.latimes.com/2011/oct/10/local/la-me-brown-guns-20111011; Cal. Penal Code §§ 25850, 26350.

II. The plain language and history of the Second Amendment as well as Supreme Court precedent demonstrate that the right to keep and bear arms does not stop at the front door of the home.

The defendants have erroneously argued that the Second Amendment cannot be infringed by concealed-carry regulations because "the right recognized in *Heller* does not extend beyond the home." *Peruta v. Cnty. of San Diego*, 758 F.Supp.2d 1106, 1113 (S.D. Cal. 2010). This Court should reject this analysis in no uncertain terms. Instead, the Court should conduct the same analysis of the plain language and history of the Second Amendment as the Supreme Court undertook in *Heller* and *McDonald*. The Second Amendment's text, history, and case law establish that the right to bear arms extends beyond the home.

A. The text of the Second Amendment extends beyond the home.

This Court's analysis should begin with the text of the Second Amendment itself. The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. Although the Court in *Heller* focused on the right to keep arms in the home, it also defined what it means to bear arms. The Court explained that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.' *Id.* at 584, 128 S. Ct. at 2793. It then endorsed Justice Ginsburg's analysis in *Muscarello v. United States* of what it means to carry a firearm. *Id.* In *Muscarello*, Justice Ginsburg wrote, "Surely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in

the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" 524 U.S. 125, 143, 118 S. Ct. 1911, 1921 (1998) (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed.1998)).

This broad definition cannot justify a limitation of its reach to mere domestic life. As the Seventh Circuit noted, "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Such an awkward interpretation of the Second Amendment would run afoul of the Supreme Court's admonition to evaluate constitutional provisions as they would have been "understood by the voters." *Heller*, 554 U.S. at 576, 128 S. Ct. at 2788 (citations omitted). Taken in that context, the natural language of the Second Amendment "implies a right to carry a loaded gun outside the home." *Moore*, 702 F.3d at 936.

Moreover, an interpretation of the right to bear arms that did not extend beyond the home would undermine the prefatory clause of the Second Amendment: "A well regulated Militia, being necessary to the security of a free State . . . ." U.S. Const. amend. II. In *Heller*, the Court explained that the prefatory clause in no way weakens the underlying right to bear arms. Rather, it "announces the purpose for which the right was codified: to prevent elimination of the militia."

Heller, 554 U.S. at 599, 128 S. Ct. at 2801. It is difficult to imagine how the right could accomplish that objective if it were intended to be limited to the confines of the home.

B. The history of the Second Amendment confirms that the right extends outside the home.

This interpretation of the plain text of the Second Amendment is bolstered by a historical review of the right. The panel opinion took great pains to conduct a thorough analysis of the history and precedent concerning the right to bear arms. *See Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1153-67 (9th Cir. 2014). But even looking to only those historical examples cited by the Supreme Court in *Heller* confirms that the right to bear arms extends beyond the home.

In *Heller*, the Court explained that, by the time of the founding, the historical experiences of the English had led to an understanding of the right as "protecting against both *public* and private violence." 554 U.S. at 594, 128 S. Ct. at 2798-99 (emphasis added). The Court quotes from Charles Sumner's Bleeding Kansas speech, in which he proclaims, "The rifle has ever been the companion of the pioneer and, under God, his tutelary protector…. Never was this efficient weapon more needed in just self-defence, than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached." *Id.* at 609, 128 S. Ct. at 2807 (quoting *The Crime Against Kansas*, May 19–20, 1856, in American Speeches: Political Oratory

from the Revolution to the Civil War 553, 606–607 (T. Widmer ed. 2006)). Even the historical examples the Court points to as limitations on the right to bear arms nevertheless confirm its general breadth. *Id.* at 626-27, 128 S. Ct. 2816-17 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, *or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings*, or laws imposing conditions and qualifications on the commercial sale of arms.") (emphasis added).

C. Precedent underscores that the right extends outside the home.

Finally, Supreme Court precedent, limited though it may be, has focused on the Amendment's purpose—ensuring a means to self-defense—rather than the locale in which that right is exercised. In *Heller*, the Supreme Court confirmed that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592, 128 S. Ct. at 2797. The Court found this particularly true of handguns, "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family." *Id.* at 628-29, 128 S. Ct. at 2818 (citations omitted). The Court reiterated in *McDonald* that the "possession of firearms," which is "essential for self-defense," is constitutionally

protected in the United States because "self-defense" is the "central component" of the Second Amendment right. 561 U.S. at 787, 130 S. Ct. at 3048.

In *Heller*, the Court dealt with the right to keep arms within the home where the need for self-defense is "most acute," 554 U.S. at 628, 128 S. Ct. at 2817, but it did not do so at the expense of the right to bear arms in public. The Court's opening line in *McDonald* is instructive: "Two years ago . . . this Court held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ." 561 U.S. at 742, 130 S. Ct. at 3021. The need for self-defense does not end at the front door of the home. Neither should the right. *See, e.g.*, *Moore*, 702 F.3d 933 at 937. ("Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.").

Because the Second Amendment protects a right to bear arms outside the home and because the sheriff's licensing scheme substantially burdens that right, this Court should apply strict scrutiny.

III. The experience of other States shows that the San Diego County sheriff's licensing scheme cannot survive heightened scrutiny.

The San Diego County sheriff's near total ban on the right to bear arms cannot stand up under the rigors of heightened scrutiny. Strict scrutiny means that "the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a heavy burden of justification, that

the State must demonstrate that its. . . system has been structured with precision, and is tailored narrowly to serve legitimate objectives and that it has selected the less drastic means for effectuating its objectives." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 93 S. Ct. 1278, 1288 (1973). Protecting the health and safety of its citizens is certainly a compelling interest for any government. But the sheriff's licensing scheme is neither narrowly tailored nor the least restrictive means of carrying out that interest, as the experience of a growing majority of states with the same compelling interest has shown.

In examining the reasonableness of laws that impinge on fundamental rights, the Supreme Court has regularly looked to the views of the several states for guidance. States should have the freedom to adopt different laws than their sisters. But, even though other states' laws should not be controlling, they can nonetheless "provide testimony to the unreasonableness" of a single state's law "and to the ease with which the State can adopt less burdensome means" to accomplish its objectives. *Hodgson v. Minnesota*, 497 U.S. 417, 455, 110 S. Ct. 2926, 2947 (1990). Such reasoning is in keeping with historical precedent. *See Tennessee v. Garner*, 471 U.S. 1, 15-19, 105 S. Ct. 1694, 1703-06 (1985) ("In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions…. In light of the rules adopted by those who must actually administer them, the older and fading common-law

view is a dubious indicium of the constitutionality of the Tennessee statute now before us."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 n.4, 86 S. Ct. 1079, 1081 (1966) ("Only a handful of States today condition the franchise on the payment of a poll tax."); *Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S. Ct. 792, 797 (1963) ("Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree.").

The emerging trend here is toward a robust protection of Second Amendment rights. As of last count, forty-one states have narrowly tailored their licensing procedures to both secure the constitutional rights of their citizens while ensuring public safety. These so-called "shall issue" states grant concealed carry licenses to all law-abiding citizens who can show reasonable proficiency with a firearm. John R. Lott, Jr., *What A Balancing Test Will Show for Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1207 (2012). Seven of the nine states that comprise the Ninth Circuit are shall-issue states. [3] David Kopel, *Growth Chart of Right to Carry*, WASH. POST, Feb. 17, 2014, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/17/growth-chart-of-right-to-carry/.

[3] As is Guam. Sabrina Salas Matanane, *Governor Signs 12 Bills, Vetoes 2*, KUAM NEWS, May 28, 2014, http://www.kuam.com/story/25626210/2014/05/28/governor-signs-12-bills-vetoes-2.

The laws of these states "provide testimony to the unreasonableness" of San Diego County's licensing procedure and to "the ease with which" the sheriff "can adopt less burdensome means" to accomplish its ends. *Hodgson*, 497 U.S. at 455, 110 S. Ct. at 2947. Forty-one states have managed to enact regulations that both respect the right to bear arms while furthering their compelling interest in protecting the health and safety of their citizens. The San Diego County sheriff should be able to do the same.

Even if the sheriff were to argue that it is somehow unique from places in states like Washington, Oregon, and Nevada, surely there is some middle ground between the thoroughgoing protection of Second Amendment rights that other governments provide and the absolute denial of those rights in San Diego County. It is striking that a resident of Alabama, upon moving to San Diego County, would find such a stark difference in the treatment of a fundamental right protected by the United States Constitution. Although some differences in the law are expected—and even welcomed—in our federalist system, it offends basic notions of ordered liberty to have a constitutionally enshrined right robustly protected in one jurisdiction—or in this case forty-one states—and extinguished elsewhere.

* * *

Although increasing safety and reducing crime are compelling government interests, the Supreme Court has made clear that "the very enumeration of the

[Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634, 128 S. Ct. at 2821. Because the San Diego County sheriff's licensing scheme burdens the core Second Amendment right of law-abiding citizens to keep and bear arms for lawful purposes, it should be subjected, at least, to strict scrutiny. Here, the San Diego County sheriff has failed to show that its ban is narrowly tailored to serve its interests in public safety and preventing crime. The licensing regime cannot pass constitutional muster. The well-reasoned opinion of the panel reached the same conclusion. So should this Court.

CONCLUSION

The Court should reverse the district court and reinstate the panel decision.

Luther Strange
Attorney General

/s/ Andrew L. Brasher
Andrew L. Brasher
Solicitor General
Brett J. Talley
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2609
(334) 242-4891 (fax)
abrasher@ago.state.al.us
btalley@ago.state.al.us

COUNSEL FOR ADDITIONAL AMICI

Craig W. Richards
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-3600

Leslie Rutledge
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201-2610
(800) 482-8982

Pamela Jo Bondi
Attorney General of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

Lawrence G. Wasden
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Derek Schmidt
Attorney General of Kansas
120 S.W. 10th Avenue, 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

Jack Conway
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5300

Buddy Caldwell
Attorney General of Louisiana
P. O. Box 94005
Baton Rouge, LA 70804-9005
(225) 326-6079

Bill Schuette
Michigan Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

Chris Koster
Attorney General of Missouri
Supreme Court Building
207 W. High Street
Jefferson City, MO 65101
(573) 751-3321

Tim Fox
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

Adam Paul Laxalt
Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1100

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

Mike DeWine
Attorney General of Ohio
30 E. Broad Street, 17th Floor
Columbus, OH 43215
(614) 466-4320

E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105-4894
(405) 521-3921

Alan Wilson
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-3970

Marty J. Jackley
Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

Ken Paxton
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2100

Sean Reyes
Attorney General of Utah
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320
(801) 538-9600

Patrick Morrisey
Attorney General of West Virginia
State Capitol
Building 1, Rm. E-26
Charleston, WV 25305
(304) 558-2021

Brad Schimel
Attorney General of Wisconsin
P. O. Box 7857
Madison, WI 53707-7857
(608) 266-1221

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because it contains 3,865 words, excluding the parts of the brief exempted Fed. R. App. P. 32. I have relied upon Microsoft Word 2007 to determine the word count.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: April 30, 2015

s/ Andrew L. Brasher
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

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