

No. 19-10011  
**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

*Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II; SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

*Defendants-Appellees.*

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

*Intervenor Defendants-Appellants.*

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On Appeal from the United States District Court for the Northern District of Texas  
(No. 4:18-cv-00167-O)

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**BRIEF OF AMICI CURIAE 35 COUNTIES, CITIES, AND TOWNS AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF INTERVENOR DEFENDANTS-APPELLANTS**

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## **CERTIFICATE OF INTERESTED PERSONS**

Because the twenty-nine counties, cities, and towns are government entities, a certificate of interested parties is not required for them. 5th Cir. R. 28.2.1.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae the California State Association of Counties represents that it is a non-profit mutual benefit corporation, which does not offer stock and which is not a subsidiary or affiliate of any publicly owned.

Respectfully submitted,

/s/ Lorraine Van Kirk  
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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici are counties, cities, and towns located throughout the United States, including throughout the Plaintiff States. Amici are politically and geographically diverse, ranging from the largest county in the nation, Los Angeles County, with its population larger than forty-two states, to cities and counties of all sizes from around the country, from Jefferson County, Mississippi, to Orange County, Florida, to Shelby County, Tennessee. Amici also include the California State Association of Counties (CSAC), a non-profit corporation whose membership is comprised of all fifty-eight California counties.

As local governments, Amici are responsible, oftentimes by constitutional and statutory mandates, for protecting the health and safety of our communities. We operate law enforcement agencies and jail facilities, maintain roads and public infrastructure, provide emergency medical transportation and public health services, plan for and respond to disasters and emergencies, assist children and the elderly, and much more. We share a substantial interest in the wellbeing of our residents and the effective expenditure of their tax dollars.

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Counsel for all parties consented to the filing of this brief.

Notwithstanding our diversity, we are united in our support for the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (ACA). We bear an outsized burden in caring for our uninsured residents, measurable in staggering direct costs for services we provide, but are not paid for, and in the myriad indirect harms to our governments and our communities that flow from our residents' lack of health care coverage. By expanding access to health insurance and promoting primary and preventative health care, the ACA reduced the billions in uncompensated costs local governments bear and enabled our towns, cities, and counties to better spend taxpayer dollars on more effective health services and to preserve our resources for our other critical government functions. Under the ACA, we better serve our communities as a whole. Invalidating the ACA would unravel these gains and impose extraordinary financial and human costs, leaving us worse off along many dimensions than we were before the ACA was enacted. This was not—and could not have been—Congress's intent.

## **ARGUMENT**

### **I. THE ACA IS CRITICAL TO REDUCING LOCAL GOVERNMENTS' UNCOMPENSATED COSTS**

As local governments, Amici are obligated to provide vital services to our residents and communities. The broad police powers vested in Amici, as municipal and county governments, simultaneously vest in us the responsibility to

supply an array of essential services. In many jurisdictions, state and local laws codify these duties in express mandates Amici must fulfill. We must protect public safety, operate law enforcement agencies and correctional facilities, supply emergency medical transportation and emergency health services for the indigent, maintain roadways and public infrastructure, assist children and the elderly, and much more. In many cases, local governments are the only entities with the ability to perform these vital public functions that enable our residents to pursue full and independent lives.

Before the ACA was enacted, Amici incurred massive uncompensated costs from supplying services to our uninsured and underinsured residents. Amici are obligated to provide many health care services to our residents regardless of their ability to pay. We do not condition emergency transportation in our ambulances, examination and treatment in our health care clinics and emergency departments, or emergent care in our safety-net hospitals on ability to pay the medical bill. Thus, prior to the ACA, when our communities were filled with residents who could not cover the costs of the health care services they needed because they lacked any or adequate health insurance, our local governments strained to provide services we were responsible for offering but not compensated for supplying. We sustained still more of these costs on behalf of our communities because private practitioners regularly refused to incur them by serving the poor or the uninsured.

Prior to the ACA, uninsured and underinsured residents also required costlier and less effective health care. Without access to the primary care, prescription drugs, and early diagnosis and treatment that health insurance enables, our residents were more likely to fill our ambulances and our public emergency rooms and to seek care later, when they were sicker and more costly to treat.<sup>2</sup> They were also less likely to receive the type of early interventions and treatments for substance use and mental health conditions that reduce the need for other high-cost government services, such as our jails, law enforcement resources, and safety-net services.

Amici bear massive, but avoidable, direct costs from the less effective, less timely, and more expensive care people seek when they cannot afford health insurance. For example, for just a single uninsured resident with an ear infection, the County of Santa Clara incurs hundreds more when treatment is provided not in its clinics but in its emergency department, on which the uninsured disproportionately rely.<sup>3</sup> Such unnecessary costs were multiplied across Amici's millions of uninsured residents in their encounters with our public health systems, and these costs often forced us to divert finite funds from our other critical

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<sup>2</sup> *E.g.*, INST. OF MED. OF THE NAT'L ACADS., CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE (2002), <http://tinyurl.com/yyttlqhm>.

<sup>3</sup> Benjamin T. Squire et al., *At-Risk Populations and the Critically Ill Rely Disproportionately on Ambulance Transport to Emergency Departments*, 20 ANNALS OF EMERGENCY MED. 1, 6 (2010).

functions or to further tax the public.

The ACA was enacted in part to address the astronomical “cost of providing uncompensated care to the uninsured ... \$43,000,000,000 in 2008” alone,<sup>4</sup> and the “straining budgets across government” that these costs create.<sup>5</sup> The ACA greatly reduced, but did not completely eliminate, the uncompensated costs Amici bear. For example, although the uninsured rate was more than halved in the County of Santa Clara after implementation of the ACA,<sup>6</sup> the County’s safety net hospital still incurred over \$131 million in uncompensated costs from providing critical health care services to its remaining uninsured and underinsured residents in fiscal year 2017, even while operating in an extremely efficient cost landscape.<sup>7</sup> But by helping millions of Americans secure health insurance and thereby access more effective and efficient health care, the ACA did dramatically lessen the direct

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<sup>4</sup> 42 U.S.C. § 18091(2)(F).

<sup>5</sup> U.S. GOV’T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: BARACK OBAMA 2009 at 127 (2010), <http://tinyurl.com/y6hv9wvj>.

<sup>6</sup> Miranda Dietz et al., *ACA Repeal in California: Who Stands to Lose?*, UCLA CTR. FOR HEALTH POL’Y RES. 7 (Dec. 2016), <https://perma.cc/K77T-S6Q8>.

<sup>7</sup> Cal. Ass’n of Pub. Hosps., *Is Medi-Cal Working? Absolutely—Check the Facts 2* (Mar. 21, 2018), <https://perma.cc/62PL-57JV>.

uncompensated care burden borne by Amici and our public health systems: it critically reduced the financial strain on our towns, cities, and counties.<sup>8</sup>

## **II. THE ACA ENABLES LOCAL GOVERNMENTS TO PROVIDE OUR COMMUNITIES WITH BETTER CARE**

The ACA also enables Amici to provide our communities with better health outcomes at significantly lower public expense. By expanding access to health insurance and changing how people receive health care, the ACA has allowed many Amici to deliver more of the prevention and primary care services that Americans want their governments to provide and that produce better health outcomes, earlier, in more appropriate settings, and at lesser expense.

With the support of the ACA, many of Amici's public health systems piloted dramatic system improvements for patients with chronic diseases—the persistent, prevalent, but preventable conditions such as diabetes, certain heart diseases, and obesity that are among the most common, costly, and deadly of America's health problems. For example, due to the ACA, the County of Santa Clara was able to pilot a chronic conditions care management program that decreased participants' emergency department visits by more than fourfold.<sup>9</sup> Major gains like this in

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<sup>8</sup> See Larisa Antonisse et al., *The Effects of Medicaid Expansion Under the ACA: Updated Findings from a Literature Review*, KAISER FAMILY FOUND. 8-11 (Mar. 28, 2018), <https://perma.cc/GU93-U9DE>.

<sup>9</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Santa Clara Valley Health & Hospital System at 1* (2017), <https://perma.cc/XN93-EKAP>.

quality of care and quality of life were made possible because of the ACA, and they are mirrored by similar gains in many public health care systems. Because of the ACA, other public health care systems were able to increase by 50% the number of diabetes patients with self-management goals,<sup>10</sup> reduce emergency department visits by 18% for complex care management patients,<sup>11</sup> cut by more than fifteen times patients' rates of uncontrolled diabetes,<sup>12</sup> and nearly halve the readmission rate of patients at high risk of heart failure.<sup>13</sup>

Supported by the ACA, Amici's public health systems also effectively expanded both insured and uninsured people's access to primary and preventative care. For example, the County of Santa Clara was able to slash patients' wait times for primary care appointments from 53 days to fewer than 48 hours.<sup>14</sup> Other Amici similarly rolled out improvements to ensure their residents can feasibly secure timely and needed health care, such as co-locating behavioral health services at clinics so that patients with positive screens for depression can now be seen by a

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<sup>10</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Arrowhead Regional Medical Center* (2017), <https://perma.cc/J9HN-T6KB>.

<sup>11</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Alameda Health System* (2017), <https://perma.cc/BD87-8EJ4>.

<sup>12</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Natividad Medical Center* (2017), <https://perma.cc/ADU7-6G5P>.

<sup>13</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: San Francisco Health Network* (2017), <https://perma.cc/5E5N-CVLT>.

<sup>14</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Santa Clara Valley Health & Hospital System at 1* (2017), <https://perma.cc/XN93-EKAP>.

specialist in less than an hour,<sup>15</sup> or creating new databases to match people to the care providers who are most convenient to them.<sup>16</sup>

More than four in five Americans favor public funding for chronic disease prevention.<sup>17</sup> Americans also overwhelmingly favor free preventative health services.<sup>18</sup> The ACA reflects these values and has enabled Amici to effectively invest in much needed and desired preventative and primary care programs, and to do so at far less cost than the care provided through emergency treatment, or even than many private health care providers.<sup>19</sup> Amici provided these efficient, high-value Medicaid services while earning accolades for their care, with, for example, more than half of California's public health care systems performing within the top 10% in the country across multiple health care quality metrics.<sup>20</sup>

The ACA's expansion of insurance access and support for delivery system

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<sup>15</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: San Mateo Medical Center* (2017), <https://perma.cc/678E-2FAX>.

<sup>16</sup> Cal. Ass'n of Pub. Hosps., *Impact of Medi-Cal Expansion: Contra Costa Health Services* (2017), <https://perma.cc/8U9Q-TXTT>.

<sup>17</sup> Ctrs. for Disease Control & Prevention, *The Power of Prevention: Chronic Disease ... the Public Health Challenge of the 21st Century* 1 (2009), <https://perma.cc/LA45-YV77>.

<sup>18</sup> Jessica A.R. Williams & Selena E. Ortiz, *Examining Public Knowledge and Preferences for Adult Preventive Services Coverage*, PLOS ONE 11 (Dec. 20, 2017), <https://tinyurl.com/yxclarcv>.

<sup>19</sup> See, e.g., Cal. Ass'n of Pub. Hosps., *Is Medi-Cal Working? Absolutely—Check the Facts* 2 (Mar. 21, 2018), <https://perma.cc/8CCD-LKBN>.

<sup>20</sup> *Id.*



reforms fueled these health and fiscal gains. Invalidating the ACA would abruptly unravel these dramatic improvements, and by upending the insurance coverage gains created by the ACA and changing the very services people seek and receive, it would force Amici to spend more taxpayer money only to obtain poorer health outcomes.

### **III. INVALIDATING THE ACA WOULD HURT OUR RESIDENTS, COMMUNITIES, AND HEALTH SYSTEMS**

There is no dispute that tens of millions of people would lose their health insurance without the ACA, and millions of those people are residents of Amici's towns, cities, and counties. More than 20 million Americans gained health insurance through the ACA—all of whom could be at risk of joining the ranks of the long-term uninsured.<sup>21</sup> In California, because smaller and more rural counties gained the greatest proportional increases in new enrollees, those smaller and more rural counties would stand to lose proportionally more.<sup>22</sup> Previously insured people would also be forced off the insurance rolls due to the market upheaval and significant premium increases that ACA invalidation would produce.<sup>23</sup> Indeed, the

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<sup>21</sup> Kaiser Family Found., *Key Facts about the Uninsured Population* (Dec. 7, 2018), <https://perma.cc/GY3V-ZQVV>.

<sup>22</sup> Cal. Legislative Analyst's Office, *What the Patient Protection and Affordable Care Act (ACA) Means for California* 7 (Mar. 22, 2017), <https://perma.cc/EC7N-6RPT>.

<sup>23</sup> Miranda Dietz et al., *ACA Repeal in California: Who Stands to Lose?*, UCLA CTR. FOR HEALTH POL'Y RES. 5 (Dec. 2016), <https://perma.cc/K77T-S6Q8>.

Congressional Budget Office estimates that 32 million insured Americans would lose their health insurance if just parts of the ACA were invalidated<sup>24</sup>—producing millions more uninsured Americans than before the ACA was enacted.<sup>25</sup> These losses would not just cut off people’s access to medical care, but also to mental health care and substance use services,<sup>26</sup> making it less likely people would receive the early interventions and treatments that are widely acknowledged to be most effective and least expensive.<sup>27</sup>

The financial and human costs of a sudden loss of health insurance are profound, wide-ranging, and long-term. People without health insurance suffer demonstrably worse health outcomes. They are more likely to contend with financial strain and their children are more likely to miss developmental milestones;<sup>28</sup> overall, their lives are shorter and less healthy.<sup>29</sup>

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<sup>24</sup> Cong. Budget Office, *How Repealing Portions of the Affordable Care Act Would Affect Health Insurance Coverage and Premiums* 1 (Jan. 2017), <https://tinyurl.com/yxZR4d5e>.

<sup>25</sup> See Kaiser Family Found., *Key Facts About the Uninsured Population* (Dec. 7, 2018), <https://perma.cc/DCL9-QKY3>.

<sup>26</sup> Jane B. Wishner, *How Repealing and Replacing the ACA Could Reduce Access to Mental Health and Substance Use Disorder Treatment and Parity Protections*, URBAN INST. 3 (June 2017), <https://tinyurl.com/yyfltjee> .

<sup>27</sup> U.S. Dep’t Health & Hum. Servs., *Facing Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health* 3-14, 4-9 (Nov. 2016), <https://perma.cc/UWK8-69JB>.

<sup>28</sup> INST. OF MED. OF THE NAT’L ACADS., HIDDEN COSTS, VALUE LOST: UNINSURANCE IN AMERICA 6-7, 69-76 (2003).

These consequences hurt our communities. The harms cascade, creating everything from more sick days that harm employers to diminished educational achievement, lost jobs and tax revenue, and greater need for safety-net supports. In numbers, this means that a single city such as Chicago projects \$3.23 billion in lost economic impact due to an invalidated ACA.<sup>30</sup> In California alone, by 2027, invalidation of the ACA would likely mean 550,000 fewer jobs, \$60.4 billion less in annual GDP, and \$4.4 billion in lost state and local tax revenue.<sup>31</sup>

All of our residents are injured when many of our residents lack health insurance.<sup>32</sup> When our communities are home to a sizable uninsured population, everyone's health care suffers. Medical providers strain to stay open and those that do are reported to and report they deliver lower quality care.<sup>33</sup> With many uninsured people in our midst, all of our residents are less satisfied with their health care, less able to access it, and more likely to have unmet medical needs,

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<sup>29</sup> *Id.* 3-4; Benjamin D. Sommers et al., *Mortality and Access to Care Among Adults After State Medicaid Expansions*, 367 *NEW ENG. J. MED.* 1025 (2012).

<sup>30</sup> Ill. Health & Hosp. Ass'n, *ACA Repeal Economic Impact on Chicago*, <https://perma.cc/UAQ3-7LEF> (last visited Mar. 28, 2019).

<sup>31</sup> Cal. Ass'n of Pub. Hosps., *Is Medi-Cal Working? Absolutely—Check the Facts* at 1 (Mar. 21, 2018), <https://perma.cc/3N3A-K7VE>.

<sup>32</sup> Julie Rovner, *Millions More Uninsured Could Impact Health of Those with Insurance Too*, *KAISER HEALTH NEWS* (July 14, 2017), <https://perma.cc/FP3A-2A8P>.

<sup>33</sup> Mark V. Pauly & Jose A. Pagan, *Spillovers and Vulnerability: The Case of Community Uninsurance*, 26 *HEALTH AFFAIRS* 1304, 1309-10 (2007), <https://tinyurl.com/y4gz663s>.

with especially concerning consequences for critical capital-intensive health services like mammography screenings, trauma care, and neonatal intensive care.<sup>34</sup>

#### **IV. INVALIDATING THE ACA WOULD LEAVE US WORSE OFF THAN BEFORE THE ACA WAS ENACTED**

Invalidation of the ACA would also leave Amici and our residents worse off than before it was enacted. Simply put, the ACA cannot be undone without catastrophic costs, chaos, and disruption.

Much of the health care funding that was available before the ACA was enacted has been repurposed or no longer exists. Amici projected our budgets and structured our programs to efficiently leverage federal and state health care funding based on the core expectation that the ACA would continue. The highly-regulated, non-fungible funds we would have used to provide indigent care have been obligated elsewhere and cannot be redeployed. In California, for example, although counties have been obligated to provide health services to their indigent residents for over a century,<sup>35</sup> due to the ACA dramatically reducing the ranks of the uninsured, counties now receive only a portion of the state money they have long relied on to fund these services, and that money is largely obligated to cover

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<sup>34</sup> *Id.* at 1307-11.

<sup>35</sup> See Cal. Healthcare Found., *Locally Sourced: The Crucial Role of Counties in the Health of Californians* 3-4 (Oct. 2015), <https://perma.cc/T4FD-W7UD>.

state social services instead.<sup>36</sup> The laws that created this change are “labyrinthine”—both the product and source of highly-negotiated, multi-year, multi-entity obligations that cannot be unwound without great cost and chaos.<sup>37</sup> Our counties would not have the money we need to care for our newly uninsured.

Political and practical realities mean that many towns, cities, and counties cannot revert to providing the same services as they did before the ACA. Due to the very success of the ACA, some Amici are less able to provide health services today than before the ACA was enacted. Many of Amici’s public health clinics, such as Orange County’s Ryan White HIV/AIDS Clinic, dramatically decreased their services because the ACA enabled newly insured residents to access care in more traditional primary care settings so they no longer need services from clinics designed to serve the uninsured and underinsured.<sup>38</sup> Other parts of our safety-net systems shuttered in response to the ACA as well. Amici that previously operated health centers to serve their underserved rural or urban residents closed these centers after the ACA’s insurance changes made it viable for private providers to open and provide health care instead. Relying on the changed health care

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<sup>36</sup> *Id.* at 9; CAL. STATE BUDGET 2018-19 at 45-46 (2019), <https://perma.cc/BJN9-EEFU>.

<sup>37</sup> Mac Taylor, *Rethinking the 1991 Realignment*, LEGISLATIVE ANALYST’S OFFICE 20 (Oct. 15, 2018), <https://perma.cc/Z9GE-SF86>.

<sup>38</sup> Cal. Healthcare Found., *Locally Sourced: The Crucial Role of Counties in the Health of Californians* 27 (Oct. 2015), <https://perma.cc/M3QL-TFU5>.

landscape created by the ACA, many Amici could not restart their health centers without significant disruption and costs—and considerable time. Amici made substantial commitments under the ACA—in physical infrastructure, budgets, human capital, research, services, outreach, public education, electronic systems, and much more. These cannot be undone without tremendous cost, an intervening period of chaos, and, in the meantime and beyond, great harm to the health and wellbeing of our residents.

### **CONCLUSION**

Amici bear massive uncompensated costs from our underinsured and uninsured residents, who disproportionately rely on Amici's publicly-funded health systems. The ACA overwhelmingly reduces Amici's uncompensated costs and the toll these costs exact on our communities, all of our residents, and our very ability to govern. It enables us to supply the more effective, more efficient, and less costly health care that Americans want and need. Invalidating the ACA would undo these gains and leave many Amici and our residents worse off, and with fewer and lower quality options for health care. These are the considerations that ultimately led Congress to abandon a repeal, and it would be improper for the judiciary to effect public harms that Congress deliberately did not. The decision below should accordingly be reversed.

Dated: April 1, 2019

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,245 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

Respectfully submitted,

*/s/ Lorraine Van Kirk*

Lorraine Van Kirk

**CERTIFICATE OF SERVICE**

I hereby certify that, on April 1, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Respectfully submitted,

/s/ Benna Ruth Solomon