17-3065

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

K. D., by and through her parents, Theresa and Jonathan Dunn; THERESA DUNN; JONATHAN DUNN, Individually,

Plaintiffs-Appellants,

—v.—

DOWNINGTOWN AREA SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF OF FORMER OFFICIALS OF THE DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR YOUTH LAW, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, AND DISABILITY RIGHTS PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL OF THE DISTRICT COURT DECISION

ROBERT M. ABRAHAMS
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000

ERIC A. BENSKY
SCHULTE ROTH & ZABEL LLP
1152 15th Street N.W., Suite 850
Washington, DC 20005
(202) 729-7470

Attorneys for Amici Curiae Former Officials of the Department of Education, National Center for Youth Law, Judge David L. Bazelon Center for Mental Health Law, Disability Rights Pennsylvania

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), Dr. Alexa Posny, Mr. Michael Yudin, the National Center for Youth Law ("NCYL"), the Judge David L. Bazelon Center for Mental Health Law, and Disability Rights Pennsylvania request leave to file an *amicus curiae* brief in support of Plaintiffs-Appellants K.D., *ex rel.* Theresa and Jonathan Dunn.[1]

I. The Movant's Interest

Rule 29(a)(3)(A) requires that the motion for leave to file an *amicus* brief state the movant's interest. As stated in the Statement of Interest in the attached proposed brief, *amici*'s interests are as follows.

Dr. Alexa Posny has almost four decades of experience in education, from classroom teacher to Chief State School Officer to Assistant Secretary of the Office of Special Education and Rehabilitative Services in the U.S. Department of Education. Dr. Posny was most recently the Senior Vice President of State and Federal Programs for Renaissance Learning. Dr. Posny served as Assistant Secretary of the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education from 2009-2012. In this position, she played a pivotal role in policy and management issues affecting special education and

[1] *Amici* solicited the parties' consent to file the accompanying brief. Plaintiffs-Appellants have consented. As of the time of finalizing this motion, *amici* had not received a response from Defendant-Appellee.

rehabilitative services across the country. She also served as the principal adviser to the U.S. Secretary of Education on all matters related to special education. Prior to arriving at the Department, Dr. Posny served as the Commissioner of Education for the Kansas State Department of Education (KSDE) from 2007-2009, Director of the Office of Special Education Programs for the U.S. Department of Education (2006-2007), Deputy Commissioner of Education at KSDE (2001-2006), State Director of Special Education at KSDE (1999-2001), and the Director of Special Education for the Shawnee Mission School District in Overland Park, KS (1997-1999). Prior to that, she was the Director of the Curriculum and Instruction Specialty Option as part of the Title 1 Technical Assistance Center network across the United States and a Senior Research Associate at Research and Training Associates in Overland Park, KS. Dr. Posny has also served on the board of directors for the Chief State School Officers and the National Council for Learning Disabilities, and she chaired the National Assessment Governing Board's Special Education Task Force.

Michael Yudin has more than 25 years of experience in the executive and legislative branches of the federal government concerning educationally disadvantaged students and individuals with disabilities. He served as both the Assistant Secretary of the Office of Special Education and Rehabilitative Services and the Acting Assistant Secretary of the Office of Elementary and Secondary

Education under President Barack Obama. In these capacities, Mr. Yudin helped implement both the Individuals with Disabilities Education Act ("IDEA") and the Elementary and Secondary Education Act of 1965, as amended. Prior to his work at the Department of Education, Mr. Yudin spent nine years in the United States Senate, where he worked for senior members of the Health, Education, Labor, and Pensions Committee on education legislation, including the IDEA reauthorization of 2004 and the No Child Left Behind Act of 2001.

The National Center for Youth Law ("NCYL") is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to children and youth in cases that have a broad impact and has represented many children with disabilities in litigation and class administrative complaints to ensure their access to appropriate and non-discriminatory services. NCYL engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL pilots collaborative reforms with state and local jurisdictions across the nation to improve educational outcomes of children in the foster care and juvenile justice systems, with a particular focus on improving education for system-involved children with disabilities.

The Judge David L. Bazelon Center for Mental Health Law is a national nonprofit advocacy organization founded in 1972 that provides legal and other advocacy assistance to people with mental illness and intellectual disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of people with disabilities in all aspects of their lives, including community living, employment, education, health care, housing, voting, parental rights, and other areas. Since the IDEA became law, the Bazelon Center has litigated groundbreaking actions seeking to improve educational and health services for children with mental disabilities. As a result of this expertise in the needs of children with mental disabilities, the Bazelon Center is well-positioned to offer the Court a unique perspective on the Supreme Court's recent decision in *Endrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017).

Disability Rights Pennsylvania ("DRP") is the protection and advocacy system designated by the Commonwealth of Pennsylvania pursuant to federal law to protect the rights of and advocate for Pennsylvanians with disabilities so that they may live the lives they choose, free of abuse, neglect, discrimination, and segregation. The right to receive appropriate special education and related services is vitally important for children with disabilities, and DRP has made it a priority to assure access to quality education for students with disabilities. DRP thus has an

interest in ensuring that the provisions of the IDEA are interpreted and applied so as to fully protect those rights.

II. The Proposed Brief is Desirable and Relevant to the Disposition of this Case

Rule 29(a)(3)(B) requires that the proposed *amicus* brief be desirable and assert matters relevant to the disposition of the case. "The criterion of desirability set out in Rule 29 . . . is open-ended, but a broad reading is prudent." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002). This Court has liberally granted motions for leave to file briefs as *amicus curiae* because such briefs shed light on the broader impact that a holding may have, and can provide other useful information to the Court. *See id*. at 132-33.

In this case, the proposed *amicus* brief is desirable because it may be useful to the Court when analyzing the Supreme Court's "markedly more demanding" standard for free and appropriate public education ("FAPE") recently announced in *Endrew*. 137 S. Ct. at 1000. This issue, and the impact of *Endrew* more generally, is not something that this Court has yet had the opportunity to consider. Indeed, the Third Circuit has yet to interpret the requirements of *Endrew* in any context.

Moreover, the proposed *amicus* brief presents the Court with a perspective different from that of Plaintiffs-Appellants. The proposed *amicus* brief focuses on the general expectations of *Endrew* for most students with a disability rather than advocating for a particular outcome for any individual student.

The proposed *amicus* brief is relevant to this Court's decision because it will address *Endrew*'s presumption that most students with a disability should be expected to accomplish grade-level goals, which the District Court failed to recognize and appropriately analyze. The proposed *amicus* brief will also address how the FAPE standard applied by the hearing officer, regardless of the descriptive label applied to that standard, was insufficient in light of *Endrew*'s requirements. Because of these errors, the proposed *amicus* brief will recommend that this Court remand the case back to the District Court in order to correctly analyze and apply the Supreme Court's *Endrew* decision.

CONCLUSION

The proposed brief is relevant and desirable. Accordingly, the a*mici* respectfully request that this Court grant the *amici's* Motion for Leave to File Brief of Former Officials of the Department of Education, National Center for Youth Law, Judge David L. Bazelon Center for Mental Health Law, and Disability Rights Pennsylvania as *Amicus Curiae* in Support of Plaintiffs-Appellants' Appeal of the District Court Decision.

Respectfully submitted,

Date: February 27, 2018

/s/ Eric A. Bensky

Eric A. Bensky
Schulte Roth & Zabel LLP
1152 15th Street, N.W.,
Suite 850
Washington, DC 20005
eric.bensky@srz.com
202-729-7470

Robert M. Abrahams
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
robert.abrahams@srz.com
212-756-2000

Certificate of Service

I hereby certify that on February 27, 2018, the foregoing Motion for Leave to File Brief of Former Officials of The Department of Education, National Center for Youth Law, Judge David L. Bazelon Center for Mental Health Law, and Disability Rights Pennsylvania as *Amicus Curiae* in Support of Plaintiffs-Appellants' Appeal of the District Court Decision was filed with the Clerk of the United States Court of Appeals, Third Circuit via the Court's CM/ECF system in a PDF format.

Date: February 27, 2018

/s/ Eric A. Bensky

Eric A. Bensky
Schulte Roth & Zabel LLP
1152 15th Street, N.W.,
Suite 850
Washington, DC 20005
eric.bensky@srz.com
202-729-7470

EXHIBIT A

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ROBERT M. ABRAHAMS
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
(212) 756-2000

ERIC A. BENSKY
SCHULTE ROTH & ZABEL LLP
1152 15th Street N.W., Suite 850
Washington, DC 20005
(202) 729-7470

Attorneys for Amici Curiae Former Officials of the Department of Education, National Center for Youth Law, Judge David L. Bazelon Center for Mental Health Law, Disability Rights Pennsylvania

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the following disclosure is made on behalf of these entities:

National Center for Youth Law
Judge David L. Bazelon Center for Mental Health Law
Disability Rights Pennsylvania

1. No *amicus* is a publicly held corporation or other publicly held entity;
2. No *amicus* has parent corporations; and
3. No *amicus* has 10% or more of stock owned by a corporation.

Respectfully submitted,

/s/ Eric A. Bensky

Eric A. Bensky
Schulte Roth & Zabel LLP
1152 15th Street N.W.,
Suite 850
Washington, DC 20005
eric.bensky@srz.com
202-729-7470

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Interests of *Amici Curiae*

The individuals and organizations submitting this brief are dedicated to advancing the interests of students with disabilities. The individual *amici* – Dr. Alexa Posny and Mr. Michael Yudin – are former U.S. Department of Education officials responsible for special education policy. As such, they were charged with enforcing the statutory rights and obligations enacted by Congress for the benefit of students with disabilities and their families, and for leading the Department's support of peer-reviewed research into effective approaches to educating students with disabilities. The *amici* organizations – the National Center for Youth Law, the Judge David L. Bazelon Center for Mental Health Law, and Disability Rights Pennsylvania – are national and state organizations dedicated to advancing and protecting the civil rights of students with disabilities, fostering their integration into all aspects of school and adult life, and furthering their ability to live full and independent lives. The *amici* have extensive experience and nationally recognized expertise in the Individuals with Disabilities Education Act (IDEA) and other disability rights laws.

Dr. Alexa Posny has almost four decades of experience in education, from classroom teacher to Chief State School Officer to Assistant Secretary of the Office of Special Education and Rehabilitative Services in the U.S. Department of Education. Dr. Posny was most recently the Senior Vice President of State and

Federal Programs for Renaissance Learning. Dr. Posny served as Assistant Secretary of the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education from 2009-2012. In this position, she played a pivotal role in policy and management issues affecting special education and rehabilitative services across the country. She also served as the principal adviser to the U.S. Secretary of Education on all matters related to special education. Prior to arriving at the Department, Dr. Posny served as the Commissioner of Education for the Kansas State Department of Education (KSDE) from 2007-2009, Director of the Office of Special Education Programs for the U.S. Department of Education (2006-2007), Deputy Commissioner of Education at KSDE (2001-2006), State Director of Special Education at KSDE (1999-2001), and the Director of Special Education for the Shawnee Mission School District in Overland Park, KS (1997-1999). Prior to that, she was the Director of the Curriculum and Instruction Specialty Option as part of the Title 1 Technical Assistance Center network across the United States and a Senior Research Associate at Research and Training Associates in Overland Park, KS. Dr. Posny has also served on the board of directors for the Chief State School Officers and the National Council for Learning Disabilities, and she chaired the National Assessment Governing Board's Special Education Task Force.

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Introduction

In its decision last year in *Endrew F. v. Douglas County School District RE-1*, the Supreme Court announced a new and more demanding standard for educating students with disabilities under the Individuals with Disabilities Education Act ("IDEA"). 137 S. Ct. 988 (2017). The Supreme Court made clear that, in the significant majority of instances, the IDEA requires schools to provide special education that enables students with disabilities to meet grade-level standards and advance from grade to grade. *See id*. at 999. The District Court opinion here, however, does not apply *Endrew*'s standard to Appellant K.D.'s case; nor does it analyze the circumstances of her case against *Endrew*'s presumption concerning most children with disabilities. It does not require K.D.'s school to set appropriately ambitious goals for her, as *Endrew* requires. This Court should remand for the District Court to conduct a more thorough analysis in light of the requirements of *Endrew*.

Argument

I. The Supreme Court Has Clarified that the IDEA Holds Schools to a More Demanding Standard for Educating Students with Disabilities.

In its decision in *Endrew*, the Supreme Court clarified the substantive standard for whether a school has provided a free and appropriate public education ("FAPE"), as required by the IDEA. In so doing, the Court emphasized that schools must be held to a standard for providing education to a child with a

disability that is "markedly more demanding," 137 S. Ct. at 1000, than the "merely . . . more than *de minimis*" standard applied by the Tenth Circuit Court of Appeals, 798 F.3d 1329, 1338 (10th Cir. 2015).

The Court declared that the special education that schools provide to students with disabilities must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 998-99. For most students, the special education provided in the student's Individualized Education Program ("IEP") must "provid[e] a level of instruction reasonably calculated to permit advancement through the general curriculum." *Id.* at 1000. That is, most children with disabilities can be expected to "advance[] from grade to grade," and their IEPs should be designed to allow them to do so. *Id.*; *see also id.* at 999 (noting that the IDEA was enacted to prevent "academic stagnation"). The Court emphasized that all children with disabilities must have the opportunity to meet "appropriately ambitious" goals; for most children, meeting grade-level expectations and advancing grade to grade are the appropriate goals.[1]

For the many students with disabilities who have fallen far behind their peers academically (whether due to low expectations, inadequate goals, lack of access to research-based instruction or other special education resources necessary

[1] As the Court explained, this expectation arises from the IDEA's "promise" that children with disabilities will receive "access to an education" and that appropriate grade-level progression is "what our society generally means by an education." 137 S. Ct. at 999 (internal quotation marks omitted).

to achieve at grade level, or any other reason), *Endrew* requires that schools help them catch up.[2] For some students, that may be a multi-year project; but the ultimate goal is to meet grade-level expectations for the grade in which the student is enrolled. The Court in *Endrew* also recognized that a small group of students with significant cognitive impairments may not meet generally applicable academic standards. *See* 137 S. Ct. at 1000. Where grade-level achievement is "not a reasonable prospect for a child, his IEP need not aim for grade-level achievement." *Id*. Educational programs and goals for these children, however, must still be, as for all other students with disabilities, "appropriately ambitious." *Id*. For these students, the goals should still provide the student "the chance to meet challenging objectives," 137 S. Ct. at 1000, that are designed to promote further education, work, and independence.[3]

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[2] *See* U.S. Dep't of Educ., Office of Special Educ. & Rehab. Servs., Dear Colleague Letter on FAPE 5 (Nov. 16, 2015) ("Dear Colleague Letter"), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf ("In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious . . . [T]he annual goals need not necessarily result in the child's reaching grade-level within the year covered by the IEP, but . . . should be sufficiently ambitious to help close the gap.").

[3] *See* Dear Colleague Letter, *supra* note 2 at 5; 20 U.S.C. § 1400 (d)(1)(A) (special education should "emphasize[]" instruction and services designed to prepare students "for further education, employment, and independent living"); *see also* 20 U.S.C. § 1111(b)(1)(E)(i)(V) (Every Student Succeeds Act) (alternate academic achievement standards for students with most significant cognitive disabilities must be "aligned to ensure" student "is on track to pursue postsecondary education or employment").

In developing a student's IEP, the IEP team, including school officials, must consider "the child's present level of achievement, disability, *and potential for growth*." 137 S. Ct. at 999 (emphasis added). It is impossible to set "appropriately ambitious" goals for a student without consideration of (i) where that student is – the student's "present level of achievement" – (ii) what the student can achieve – the student's "potential for growth" – and (iii) the student's other unique circumstances, including the student's disability. *See id*. While the IDEA does not guarantee specific *outcomes*, *Endrew* makes clear that goals that do not account for, and accurately reflect, a child's potential are not "appropriately ambitious." *See id*. at 999-1000.

II. The Decision Below is Inconsistent with the Supreme Court's Decision in *Endrew*.

The District Court's decision misinterprets the *Endrew* standard and misapplies it to the facts of K.D.'s case. As a result, the decision should be vacated and the case remanded.[4]

[4] The timing of this case and the *Endrew* decision created an unusual chain of events unlikely to arise in the future. K.D.'s case was heard by the Special Education Hearing Officer during fall 2015, over one year before the Supreme Court would issue its opinion in *Endrew*. The Hearing Officer did not have the opportunity to consider the "markedly more demanding" standard announced by the Court. Similarly, the main briefing in the District Court was completed before the *Endrew* opinion was issued, although the District Court did allow supplemental briefing on the impact of the *Endrew* decision.

A. As Described by the District Court, the Meaningful Benefit Standard is Essentially the Same as the Standard Rejected in *Endrew*.

Although the Hearing Officer used the words "meaningful educational benefit" to describe the applicable standard, the standard the Hearing Officer used does not appear to differ in any material way from the Tenth Circuit standard that the Supreme Court rejected in *Endrew*. The Hearing Officer described "meaningful educational benefit" as a benefit that is "more than a trivial or *de minimis* educational benefit." JA 107. That language, on its face, is the same as the rejected Tenth Circuit standard of "merely . . . more than *de minimis*." *Cf. Endrew*, 137 S. Ct. at 1000-01; JA 26 n. 7; *see also* U.S. Dep't of Educ., Questions and Answers (Q&A) on *U. S. Supreme Court Case Decision Endrew F. v. Douglas County School District Re-1* at 9 (Dec. 7, 2017), https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf ("The Court in *Endrew F* . . . expressly rejected the merely more than *de minimis*, or trivial progress standard.").

The District Court's statements to the contrary are not persuasive. The District Court apparently concluded that an improper standard was not applied because the Hearing Officer omitted the word "merely" when echoing the Tenth Circuit standard rejected by the Supreme Court. The District Court said that, rather than applying the standard that the educational benefit must be "merely . . . more than *de minimis*," the Hearing Officer applied a standard requiring that the

educational benefit be "more than . . . trivial or *de minimis*." *See* JA 26 n. 7. But, even with the word "merely" removed, there is no meaningful difference between the Hearing Officer's formulation and the formulation rejected in *Endrew*. "The IDEA demands more." *Endrew*, 137 S. Ct. at 1000-01.

In addition, the District Court did not give proper weight to the presumption that most children with disabilities, including those with learning disabilities, can perform at grade level. *Contrast* JA 35 (stating that *Endrew* makes a distinction between children who are "progressing smoothly" and children "with a learning disability") *with Endrew*, 137 S. Ct. at 1000 ("[F]or most children, a FAPE will involve . . . individualized special education calculated to achieve advancement from grade to grade.").[5] Instead, the District Court seemed to divide students into "two types . . . : (1) a child who is progressing smoothly, grade-to-grade, through school, and (2) *a child with a learning disability* or cognitive limitation who is not . . . ," implying that the latter could not be expected to achieve at grade level. JA 35 (emphasis added). This framing by the District Court is inconsistent with the clear language of *Endrew* that the IDEA "typically aims for grade-level advancement for children with disabilities," 137 S. Ct. at 1000-01, "an IEP

[5] According to the National Center for Education Statistics, 35 percent of students receiving special education services do so because of a "specific learning disability." National Center for Education Statistics, Children and Youth With Disabilities, https://nces.ed.gov/programs/coe/indicator_cgg.asp (last visited Feb. 27, 2018).

typically should . . . be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade," *id.* at 999, and "advancement from grade to grade is appropriately ambitious for most children in the regular classroom," *id.* at 1000.

B. The District Court Failed to Consider Whether K.D.'s IEP Goals Were Appropriately Ambitious.

Neither the District Court nor the Hearing Officer addressed whether K.D.'s IEPs contained "appropriately ambitious" goals. Specifically, neither addressed whether appropriately ambitious goals for K.D. were goals that would help her to meet grade-level expectations for the grade in which she was enrolled so that she could advance from grade to grade.

That omission is particularly striking on the record here, which indicates that K.D.'s cognitive and intellectual abilities were in the average range. Indeed, the school's own psychologist evaluated K.D. and determined that she "exhibit[ed] Low Average overall cognitive ability." *See* JA 168. The psychologist thus noted that there was a "discrepancy" between K.D.'s "cognitive potential" and her "academic achievement" that made her eligible for special education. *Id.* The psychologist did not find that she had a significant cognitive impairment. *See* JA 244 ("[K.D.] is a student of Average intellectual ability."). Indeed, K.D.'s scores on intelligence tests yielded results that were within or bordering normal ranges.

See, e.g., JA 13 ("K.D.'s overall IQ score was in the 'low average' range."); *id.* ("K.D. scored 'average' in verbal comprehension and working memory.").

Despite her cognitive abilities, however, the District Court did not analyze whether K.D.'s IEPs were sufficiently ambitious and helping her advance from grade to grade with her peers. Instead, the District Court appears to have based its decision on raw score improvements in certain standardized tests, concluding that K.D. made "meaningful progress." *See* JA 30-34. However, "meaningful progress" is not the standard that the Supreme Court has directed lower courts to apply. Moreover, the school's own psychologist twice found that K.D. was "not making meaningful progress." *See* JA 175, 243. Neither the District Court nor the Hearing Officer addressed that determination.[6]

In short, the District Court's opinion does not address whether the evidence in the record demonstrated an IEP with "appropriately ambitious" goals for K.D., as *Endrew* requires.

Conclusion

Neither the Hearing Officer nor the District Court applied the standard announced in *Endrew* for evaluating the adequacy of K.D.'s special education. The Hearing Officer did not have the benefit of the *Endrew* decision at the time of his

[6] As Plaintiffs point out, the District Court also disregarded certain test scores that indicated a lack of progress. *See* Brief of Appellants § B(3) (Feb. 21, 2018).

order, and applied a standard indistinguishable from the one rejected by *Endrew*. The District Court did not correctly analyze the scope and effect of the *Endrew* decision. As a result, this Court should remand the case back to the District Court to allow proper consideration of the "markedly more demanding" standard required by *Endrew*.

Respectfully submitted,

Date: February 27, 2018

/s/ Eric A. Bensky

Eric A. Bensky
Schulte Roth & Zabel LLP
1152 15th Street N.W.,
Suite 850
Washington, DC 20005
eric.bensky@srz.com
202-729-7470

Robert M. Abrahams
Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022
robert.abrahams@srz.com
212-756-2000

Certificate of Compliance

Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for the *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than the *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to L.A.R. 28.3, counsel for the *amici* represent that the below listed attorney is admitted to practice in the Third Circuit Court of Appeals. Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached *amicus* brief is proportionately spaced, has a typeface of 14 points and contains 2092 words.

Date: February 27, 2018

/s/ Eric A. Bensky

Eric A. Bensky
Schulte Roth & Zabel LLP
1152 15th Street N.W.,
Suite 850
Washington, DC 20005
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