Nos. 14-30198 & 14-30219

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANDREW KOWALCZYK,
Defendant-Appellant.

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
The Honorable Michael W. Mosman, United States District Judge
DC No. 3:08-CR-00095-MO-1

Before the Honorable Harry Pregerson, N. Randy Smith, and John B. Owens, CJJ
Panel Opinion filed November 4, 2015

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), counsel states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional bar association for the criminal defense bar, with over ten thousand members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is not a publicly held company; does not have any parent corporation; does not issue or have any stock; and does not have any financial interest in the outcome of this litigation.

Dated: November 30, 2015

s/ Elizabeth Richardson-Royer
Elizabeth Richardson-Royer

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I. INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with members nationwide, including private criminal defense lawyers, public defenders, and law professors. Among its objectives is ensuring that the Sixth Amendment guarantee of right to counsel is honored in full.

II. CONSENT OF PARTIES

Pursuant to Fed. R. App. P. 29(a), all parties consent to the filing of this brief.

III. SUMMARY OF ARGUMENT

At early common law, there were two types of lawyers: legal advisors, or specialists, and legal representatives. Historically, amici curiae have always fulfilled the role of legal specialists, even as their roles have shifted over time from "friends of the court" to representatives of interested third parties. Common-law "pleaders," or barristers, were likewise limited to providing formalized legal advice and expertise. An attorney was something different altogether, an agent who spoke directly for his client as the client's representative.

As the right to counsel developed in this country, courts and litigants rejected the common-law distinction between legal advisors and representatives. Under the Sixth Amendment, defense lawyers are now required to fulfill both roles: conferring with and advising clients but also speaking as their representatives in court, including in ways that are legally binding. The conflict-free attorney-client relationship is of primary importance, and undue interference with it—even without more—violates the Sixth Amendment.

By holding that an amicus curiae satisfied the Sixth Amendment guarantee of counsel in Andrew Kowalczyk's case, the panel ignored the dual roles played by defense counsel in this country and harkened back to a time in England when criminal defendants were only entitled to the *advice* of counsel, if anything at all. The panel's decision ignores the much broader, more substantial role that the Sixth Amendment requires counsel to play. Because independent amici can never fulfill the critical duties of loyalty, communication, or vigorous pursuit of client interests, their involvement can never satisfy the Sixth Amendment. The panel's decision conflicts with decades of Supreme Court authority, and panel or en banc review is necessary.

Review is also necessary to prevent the unnecessary litigation that will occur if the panel's decision stands. District courts will appoint amicus curiae instead of defense counsel with impunity, because the panel held that a Sixth Amendment violation only occurs if the amicus fails to act sufficiently "like" defense counsel during the proceedings. Appointed amici will have to guess at what role they are supposed to play in order to remain "independent" but also perform enough traditional defense counsel tasks to satisfy the new conception of what the Sixth Amendment requires. And appellate courts will be faced with requests for case-by-case, after-the-fact determinations of whether an amicus's performance satisfied the panel's amorphous standard of "close enough."

There was nothing wrong with the longstanding, bright-line rule that where the Sixth Amendment right to counsel applies, counsel must be appointed unless the defendant validly waives that right. This Court should grant review to clarify

that this standard—established in *Johnson v. Zerbst*, 304 U.S. 458 (1938), and reinforced over the decades since—still governs indigent criminal defense in this country.

IV. ARGUMENT

V. THE PANEL'S DECISION, WHICH EQUATES DEFENSE COUNSEL WITH AMICUS CURIAE, IGNORES COUNSEL'S CRITICAL ROLE AS REPRESENTATIVE AND ADVOCATE.

A. Historically, Amici Curiae Are Legal Advisors Unaffiliated With Any Party to the Litigation.

The Latin term "amicus curiae" means "friend of the court." Black's Law Dictionary (10th ed. 2014). The use of amici curiae to assist in judicial decision-making dates back to Roman law and was an early instrument at common law. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L. J. 694, 695 (1963). For centuries, amici were essentially bystanders who, by virtue of their specialized or legal expertise, brought technical information or even legal authority to the court's attention. *Id.*; Henry James Holthouse, A New Law Dictionary 19 (1850) ("When a judge is doubtful or mistaken in matter of law, a bystander may inform the court thereof as *amicus curiae*."). The "classic role" of amicus curiae was "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

The role of amici has changed over time as the needs of the courts have changed. To deal with federalism concerns, for example, the United States

Supreme Court early on permitted counsel for state and federal governments to file briefs as amici curiae without actually intervening. *See, e.g.*, *Green v. Biddle*, 21 U.S. 1 (1923) (amicus curiae appearing for State of Kentucky in dispute concerning land holdings); *The Gray Jacket*, 72 U.S. 342 (1866) (amicus curiae appearing for multiple nonparty federal agencies). Between 1790 and 1890, amici appeared for a wide variety of partisan, quasi-partisan, and nonpartisan reasons. Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends 1790-1890*, 20 CONST. COMMENT. 111, 117-18 (2003). The enduring usefulness of amici, in fact, is a result of this "flexible tradition" and inherent "trait of adaptability." Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1244, 1246 (1992).

In the modern era, still, "the amicus curiae tool allows an entity that is separate from the parties to provide legal or factual information to the court." Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 680 (2008). Critics charge that the involvement of amici in so many Supreme Court cases is a form of political symbolism reflecting the policy-making capability of that institution. Omari Scott Simmons, *Picking Friends from the Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 186-87 (2009). But a commonality between early and modern amici remains: an amicus curiae "is not a party to litigation." *Miller-Wohl*, 694 F.2d at 204. The actions or inactions of an entity or organization appearing as amicus curiae may influence a court, but they

generally do not bind the organization for purposes of future litigation. *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir. 1982).

B. The Sixth Amendment Right to Counsel Guarantees Substantially More than Mere Access to an Independent Legal Advisor.

From the beginning, the Sixth Amendment was a reaction to what colonial Americans perceived as the coercive, improper common law rule that defendants charged with serious crimes could not be represented by counsel. We begin, then, with a brief history of the right to counsel—or lack thereof—at common law.

1. At Common Law, Criminal Defendants Could Seek Legal Advice But Not Representation.

At early common law, "the essence of the English criminal trial was argument between the defendant and counsel for the Crown." *Herring v. New York*, 422 U.S. 853, 860 (1975). Criminal defendants were expected to largely handle their own cases, and those charged with treason or serious felonies were explicitly prohibited from seeking the assistance of counsel. *See Betts v. Brady*, 316 U.S. 455, 466 (1942), *overruled by Gideon v. Wainwright*, 372 U.S. 335 (1963). "The practice of English judges, however, was to permit counsel to advise with a defendant as to the conduct of his case and to represent him in collateral matters and as respects questions of law arising upon the trial." *Id.*; *see also* 4 William Blackstone, Commentaries on the Laws of England 355 ("It is the settled rule at common law that no counsel be allowed a prisoner . . . unless some point of law shall arise proper to be debated.").

These common-law legal advisors provided specialized assistance but did not speak for defendants or act as their representatives. In fact, "an ancient and

rigid distinction once existed between 'attorney' and 'counsel,' between one who stood as the alter ego of the client, and one who provided specialized assistance." George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 557 (2004). Ancient Romans used a *procurator* as their legal agent but hired a *patronus causarum* to argue for them in court. Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 37, 44-45 (1953). In Ancient Greece, defendants represented themselves in court, but they sometimes engaged a *logographos* as a speechwriter. *Id.* at 32.

Like the ancient *logographos*, *patronus causarum*, and historical amicus curiae, "[l]awyers from the twelfth and thirteenth centuries who provided 'counsel' in England did not stand in for the client in the same way that an 'attorney in fact' acted for the principal." Thomas, *supra*, at 555. There was a sharp distinction between attorneys, or legal representatives, and these more technical "pleaders." *Id.* at 557. The bottom line was that, aside from the occasional assistance of specialists to argue discrete points of law, defendants charged with serious crimes were on their own in England until the 19th century.

2. Sixth Amendment Jurisprudence Established an Expanded Role for Defense Counsel as "Alter Ego" and Advocate.

The colonial precursors to the Sixth Amendment were a reaction to what early Americans felt was the unjust common-law prohibition against representation by counsel. By the mid-18th century, all of the colonies had laws that permitted defendants to appear through counsel. Bruce A. Green, *Lethal Fiction: the Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 438 (1993).

The Sixth Amendment itself was initially thought to have been intended primarily to forbid laws requiring a defendant to represent himself, as early common law had done. *Bute v. Illinois*, 333 U.S. 640, 660-61 (1948) (explaining that, prior to 1938, Sixth Amendment was understood to recognize "the right of the accused to be represented by counsel of his own if he so desired" rather than the right to appointment of counsel).

There was also a colonial backlash against the professionalization or specialization of law, and the two distinct roles at common law—broadly "counsel" and "attorney"—merged into one in early American history. Thomas, *supra*, at 569. Greater emphasis was placed on the "attorney" function over the "advisor" function, with lawyers "thought of as alter egos first and specialists second." *Id.* at 570. By the late 1800s, "the most conspicuous role of the lawyer [was] as an advocate." James Willard Hurst, *Lawyers in American Society 1750-1966*, 50 MARQUETTE L. REV. 594, 594 (1967).

The "personal representative" nature of legal counsel at American law was front and center as the Sixth Amendment right to counsel developed and solidified in the 20th century. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court recognized the difference between a general sort of legal advisor, appointed by the trial court to assist the defendant without any "substantial or definite obligation," and a properly appointed defense counsel, who would have "clear appreciation of responsibility or . . . individual sense of duty" toward the defendant. *Id.* at 56. The *Powell* Court was particularly dismissive of the early common-law view that the "court itself" could act as counsel for the prisoner. *Id.* at 61. Among other

shortcomings, a judge could not "participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional." *Id.* At least for cases like *Powell*, in which uneducated defendants were facing capital charges, due process required the provision of a *specific* lawyer, as differentiated from mere access to legal advice. *See id.* at 63. As the Supreme Court later noted, *Powell*'s "conclusions about the fundamental nature of the right to counsel are unmistakable." *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court held that a defendant charged by the federal government must be provided the assistance of counsel, even without requesting it, unless he competently and knowing waives that right. *Id.* at 469; *see also id.* at 462-63 (explaining that Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). In *Gideon*, the Court finally applied the Sixth Amendment's guarantee of counsel to the States as well as the federal government. Perhaps recognizing the Sixth Amendment's departure from the common law, the Court noted that the right to counsel "may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 372 U.S. at 344. A defendant "'requires the guiding hand of counsel at every step in the proceedings against him.'" *Id.* at 345 (quoting *Powell*, 287 U.S. at 68-69).

Post-*Gideon*, the Supreme Court further cemented the role of defense counsel as a forceful advocate speaking for the defendant. In *Anders v. California*,

386 U.S. 738 (1967), for example, the Court rejected appellate counsel's attempt to abandon an appeal by reporting, in a neutral manner, that he believed the appeal was frivolous. *Id.* at 744. The Court emphasized that "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id*. It was not enough for the lawyer to serve as a sort of learned advisor, or legal specialist. He had to *advocate* for his client, as well. *See id.* "That the lawyer in the post-Gideon world almost always speaks for the criminal client in the courtroom further enhances the notion that the criminal lawyer is the alter ego of the client." Thomas, *supra*, at 575.

The Supreme Court has also established the importance of the attorney-client relationship as part and parcel of the right to counsel. Thus, it violates the Sixth Amendment for counsel to operate under a conflict of interest, even if he otherwise goes through the motions of providing a defense. *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978). Likewise, preventing a defendant from conferring with her lawyer—even during a relatively short period of time—is unconstitutional. *Geders v. United States*, 425 U.S. 80, 91 (1976).

In fact, the only vestige of the more limited, common-law "advisor" role for criminal defendants is the occasional appointment of "standby counsel" to assist pro se defendants. Critically, however, standby counsel have been deemed appropriate only in cases where a defendant has validly *waived* the Sixth Amendment right to counsel. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring) (recognizing trial judge's ability to appoint

"standby counsel" to assist criminal defendant who has refused or discharged counsel); *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) (holding that defendant has right to self-representation but noting that trial court may, even over defendant's objection, "appoint a 'standby counsel' to aid the accused if and when the accused requests help").

Furthermore, despite the fact that standby counsel are *not* expected to fulfill the role of defense counsel, their use has nonetheless been problematic. For one thing, the Supreme Court has only addressed the upper limit of standby counsel's involvement—i.e., what level of participation would interfere with the defendant's right to self-representation. *McKaskle v. Wiggins*, 465 U.S. 168, 187-88 (1984). The Court has never addressed the lower limit, or even whether standby counsel has any affirmative obligation or duty at all. A standby lawyer thus exists in "an uncomfortable twilight zone of the law" where she is "unsure of her duties and the extent of her obligation," and "function[ing] in a context where the usual professional and ethical guides to attorney conduct appear not to fit." Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: The Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 675, 677 (2000). As explained below, this problem of an uncertain role will only be magnified if courts begin appointing amici intended to take the place of Sixth Amendment counsel, as the panel's decision suggests courts can do.

* * *

Throughout history, amici curiae have always been mere legal advisors or experts whose primary purpose is to assist the court in reaching an informed

decision. They have this in common with the common-law "counsel" or "pleaders" who sometimes advised a criminal defendant or the court about points of law relevant to the disposition of a criminal case. The panel's decision ignores the American rejection both of the common-law distinction between legal advisors and representatives, and of the common-law rule that a criminal defendant could not be *represented* by counsel. More critically, it ignores the development of a truly comprehensive right to counsel in this country, with its attendant guarantees of communicative, conflict-free, loyal counsel who will advance the client's interests at every turn. This Court should grant review to clarify that an "independent" amicus curiae cannot be equated with Sixth Amendment defense counsel.

VI. THE PANEL'S DECISION CREATES AN UNWORKABLE SYSTEM FOR DISTRICT COURTS, APPOINTED AMICI CURIAE, AND APPELLATE COURTS.

The panel's unprecedented decision seems to invite courts faced with difficult or mentally ill defendants to appoint amici curiae instead of defense counsel. If courts accept this novel invitation, serious issues will arise.

A. District Courts Will Not Know Until After the Fact Whether Appointing Amicus Instead of Counsel Violates the Sixth Amendment.

Whether the appointment of amicus curiae instead of counsel poses a constitutional concern, according to the panel, depends on the degree to which amicus ultimately acts like defense counsel. Put another way, a constitutional violation occurs only if it is determined, as some point *after* appointment, that the amicus did not "sufficiently represent[]" the defendant. *See* Slip op. at 21. Accordingly, district courts can seemingly appoint amicus instead of counsel with

impunity, because any constitutional violation that occurs later will be the result of amicus's subpar performance, not the court's decision to appoint him in the first place.[1]

Despite this implied invitation for district courts to appoint amici, it is unclear what role district courts should play, if any, after such appointment. Should the district court be constantly on guard for signs that amicus counsel is not meeting the ill-defined standard of "close enough" that the panel's opinion suggests? Is the failure of amicus to act enough "like" defense counsel something the district court is required to correct during the proceedings, or is it addressable only on appeal? And if the district court does appoint an amicus only to later find her performance inadequate, what is the remedy? The panel's decision invites a complete sea-change in how district courts may handle appointments of "counsel" but provides them no meaningful guidance regarding how to exercise their newfound discretion.

There is, of course, nothing wrong with the bright-line rule that has long governed the right to counsel—that is, where the Sixth Amendment applies, counsel must be appointed absent a valid waiver. *Zerbst*, 304 U.S. at 468-69. This is a simple, workable rule that district courts have had no trouble following and

[1] The inevitable use of amici instead of defense counsel raises logistical and financial questions, as well. For example, who might be appointed as amicus? Members of a district's CJA panel, or members of the bar at large? In addition, it is unclear how amici would be compensated, or under what authority. Presumably the costs would fall on the judiciary, adding to recent budgetary woes.

appellate courts no trouble enforcing. *See, e.g.*, *United States v. Foster*, 904 F.2d 20, 21-22 (9th Cir. 1990) (reversing judgment where court failed to appoint counsel to represent probationer facing imprisonment); *United States v. Wadsworth*, 830 F.2d 1500, 1505 (9th Cir. 1987) (reversing conviction where district court failed to appoint substitute counsel for indigent defendant who had not waived Sixth Amendment right to counsel). The panel's decision conflicts with Supreme Court authority and unnecessarily invites chaos and unpredictability into what has long been a very straightforward rule.

B. Counsel Appointed as Independent Amici Curiae Will Not Know What Is Required of Them.

Counsel appointed to provide some adversarial testing but not full representation will be at a loss as to what is required of them. According to the panel, a defendant may be "sufficiently represented by counsel" if court-appointed, independent amicus counsel cross-examines witnesses, files motions, or makes some argument in court at a competency hearing. But the panel was silent as to what level of involvement short of Robert Reid's would have sufficed. Would it have been enough if Reid had cross-examined just one of the witnesses? If he had called one, but not both, of Kowalczyk's parents to the stand? Would it matter if it turned out there were available defense witnesses that Reid failed to call? The panel's decision fails to draw any meaningful line between what is "good enough" and what is not.

Counsel appointed as amici curiae under the panel's decision will have to simply guess at what role they should play. Even if they are aware of the panel's

decision in this case and therefore know that they must act something like defense counsel with respect to filing motions or cross-examining witnesses, they will have no way of knowing whether the following pretrial duties apply to them: (1) establishing an attorney-client relationship (ABA Criminal Justice Standard 4-3.1); (2) avoiding conflicts of interest (Standard 4-3.5); (3) keeping the client informed (Standard 4-3.8); (4) investigating (Standard 4-4.1); (5) advising the client concerning all aspects of the case (Standard 4-5.1); and (6) exploring disposition without trial (Standard 4-6.1). If counsel were appointed for any portion of a trial, they would likewise have no way of knowing whether the amicus appointment imposed upon them the trial-related duties of care normally tasked to defense counsel.

The uncertainty described above would attend an open-ended "amicus curiae" appointment intended to somehow satisfy the Sixth Amendment. It is possible, of course, that appointing courts would circumscribe the amicus's duties in some way. In Kowalczyk's case, for example, Reid was told that he was "independent" and did not represent Kowalczyk, therefore he might have known that he was not obligated to establish an attorney-client relationship or avoid conflicts of interest. But such limitations highlight the Sixth Amendment concern instead of ameliorating it: the more circumscribed the appointment is, the further afoul of the Sixth Amendment it runs. *See Holloway*, 435 U.S. at 489-90 (holding that Sixth Amendment requires conflict-free counsel because of what conflict "tends to prevent the attorney from doing"); *Geders*, 425 U.S. at 91 (holding that depriving defendant of contact with his lawyer violated Sixth Amendment).

C. Appellate Courts Will Face Requests for Case-by-Case, After-the-Fact Determinations of Whether Amici Curiae Acted Enough Like Defense Counsel to Satisfy the Rule Announced in *Kowalczyk*.

There is nothing in the panel's decision that suggests any limitation on a district court's ability to appoint amicus instead of defense counsel whenever it chooses. Instead, the panel suggests a sort of retrospective limitation: in the panel's view, such appointments become problematic only if amicus counsel, once appointed, fails to act enough like defense counsel to comply with an amorphous, unarticulated standard. Slip op. at 20-21. Under the panel's new rule, the only way to tell whether appointment of amicus instead of defense counsel violates the Sixth Amendment is by engaging in a case-by-case analysis of how "defense-like" amicus counsel was, after the fact. Appellate courts will thus face unnecessary Sixth Amendment challenges.

Even aside from issues surrounding the adequacy or inadequacy of amicus counsel operating without guidance, appellate courts will face a more fundamental issue if the panel's decision stands: is the defendant bound by the actions or inactions of this "independent" amicus who is acting something like defense counsel in certain ways? If common law provides any guide, it would seem defendants would not be bound. The English "pleader" and the traditional amicus curiae, both of whom functioned merely to *assist* the court or defendant, have no agency relationship with the defendant and do not speak for him. It is easy to imagine some courts refusing to fault the defendant for an amicus's failure to object. On the other hand, since the defendant does not represent *himself* in our imaginary proceeding (unlike in cases involving standby counsel), one could also

imagine courts attributing amicus counsel's strategic decisions to the defendant. Otherwise, being technically unrepresented, as Kowalczyk was, a defendant would be bound by *nothing* that happened during a hearing or trial.

Finally, the additional complications that postconviction courts will face unless this Court grants review are worth mentioning. Just as the duties and obligations of "amicus curiae" Sixth Amendment counsel are unclear, so too is the question of what recourse a defendant would have if the amicus counsel failed to do his or her job (whatever that job may be). Where the Sixth Amendment right to counsel applies, a defendant for whom an amicus has been appointed in place of defense counsel must have the right to allege that amicus failed to perform adequately. *See Strickland v. Washington*, 466 U.S. 668 (1984). Amicus counsel will have to be compared to traditional defense counsel, and they will come up short.

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VII. CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

Respectfully submitted,

s/ Erwin Chemerinsky

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Dated: November 30, 2015

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CERTIFICATE OF COMPLIANCE

1. I certify pursuant to Circuit Rule 29-2(c)(2) that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 4,188 words.

2. Pursuant to Fed. R. App. P. 29(c)(5), I certify that no party's counsel authored this brief, nor did any party or party's counsel contribute funds toward it, nor did any other person contribute such funds.

DATED: November 30, 2015

s/ Elizabeth Richardson-Royer
Elizabeth Richardson-Royer

9th Circuit Case Number(s) 14-30198 & 14-30219

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