NO. 13-55172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAJI JAWDAT HAMDAN, *et al*.,

PLAINTIFFS-APPELLANTS,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al*.,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:10-cv-06149-DSF (JEM)
Honorable Dale S. Fischer, District Court Judge

BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the digital world.[1] Founded in 1990, EFF is based in San Francisco, California and has nearly 23,000 active donors and dues-paying members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age.

As part of its Transparency Project, EFF regularly files Freedom of Information Act ("FOIA") requests and litigates them in federal court. EFF believes that FOIA is an essential tool for the public to learn about and to scrutinize government activity. As such, EFF advocates for a robust interpretation of FOIA's disclosure requirements and is very concerned about any interpretation of the law that limits the public's ability to learn about, much less challenge, government activities.

ARGUMENT

The Panel's decision incorrectly interpreted Exemption 7(E) of FOIA, 5 U.S.C. § 552(b)(7)(E) (2012), effectively holding that law enforcement techniques and procedures are categorically exempt from the statute's broad

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, EFF states that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this *amicus curiae* brief.

disclosure requirements. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 777-78 (9th Cir. 2015). This Court should grant Plaintiff-Appellants' petition for rehearing to correct the Panel's erroneous interpretation and once again require agencies to demonstrate that disclosure of their techniques and procedures would risk circumvention of the law.

This Court should reverse the Panel opinion and restore the proper interpretation of Exemption 7(E) for three reasons.

First, the Panel's holding with respect to techniques and procedures covered by Exemption 7(E) conflicts with this Court's precedent, which requires agencies to demonstrate that disclosure of the records would allow criminals to circumvent the law. The Panel cannot overrule Ninth Circuit precedent, and its failure to acknowledge the controlling cases, much less explain its diversion from them, must be corrected.

Second, the Panel's interpretation of Exemption 7(E) places undue emphasis on the presence of a comma in the text of the statute to the exclusion of ample evidence foreclosing its proffered reading. As discussed below, congressional intent surrounding amendments to Exemption 7 and courts' interpretations of FOIA have consistently required agencies to demonstrate a risk of circumvention when withholding law enforcement techniques or procedures. Further, the Panel's reading adopts an extreme minority view of law enforcement's burden under Exemption 7(E) to withhold techniques and procedures.

Third, requiring agencies to demonstrate that disclosure would create a circumvention risk provides a check against potential misuse of Exemption 7(E) to

withhold illegal or otherwise questionable law enforcement techniques and procedures.

The government should not be able to assert Exemption 7(E) without justifying that the disclosure of specific techniques and procedures would create a risk of circumvention of the law.

I. THE PANEL DECISION CONFLICTS WITH NINTH CIRCUIT PRECEDENT REQUIRING AGENCIES TO DEMONSTRATE A CIRCUMVENTION RISK BEFORE WITHHOLDING TECHNIQUES AND PROCEDURES.

The Panel's decision in this case failed to follow, much less acknowledge, this Court's precedent requiring agencies withholding records under Exemption 7(E) to demonstrate that disclosing techniques and procedures would circumvent the law. A panel considering a case controlled by earlier precedent must follow it absent the authority being overturned by the U.S. Supreme Court or the Ninth Circuit en banc. *Hart v. Massanari*, 266 F.3d 1155, 1171-73 (9th Cir. 2001).

On at least two occasions, this Court has held that agencies must demonstrate a circumvention risk when seeking to withhold records that contained techniques and procedures. Exemption 7(E) allows agencies to withhold law enforcement records if they "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E) (2012).

In *Bowen v. U.S. Food & Drug Administration*, 925 F.2d 1225 (9th Cir. 1991), the FDA had withheld techniques for detecting and tracing cyanide in aspirin under Exemption 7(E). This Court's recitation of Exemption 7(E) in *Bowen* states that the exemption applies to records that "would disclose techniques and procedures for law enforcement investigations or prosecutions, . . . if such disclosure could reasonably be expected to risk circumvention of the law." *Id*. at 1228 (ellipsis in original). This Court then applied the circumvention risk requirement to the techniques and procedures at issue, finding the agency met its burden with an affidavit describing how "disclosure of the requested information would present a serious threat to future law enforcement product-tampering investigations." *Id*. at 1229.

Bowen built on this Court's previous decision in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653 (9th Cir. 1980). In *Hardy*, this Court recognized that "law enforcement material," which included manuals containing ATF techniques, could be withheld under FOIA upon a showing that disclosure created a circumvention risk. *Id*. at 655, 657. This Court's holding was "buttressed by the 1967 amendments to § 552(b)(7). That amendment exempts investigatory records to the extent that production would 'disclose investigatory techniques and procedures.'" *Id*. at 656.[2]

The Panel's decision in *Hamdan* neither applied *Bowen* and *Hardy* nor explained why they were not controlling. Instead, the Court relied on the Second

[2] The exemption relied upon in *Hardy* was the "High 2" Exemption that has since been overturned. *Milner v. Dep't of the Navy*, 562 U.S. 562, 570 (2011).

Circuit's decision in *Allard K. Lowenstein International Human Rights Project v. Department of Homeland Security*, 626 F.3d 678 (2d Cir. 2010). The Second Circuit interpreted the same text of Exemption 7(E) in the exact opposite way that this Court did in *Bowen*. The Second Circuit reasoned that because the phrase "if such disclosure could reasonably be expected to risk circumvention of the law" directly followed the "guidelines for law enforcement investigations or prosecutions" category of records, the circumvention risk requirement only applied to those records and not "techniques and procedures for law enforcement investigations or prosecutions." *Id*. at 681.

The Panel's reliance on the Second Circuit's case in the face of controlling precedent was incorrect as a matter of *stare decisis*.[3]

II. COURTS AND CONGRESS HAVE LONG REQUIRED AGENCIES TO SHOW THAT DISCLOSING TECHNIQUES AND PROCEDURES WOULD RISK CIRCUMVENTION OF THE LAW.

Although Congress has amended FOIA several times with respect to law enforcement records, the common theme of these amendments and courts' interpretation of the text is that agencies must show that disclosing their techniques and procedures would create a risk of circumvention. Congress amended FOIA's law enforcement exemption twice—in 1974 and 1986—to create the current text of Exemption 7(E). Before and after Congress' amendments, courts repeatedly interpreted FOIA as requiring agencies to demonstrate a circumvention risk before

[3] Further, as explained below, the Second Circuit's interpretation is also wrong when viewed in light of previous interpretations of Exemption 7(E) and congressional intent.

withholding techniques and procedures. Indeed, the considerable dialogue between the courts and Congress regarding law enforcement techniques and procedures shows that rather than categorically excluding such records from disclosure, both branches have sought to carefully balance the competing interests of increasing government transparency and promoting law enforcement.

A. Courts initially required the government to demonstrate that disclosure of techniques and procedures would risk circumvention.

In the years after FOIA's enactment, agencies tried to exploit a potential loophole in the text of FOIA to shield investigatory techniques and procedures from disclosure. Then, as now, FOIA compelled automatic disclosure of "administrative staff manuals and instructions to staff that affect members of the public." Freedom of Information Act, Pub. L. No. 90-23, 81 Stat. 54, 54 (1967), codified at 5 U.S.C. § 552(a)(2)(C). Agencies argued that the section's use of the phrase "administrative staff manuals" meant that law enforcement manuals, many of which contained techniques or procedures, were therefore exempt by negative implication or could be otherwise withheld under Exemptions 2 or 7.[4]

One of the first cases to address the negative implication argument rejected it. In *Hawkes v. Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972), the court held that it would be contrary to FOIA's purpose and its mandatory disclosure

[4] Exemption 2 allows agencies to withhold records "related solely to the internal personnel rules and practices of the agency." 5 U.S.C. § 552(b)(2) (2012). In 1967, Exemption 7 allowed agencies to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Pub. L. No. 90-23, 81 Stat. 54, 55 (1967).

provisions to allow agencies to categorically withhold law enforcement manuals containing techniques and procedures. *Id*. at 795. The court reasoned that law enforcement "is adversely affected *only* when information is made available which allows persons simultaneously to violate the law and to avoid detection." *Id*. (emphasis in original). The Fifth Circuit adopted the *Hawkes* court's reasoning a year later. *Stokes v. Brennan*, 476 F.2d 699, 701-03 (5th Cir. 1973).

The rationale for the decisions in *Hawkes* and *Stokes* applies with equal force here: agencies must demonstrate that disclosure of law enforcement techniques or procedures would risk circumvention of the law.

B. Congress approved the circumvention risk requirement adopted by courts when it amended FOIA in 1974.

With the FOIA amendments of 1974, Congress ratified the interpretation of the *Hawkes* and *Stokes* decisions and rejected the categorical withholding of law enforcement techniques and procedures favored by the executive branch. Prior to 1974, Exemption 7 allowed agencies to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Pub. L. No. 90-23, 81 Stat. 54, 55 (1967).

With the 1974 amendment, Congress limited executive discretion by narrowing the types of law enforcement records agencies could withhold. The amended text stated that an agency could withhold "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would" cause cognizable harms, such as depriving defendants of their fair trial rights, or disclose discrete categories of records, including "investigative

techniques and procedures." Freedom of Information Act and Amendments of 1974, Pub. L. No. 93-502 § 2(B), 88 Stat. 1561, 1563-64, codified at 5 U.S.C. § 552(b)(7)(A)-(F). Thus, the exemption was not a broad shield for all law enforcement records.

Though the text of Exemption 7(E) now allowed agencies to withhold records that would "disclose investigative techniques and procedures," Congress intended that "the scope of this exemption against 'disclosure of investigative techniques and procedures' should not be interpreted to include routine techniques and procedures already well known to the public . . . or commonly known techniques." H.R. Rep. No. 93-1380 (1974) (Conf. Rep.), *reprinted in* Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book at 229 (1975).[5] Further, in the legislative history of the amendments, Congress rejected interpretations of FOIA that "have tended to expand the scope of agency authority to withhold" law enforcement records. *Id*. at 229-30.

By narrowing the class of law enforcement records that could be withheld and instructing agencies that they could not withhold well-known techniques or procedures, Congress affirmed that Exemption 7(E) was designed to protect only those techniques and procedures that would allow criminals to circumvent the law. Thus, Congress intended that agencies withholding records had to show that

[5] *Available at* http://nsarchive.gwu.edu/nsa/foialeghistory/H.%20R.%20Rep.%2093-1380%20(Sept.%2025,%201974)%20Conf.%20Report.pdf.

disclosing certain techniques and procedures would impede effective law enforcement.

C. After the 1974 amendments, courts continued to require agencies to demonstrate a circumvention risk to withhold techniques and procedures.

After Congress endorsed the requirement that agencies demonstrate a circumvention risk before withholding law enforcement techniques and procedures, courts developed two primary interpretations of the amended Exemption 7(E).

The first interpretation, requiring agencies to demonstrate a circumvention risk, came from decisions such as this Court's opinion in *Hardy*, described above, and the Second Circuit's opinion in *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2d Cir. 1978).[6] In *Caplan*, the Second Circuit relied on the anti-circumvention rationale in holding that the ATF did not have to release a manual containing descriptions of the "equipment used by agents in making raids, the methods of gaining entry to buildings used by lawbreakers [and] factors related to the timing of raids." *Id*. at 545, 548. Although the records were withheld under the now defunct "High 2" exemption,[7] the agency had also claimed the information could be withheld under Exemption 7(E). *Id*. at 545 n.3. The court reasoned that ATF could withhold the techniques and procedures discussed in the manual because disclosure would "significantly assist those engaged in criminal activity by

[6] Similar to the *Hamdan* Panel's failure to apply *Bowen* and *Hardy*, the Second Circuit's opinion in *Lowenstein*, 626 F.3d at 678, did not identify the court's earlier decision in *Caplan*, much less explain why it did not control.

[7] *Milner*, 565 U.S. 565 (2011).

acquainting them with the intimate details of the strategies employed in its detection." *Id*. at 547. In other words, disclosure of the techniques and procedures created a circumvention risk. The court also noted that preventing criminals from circumventing the law was the rationale every court had relied upon to withhold similar records. *Id*.

As discussed above, this Court adopted the circumvention risk requirement in *Hardy*. This Court's decision in *Hardy* also explicitly rejected the second line of cases interpreting Exemption 7(E) that did not rely on the circumvention risk rationale. 631 F.2d at 656. Those cases included the D.C. Circuit's decision in *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc), which held that documents were exempt because the public had no legitimate interest in such information. *Id*.

Moreover, it was the D.C. Circuit's *Jordan* decision that pushed Congress to amend Exemption 7(E) in 1986 to make clear that agencies must demonstrate a risk of circumvention before withholding techniques and procedures.

D. Congress amended Exemption 7(E) in 1986 to clarify that agencies must show that undisclosed material creates a circumvention risk.

When the 1986 FOIA amendments were passed, Congress was aware of the different court interpretations of Exemption 7(E) described above. Congress could have explicitly rejected the interpretations requiring agencies to demonstrate a circumvention risk such as this Court's *Hardy* decision. Instead, Congress explicitly rejected the D.C. Circuit's decision in *Jordan*.

The 1986 amendments added the second category of records that could be withheld under Exemption 7(E)—"guidelines for law enforcement investigations or prosecutions." Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1802, 100 Stat. 3207-48, 3207-49. Congress also codified the circumvention risk requirement courts had been applying to law enforcement materials as described above, allowing for the withholding only "if such disclosure could reasonably be expected to risk circumvention of the law." § 1802.

The amendment passed by Congress explicitly rejected the *Jordan* court's rationale and "clarif[ied] congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure." 132 Cong. Rec. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy); 132 Cong. Rec. S16,504-05 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch).

Congress, however, did not intend the additional language in Exemption 7(E) to mean that the circumvention risk requirement no longer applied to techniques and procedures. There is scant legislative history regarding the addition of Exemption 7(E) because it was passed as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat 3207-48. The text of the amendment, however, came from a FOIA reform bill that earlier Congresses had tried to pass. *See* S. Rep. No. 98-221, 25 (1983). Legislative history from prior versions of the bill emphasized that the exemption "does not authorize withholding of routine techniques or procedures already well known to the public." *Id*. The Senate Report went on to state that the circumvention language was added so that "agencies and courts will consider the danger of creating 'secret law' together with the potential

for aiding lawbreakers to avoid detection or prosecution." *Id*. The Senate Report also states that the amendment was necessary "to address some confusion created by the D.C. Circuit's en banc holding in *Jordan*." *Id*.

Thus, with the 1986 amendment to Exemption 7(E), Congress reaffirmed the earlier judicial interpretations on withholding techniques and procedures as well as the court cases requiring agencies to demonstrate a circumvention risk for those records.

E. Since 1986, the majority of appellate courts have read Exemption 7(E) to permit withholding techniques and procedures only upon an agency demonstrating a circumvention risk.

With the exception of the Second Circuit and the *Hamdan* panel, every federal appellate court to interpret Exemption 7(E) after 1986 has required agencies to demonstrate that disclosing techniques and procedures would create a circumvention risk.

The Second Circuit's holding in *Lowenstein*, adopted by the panel, is the extreme minority view.

The D.C. Circuit, a court that the Ninth Circuit has recognized for its interpretations of FOIA, requires agencies withholding techniques and procedures to demonstrate a circumvention risk.[8] *Blackwell v. FBI*, 646 F.3d 37, 41-42 (D.C.

[8] *See*, *e.g.*, *Watkins v. U.S. Bureau of Customs & Border Protection*, 643 F.3d 1189, 1197 (9th Cir. 2011) (describing a D.C. Circuit interpretation of FOIA as persuasive); *Nat'l Wildlife Fed'n v. U.S. Forest Service*, 861 F.2d 1114, 1118-19 (9th Cir. 1988) (adopting the D.C. Circuit's FOIA interpretation with respect to Exemption 5's deliberative process privilege).

Cir. 2011). The disputed records in *Blackwell* included FBI procedures for forensic examinations of computers and techniques for data collection and analysis in FBI investigations. *Id*. at 42. The court held that the agency could withhold the techniques and procedures, but only after it had demonstrated a risk of circumvention. *Id*. at 41-42. The D.C. Circuit has also acknowledged its split with the Second Circuit and declined to adopt *Lowenstein*'s holding. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1102 n.8 (D.C. Cir. 2014); *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mex.*, 740 F.3d 195, 204 n.4 (D.C. Cir. 2014).

The Third, Fifth, Sixth, Seventh, and Tenth Circuits also require agencies to demonstrate a circumvention risk. *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995); *Benavides v. U.S. Marshals Serv*., No. 92-5622 1993 WL 117797, at *5 (5th Cir. 1993) (per curiam); *Jones v. FBI*, 41 F.3d 238, 249 (6th Cir. 1994); *Catledge v. Mueller*, 323 F. App'x 464, 466-67 (7th Cir. 2009); *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902-03 (10th Cir. 1992), *vacated on other grounds*, 2 F.3d 1055 (10th Cir. 1993).

In line with this Court's precedent and that of the majority of other circuit courts, district courts within the Ninth Circuit have routinely interpreted the first clause of Exemption 7(E) to require that agencies demonstrate a risk of circumvention in undisclosed law enforcement techniques and procedures. *See*, *e.g.*, *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1035-37 (N.D. Cal. 2005); *Feshbach v. Sec. Exch. Comm'n*, 5 F. Supp. 2d 774, 786 n. 11 (N.D. Cal. 1997); *Dunaway v.*

Webster, 519 F. Supp. 1059, 1082-83 (N.D. Cal. 1981); *Gerstein v. U.S. Dep't of Justice*, 2005 U.S. Dist. LEXIS 41276, *40-*41 (N.D. Cal. Sept. 30, 2005).

This Court should therefore restore the proper interpretation of Exemption 7(E) to require that law enforcement agencies demonstrate a circumvention risk before being able to withhold techniques and procedures.

III. REQUIRING AGENCIES TO DEMONSTRATE A CIRCUMVENTION RISK CHECKS MISUSE OF EXEMPTION 7(E) TO SHIELD ILLEGAL TECHNIQUES AND PROCEDURES.

Requiring agencies to demonstrate that undisclosed techniques and procedures would risk circumvention of the law helps prevent law enforcement from withholding illegal or controversial investigative methods. Under *Hamdan*, agencies can withhold records in the Ninth Circuit by merely claiming that they contain investigative techniques or procedures. That low standard, however, invites agencies to broadly apply the exemption, which may result in shielding controversial or illegal investigations from public scrutiny.

Agencies often rely on broad invocations of Exemption 7 to withhold controversial or illegal government activities. In *Rosenfeld v. U.S. Department of Justice*, 57 F.3d 803 (9th Cir. 1995), the government initially asserted Exemption 7 to prevent disclosing that the FBI had been investigating numerous individuals for their political activity. *Id*. at 808-11. The withheld records included documents showing "that the FBI waged a concerted effort" to have the former University of California, Berkeley President Clark Kerr fired because his politics differed from then-FBI Director J. Edgar Hoover. *Id*. The FBI's tactics also extended to

investigating faculty and students involved in the Free Speech Movement at Berkeley. *Id*.

More recently, a FOIA request revealed that draft surveillance requests used by the FBI and NSA to monitor specific targets included a racial epithet as placeholder name. Jason Leopold, *How Many More FBI Documents Contain the Phrase 'Mohammed Raghead'?*, Vice News (Oct. 14, 2015).[9] The government claimed the information could not be disclosed because the templates were law enforcement techniques and procedures under Exemption 7(E), even though use of the racially offensive template exposes the controversial and potentially unconstitutional targeting of Muslim-Americans. The Panel's interpretation could authorize the FBI to withhold such information in the future.

This case is no different. In particular, Plaintiff's FOIA request seeks to uncover the government's role in his detention and torture in the United Arab Emirates (U.A.E.). *See* Pls.-Appellants' Opening Br. 3-11. The information sought would shed light on the FBI's efforts to interrogate Mr. Hamdan in the U.A.E. and whether the agency was aware of or otherwise involved in his abduction and torture. Pls.-Appellants' Opening Br. 46-47.

Requiring agencies to demonstrate that records withheld under Exemption 7(E) would create a circumvention risk if disclosed therefore furthers the purpose of FOIA, as "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). In light of FOIA's

[9] *Available at* https://news.vice.com/article/how-many-more-fbi-documents-contain-the-phrase-mohammed-raghead.

disclosure presumption, the statute's exemptions "must be narrowly construed." *Id.*; *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). The Panel's interpretation flips the presumption of disclosure and interprets a FOIA exemption broadly, undermining the statute's goal and allowing agencies to hide controversial techniques behind Exemption 7(E). Restoring the proper interpretation of Exemption 7(E) therefore ensures that the exemption is construed narrowly, which will help prevent agencies' misuse of the exemption.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs-Appellants' petition for rehearing or en banc review.

Dated: November 10, 2015

Respectfully submitted,

By: *s/ Aaron Mackey*

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. Appellee's Opening Brief complies with the length limits of Circuit Rule 29-2(c)(2) because this brief contains 3,783 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: November 10, 2015

By: */s/ Aaron Mackey*__
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 10, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 10, 2015

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