No. 16-35431

In the United States Court of Appeals for the Ninth Circuit

M.S., ET AL.,
Plaintiffs-Appellants,

v.

KATE BROWN, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Oregon, (Aiken, J.)
Case No. 6:15-cv-02069-AA

AMICUS CURIAE BRIEF OF OREGONIANS FOR IMMIGRATION REFORM IN SUPPORT OF DEFENDANTS-APPELLEE AND SUPPORTING AFFIRMANCE OF THE DECISION BELOW

Dale L. Wilcox
Executive Director & General Counsel
Michael M. Hethmon
Senior Counsel
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
Phone: (202) 232-5590
Fax: (202) 464-3590
dwilcox@irli.org
mhethmon@irli.org
Attorneys for Amicus Curiae

RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Oregonians for Immigration Reform is a 501(c)(3) not for profit corporation with no parent corporation or any publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Oregon Constitution

Other Sources

INTEREST OF AMICUS CURIAE

Oregonians for Immigration Reform (OFIR) is a non-profit 501(c)(4) legal education and advocacy group organized in Oregon. OFIR recognizes the importance of immigration to the United States but works to stop illegal immigration and to ensure immigration levels are sustainable in Oregon.

OFIR's interest in the case stems from its efforts to have SB 833, which granted driver's cards to illegal aliens in Oregon, blocked by the referendum veto process. Indeed, OFIR played a special role in the referendum veto measure at issue. One of OFIR's officers was a chief petitioner in his capacity as an OFIR officer and OFIR's president was the authorizing agent for the campaign's account. OFIR submitted the ballot language that was largely adopted by the state attorney general and OFIR obtained counsel to defend the language when challenged in the Oregon Supreme Court. OFIR organized and largely staffed and funded the entire petition drive. OFIR's president was the individual to submit the petition to the Secretary of State for signature validation. OFIR's president also sat with the Secretary of State's staff while they validated the petition signatures. Once Measure 88 qualified for the November 2014 ballot, OFIR expended considerable time and money campaigning to defeat the Measure. Sixty-six percent of Oregon voters elected to overturn Measure 88.

OFIR moved to intervene in this case in the District Court because its interests as the initial proponent of the referendum were unique and not adequately protected. The district court denied OFIR's motion, which it elected not to appeal. Along with its Motion to Intervene, OFIR filed a Motion to Dismiss in the District Court and is intimately familiar with the issues at bar.

AUTHORITY TO FILE AND RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(a), an *amicus curiae* may "may file a brief only by leave of court . . . ." While counsel for Appellees consented to *Amicus* OFIR providing an *amicus curiae* brief for the court's consideration, counsel for Appellees withheld consent with no explanation. A Motion for Leave to File accompanies this brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

On May 15, 2016, the United States District Court for the District of Oregon held that the Appellants' case should be dismissed based upon Article III standing grounds. (ER:10; Doc. 48). Constitutional standing requires: 1) an injury suffered by the Appellants; 2) a causal connection between the injury and the Defendant-Appellees' conduct; and 3) a favorable decision by the court that will redress the injury suffered. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In

dismissing the complaint, the District Court determined that the injury alleged by Appellants, withholding driving privileges from illegal aliens, was not redressible by a favorable decision because SB 833 never became law. (ER:10; Doc. 48). As such, the District Court could not overturn the outcome of Measure 88 and judicially enact SB 833. *Id.*

Amicus OFIR supports the District Court's holding that it could not redress the Appellants' claims because S.B. 833 was never enacted. Additionally, OFIR asserts that no constitutional injury was inflicted upon the Appellants that would give rise to Article III standing, because Appellants did not suffer any deprivation of rights from the citizens' decision to withhold driver's cards from illegal aliens who reside in Oregon. To have constitutional standing, a party must first have been injured. *See Lujan v. Defs. of Wildlife*, 504 U.S. at 560.

Appellants claim a constitutional injury under the Fourteenth Amendment's Equal Protection Clause due to the outcome of Measure 88. Appellants' Br. 18-19. But to constitute an injury, Appellants must have "sustained or is immediately in danger of sustaining some direct injury as the result of (the statute's) enforcement . . . ." *Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 283 (1961) (quoting *Massachusetts v. Mellon*, 262 U.S. 477, 488 (1923)). The Appellants must demonstrate a legally protected interest. *See Lujan v. Defs. of Wildlife*, 504 U.S. at 560. This they have failed to do. The Appellants

have not suffered an injury that would confer standing to challenge the outcome of Measure 88 because illegal aliens do not have a legally protected interest in obtaining driving privileges in Oregon.

I. Because Illegal Aliens in Oregon Do Not Have a Constitutional Right to Driving Privileges, No Legally Protected Interest Has Been Harmed.

Appellants challenge the voters' rejection of Measure 88 as an unconstitutional outcome of a lawful referendum. Appellants' Br. at 23-27. For standing purposes, an injury occurs when a statute impairs a constitutional right. *See Gritchen v. Collier*, 254 F.3d 807, 811 (9th Cir. 2001). Appellants claim standing to bring a cause of action on the theory that the outcome of Measure 88 was an unconstitutional deprivation of rights under the Fourteenth Amendment. Appellants' Br. at 22.

OFIR responds that the outcome of Measure 88 did not create an injury-in-fact because no constitutional right was impaired. The Supreme Court has recognized a protected right to interstate travel under the Fourteenth Amendment. *See Saenz v. Roe,* 526 U.S. 489, 500 (1999) (striking down a residency requirement for state benefits). However, there is no fundamental right to drive even if driving a car would be an individual's primary mode of transportation. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999); *see also Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (determining that there is not a constitutional right to the most convenient for of travel). "Regulation of the

driving privilege is a quintessential example of the exercise of the police power of the state, and the denial of a single mode of transportation does not rise to the level of a violation of the fundamental right to interstate travel." *John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d 1369, 1375 (N.D. Ga. 2001) (finding that illegal aliens neither had a fundamental right to drive nor the right to a state driver's license).

The continued enforcement of current Oregon law does not impact any fundamental right held by Appellants. First, the referendum focuses on driving privileges in Oregon, not on preventing travel between states. The fundamental right to interstate travel is not implicated by the outcome of the referendum, which only concerned in-state driving privileges. *See id.* at 1375 ("The statutes [preventing illegal aliens from receiving driving privileges] . . . do not burden interstate travel by citizens or legal aliens"); *see also League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007) ("Plaintiffs have not identified, nor have we uncovered, any authority for the proposition that temporary resident aliens enjoy the same fundamental right to travel that citizens do."). Even if the fundamental right was implicated, the Constitution does not grant illegal aliens the right to interstate travel. "It would be curious indeed if the law gave illegal aliens a fundamental right to travel about this country when their mere

presence here is a violation of federal law." *John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d at 1373.

Second, Appellants do not have a constitutional right to driver's licenses or driving privileges in Oregon. Appellants claim injury arising from their alleged need to travel inconvenient distances for work and medical reasons. Appellants' Br. at 24 n.9. In general, citizens and non-citizens alike do not have a constitutional right to have the state issue driver's licenses or qualify them for driving privileges. *John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d at 1373. "A rich man can choose to drive a limousine; a poor man may have to walk. The poor man's lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional." *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972).

Appellants have no constitutional right to a driver's card or license. Driving is a privilege, not a right. Without driver's cards, Appellants still have other modes of transportation available to them. Therefore, no constitutional injury has occurred by limiting driver's privileges in Oregon.

II. A State May Make Changes to State Law Without Causing a Legal Injury.

On several occasions, the United States Supreme Court has examined the state referendum and initiative processes and whether the outcomes have produced

a deprivation of legally protected rights. The Supreme Court has found extra constraints on certain individual rights unconstitutional when the referendum process does not just stop the proposed law from going into effect, but places additional constitutional burdens or constraints on persons who would have been affected. *See Hunter v. Erickson*, 393 U.S. 385 (1969) (state initiative repealing state housing legislation *and* adding additional measure to prevent future enactments of housing legislation); *Romer v. Evans*, 517 U.S. 620 (1996) (state initiative repealing sexual orientation legislation *and* adding measures to prevent future protections); *Reitman v. Mulkey*, 387 U.S. 369 (2002) (repealing a housing discrimination law *and* giving private citizens the right to discriminate).

However, where a veto occurs by referendum, the proposed law may be overturned without causing a constitutional injury. In *Crawford v. Bd. of Educ. of City of Los Angeles*, the Supreme Court found that the city's decision to veto a measure requiring busing for desegregation purposes was constitutional. 458 U.S. 527 (1982). The Supreme Court found that a simple repeal or modification of a law, even when "race related[]" is not presumptively discriminatory. *Id.* at 537-38. The Court stated, "We agree [] in rejecting the contention that once a State chooses to do 'more' that the Fourteenth Amendment requires, it may never recede . . . [H]aving gone beyond the requirements of the Federal Constitution, the State was

free to return in part to the standard prevailing generally throughout the United States." *Id.* at 535, 542.

Like the Supreme Court in *Crawford v. Bd. of Educ. of City of Los Angeles*, the Oregon legislature chose to do more than was constitutionally required by giving driving privileges to illegal aliens who reside within the state. No person, regardless of citizenship or alienage, is *entitled* to a driver's license or driving privileges. *See Miller v. Reed*, 176 F.3d at 1206 (9th Cir. 1999); *see also John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d at 1375. The public's decision to reject the act passed by the legislature does not result in a constitutional injury because driving is not a constitutionally protected right. Like *Crawford v. Bd. of Educ. of City of Los Angeles*, the outcome of Measure 88 does not inflict any unconstitutional outcome on Appellants. Under *Crawford v. Bd. of Educ. of City of Los Angeles*, the State, through the referendum process, was free to repeal a law that did "more" than what was constitutionally required. 458 U.S. at 535. Even in rejecting Measure 88, Oregon continues to enforce driving privilege laws that are constitutional. Because driving is not a fundamental right and SB 833 provided privileges beyond the fundamental right to travel, the outcome of Measure 88 is a constitutional exercise of legislative authority by the citizens of Oregon to reject legislation with which they cannot agree.

III. Appellants Have Not Suffered an Injury Because the Veto of Measure 88 Continued Proper Enforcement of REAL ID.

The injury prong of standing requires a "legal wrong" suffered by the plaintiffs. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (providing a discussion of the injury prong of standing). The voters' rejection of Measure 88 ensured Oregon's continued compliance with federal law. Without the legal right to driving privileges, no "legal wrong" has been suffered.

In 2008, Congress passed the REAL ID Act (REAL ID) that enacted the 9/11 Commission's recommendation that the Federal Government "'set standards for the issuance of sources of identification, such as driver's licenses.'" U.S. Department of Homeland Security, *REAL ID Frequently Asked Questions for the Public*, Jan 8, 2016, https://www.dhs.gov/real-id-public-faqs. "The Act established minimum security standards for state-issued driver's licenses and identification cards and prohibits Federal agencies from accepting for official purposes licenses and identification cards from states that do not meet these standards." *Id.* REAL ID requires lawful presence for the issuance of a driver's license and does not expressly grant illegal aliens driving privileges. *See* Pub. L. No. 109-13 § 201, 119 Stat. 231, 312 (2005). REAL ID outlines two types of identification, the driver's license and the identification card. Both require legal presence within the United States to obtain. *Id.* REAL ID does not expressly give illegal aliens in the United

States the right to a driver's license or an identification card. *See id.* REAL ID has not been found unconstitutional.

The voters' rejection of Measure 88 kept Oregon law relating to in-state driving privileges in strict compliance with REAL ID. When the current driving laws were passed in 2008 under SB 1080, then-governor Ted Kulongoski stated, "This legislation brings us in line with the majority of other states and ensures integrity of Oregon driver licenses and identification cards." *See* Press Release, Ted Kulongoski, Oregon Governor, Governor Kulongoski Signs Legislation to Secure Oregon Driver Licenses (Feb. 15, 2008), http://archivedwebsites.sos.state.or.us/Governor_Kulongoski_2011/governor.oregon.gov/Gov/P2008/press_021508.shtml. In *Doe*, the district court struck down a challenge to Georgia's decision to not grant driving privileges to illegal aliens because Georgia law "mirrored federal objectives." *See John Doe No. 1 v. Georgia Dep't of Pub. Safety*, 147 F. Supp. 2d at 1376. Similarly, the Oregon Governor recognized the requirements of REAL ID and wanted to ensure that the state complied with those requirements. After SB 1080 was passed, it was never challenged as unconstitutional.

In the instant case, the veto of Measure 88 not only passes constitutional muster, it ensures that Oregon's driving privileges are brought into line with the requirements of REAL ID. The majority of states do not provide driver's licenses

to illegal immigrants. *See States Offering Driver's Licenses to Immigrants*, National Conference of State Legislatures (July 8, 2015), http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx (twelve states and the District of Columbia permit illegal immigrants to have the driving privilege). Like *Crawford,* where the Court commented that the referendum actually brought the state into alignment with the policy of other states, requiring legal presence brought Oregon in line with other states' policies to ensure integrity of the driving privilege. 458 U.S. at 542.

SB 1080 was never challenged as an unconstitutional deprivation of rights. Measure 88 maintains the federal guidelines required by REAL ID and in doing so, maintains the status quo of Oregon's driving laws, which have been in place since 2008. Maintenance of Oregon's current driving privilege law does not result in a cognizable injury because it maintains the constitutional floor and complies with federal law.

IV. Measure 88 Did Not Cause a Constitutional Injury to the Appellants Because SB 833 Was Never Enacted.

The district court determined that because SB 833 was never enacted, it was not law; thus a favorable finding by the court would judicially enact SB 833. (ER 16: Doc 48). Appellants now argue that SB 833 was enacted before it went

through the referendum process and a court may overturn the outcome of Measure 88 to allow the legislative enactment to prevail. Appellants' Br. at 15-18, 25.[1]

To support the position that legislation is enacted when it passes through the legislature, Appellants looked to the Oregon Court of Appeals case, *Am. Energy, Inc. v. City of Sisters*, where the court had to determine what the enactment date of a law was: the date it was passed by the legislature or the date the people of Oregon approved the law by referendum. *See* 250 Or. App. 243 (2012). The court in *Am. Energy, Inc. v. City of Sisters* determined that the approved referendum's enactment date would be the date the law passed the legislature, not the referendum date when it was approved by citizens of the state. *Id.* at 251. Similarly, Appellants rely on *Fouts v. Hood River* for continued support that a law is enacted when the legislature passes it. Appellants' Br. at 17.

The precedent used by Appellants is not persuasive to support the assertion that legislation is enacted even if the people have vetoed it through the referendum process. First, *Am. Energy Inc. v. City of Sisters* addresses what the enactment date is when it passes *both* the legislature and the referendum process. 250 Or. App. 243 (2012). The appellate court made the enactment date retroactive to the date it was passed by the legislature. *Id.* at 245. *Am. Energy Inc. v. City of Sisters* does

[1] *Amicus* addresses this argument here because enactment not only affects the redressability prong of standing, but the injury prong as well. Specifically, if SB 833 was never enacted, there could be no deprivation of a legal right and thus no injury.

not address the question at hand in this case: whether legislation was enacted even after it has been vetoed in a popular referendum. Second, the facts of *Fouts v. Hood River* differ so extensively from the facts of the present Measure that it cannot be relied upon to provide justification for the proposition that a legislative act going through the referendum process is enacted. *See generally* 46 Or. 492 (1905). In *Fouts v. Hood River*, the legislation in question required a popular vote *after* the legislative process had been completed to become operational. *Id.* at 494. In the instant case, the legislation had not completed the initial legislative process.

Both the Oregon Supreme Court as well as the United States Supreme Court have found that the referendum process is part of the legislative process. It reserves ultimate legislative power to the people. *See City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 672 (1976); *Portland Pendleton Motor Transp. Co. v. Heltzel*, 197 Or. 644, 647 (1953) (When a referendum is invoked, the act of the legislature then becomes merely a measure to be voted on by the people, and, if the people vote in the affirmative, the measure becomes an act; if they vote in the negative, the measure fails."). *Davis v. Van Winkle* makes clear than when a piece of legislation which was been passed by the legislature is being referred to the public as a referendum, it is an merely "act[,]" not a law. *See* 130 Or. 304, 308

(1929) (clarifying the differences between the legal definitions of a bill, an act, and a law).[2]

The referendum process allows the people to correct "the sins of commission" committed by the legislature. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 (2015) (internal citation omitted). It functions as a veto to the legislature's decisions that do not properly reflect the will of the people. *See City of Eastlake*, 426 U.S. at 673. The referendum process allows the citizens to approve or disapprove of any act passed by the state legislature. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 225 (1912) (finding that the decision to add the referendum process to a state's legislative process is not justiciable). Once the Oregon legislature has passed a bill, the people have the opportunity to exercise their right under the Oregon Constitution and put the law to a popular vote to "approve or reject . . . the Act." Or. Const. Art. IV, § 3(a).

If a proposed law cannot pass the referendum process with voter support, it does not become a law. Proposed legislation that does not become law "ha[s] no

[2] Appellants attempt to discredit *Davis v. Van Winkle* as outdated precedent because the language of the Constitution was changed. No Oregon Supreme Court decision has overturned *Davis v. Van Winkle* and its analysis is still applicable to the language of Or. Const. Art. IV. "The explanation of the 1968 amendment in the official Voters' Pamphlet indicates that there was no intention in the drafting of the amendment to change the role of the legislature in connection with the exercise by the people of the initiative and referendum." *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 61 (2000) (citation omitted).

existence and [is] not entitled to be enforced." *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 567 (1916). To claim an act that was vetoed through the referendum process was "valid and operative . . . [lacks] merit." *Id.* at 568.

Because the legislative process of enacting legislation does not stop at the elected legislators but flows directly to the people, legislation is not enacted until the people approve or disapprove the act. The language of Or. Const. Art. IV allows the people to accept or reject any "Act" put before them for consideration. Or. Const. Art. IV, § 1(3)(a). An act is not a law but a *bill* which has yet to become enacted. *See Davis v. VanWinkle*, 130 Or. at 308. Additionally, a measure is not the appropriate subject matter for judicial review until it is passed; otherwise, the court would be improperly providing an advisory opinion. *Boytano v. Fritz*, 321 Or. 498, 501 (1995) (citing *Foster v. Clark*, 309 Or. 464, 469 (1990)).

Measure 88 concerned legislation that had yet to be enacted by the people, who by veto referendum chose to review and reject the legislation. Nullification of SB 833 is not a cognizable injury because it never carried the force of law and driving privileges were never bestowed on Appellants. Under *Davis v. Van Winkle*, SB 833 remained an act because the full legislative process under Article 4 of the Oregon Constitution stopped SB 833 from becoming law. 130 Or. at 308. *Boytano* found measures cannot be challenged until enacted; therefore, no injury

occurred because no change in law occurred. *See* 321 Or. at 501. As a result, the outcome of Measure 88 is not reviewable by this court.

V. The Perceived Animus Complained of by the Appellants Does Not Give Rise to An Injury Because the Outcome of Measure 88 Complies With Federal Law.

Appellants claim racial animus caused Measure 88 to be rejected by the citizens of Oregon as a way to punish illegal aliens from Mexico and Central America living within the state of Oregon. Appellants' Br. at 1, 23. However, any perceived animus towards illegal aliens cannot give rise to a constitutional injury.

In *S. Alameda Spanish Speaking Org. v. City of Union City, Cal.*, the Ninth Circuit found that an examination of voter motive was inappropriate for judicial review. 424 F.2d 291, 295 (1970) (finding that voter intent in a referendum was not open to judicial inquiry). "[T]he inquiry would entail intolerable invasion of the privacy that must [be] protect[ed]." *Id.* at 295 (citation omitted). Appellants would need to show that apart from voter motive, the outcome of Measure 88 was discriminatory. *Id.* This they cannot do.

Appellant's theory is contradicted by relevant federal law. Section 1601 of Title 8 aims to remove the availability of public benefits to illegal aliens. *See* 8 U.S.C. § 1601(6). Disapproving an incentive for illegal immigration into the state is not animus, rather it is "a compelling government interest." *Id.*; *see also* 8

U.S.C. § 1621 ("Aliens who are not qualified aliens or nonimmigrants ineligible for State and local public benefits").

The Ninth Circuit has previously justified the reduction of state benefits to aliens as rationally related to state interests. *See e.g.*, *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014) (reducing state health care benefits for nonimmigrant aliens); *Pimentel v. Dreyfus*, 670 F.3d 1069 (9th Cir. 2012) (finding an alien unlikely to succeed on the merits of a claim that the state's termination of food assistance programs for aliens violated the Fourteenth Amendment). Limiting public benefits, such as the driving privilege at issue in this case, does not create a legal injury because federal law supports Oregon's decision to restrict the privilege of driving to certain lawfully present aliens. Animus cannot induce an injury where "no constitutional duty" exists to provide illegal aliens with the same benefits provided to citizens. *See City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999) (citing *Mathews v. Diaz*, 426 U.S. 76, 82 (1977)).

Under *S. Alameda Spanish Speaking Org. v. City of Union City, Cal.*, animus plays no part in the injury prong of standing. The Ninth Circuit has determined that voter motivation is an inappropriate measure of injury. To do so would be "a dangerous venture of legislative mind-reading" of only a handful of citizens. *See Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 U.S. Dist. LEXIS 162578 (D. Ariz. Nov. 22, 2016) (finding that identity theft laws in

Arizona did not violate the Equal Protection Clause even if some were motivated by animus). The determination by the state to limit state benefits so as to discourage illegal immigration is rationally related to legitimate state and federal interests under *City of Chicago v. Shalala*. No constitutional injury can be deduced from voter motivation or intent when the referendum outcome is rationally related to a legitimate state interest.

CONCLUSION

For the reasons stated above as well as the reasons stated in the Kate Brown *et al.* brief, the Court should affirm the decision below.

December 2, 2016

Respectfully Submitted,

/s/ MICHAEL M. HETHMON
Dale L. Wilcox
Executive Director & General Counsel
Michael M. Hethmon
Senior Counsel
IMMIGRATION REFORM
LAW INSTITUTE
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
Phone: (202) 232-5590
Fax: (202) 464-3590
dwilcox@irli.org
mhethmon@irli.org

Attorneys for Amicus Curiae

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-35431

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [4368] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: Michael M. Hethmon

Date: 12/2/2016

("s/" plus typed name is acceptable for electronically-filed documents)

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 December 2, 2016.

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.

/s/ MICHAEL M. HETHMON