Docket No. 15-35209

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL FRANCHISE ASSOCIATION, INC., *et al*.,

Plaintiffs-Appellants,

v.

CITY OF SEATTLE, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington

District Court Case No. C14-848-RAJ

BRIEF OF FREE SPEECH FOR PEOPLE, DĒMOS, COURAGE CAMPAIGN, AND EQUAL JUSTICE SOCIETY AS AMICI CURIAE SUPPORTING DEFENDANTS-APPELLEES AND SUPPORTING AFFIRMING THE JUDGMENT BELOW

RONALD A. FEIN*
Free Speech For People
634 Commonwealth Ave. #209
Newton, MA 02459
Phone: (617) 244-0234
rfein@freespeechforpeople.org

**Counsel of record*
Counsel for amici curiae

BRENDA WRIGHT
ADAM LIOZ
NAILA AWAN
Dēmos
220 Fifth Ave., 5th Floor
New York, NY 10001
Phone: (212) 633-1405
bwright@demos.org

CORPORATE DISCLOSURE STATEMENT

No amicus has a parent corporation or is owned in part by any publicly held corporation.

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INTEREST OF AMICI CURIAE

With the parties' consent, amici curiae file this brief in support of appellees City of Seattle *et al.*[1]

Free Speech For People is a national non-partisan campaign committed to the propositions that the Constitution protects the rights of people rather than state-created corporate entities; that the people's oversight of corporations is an essential obligation of citizenship and self-government; and that the doctrine of "corporate constitutional rights" improperly moves legislative debates about economic policy from the democratic process to the judiciary, contrary to our Constitution. Free Speech For People, along with amici Courage Campaign and Equal Justice Society, is a prospective amicus in a case before the U.S. District Court for the Central District of California involving a similar equal protection challenge to a Los Angeles "living wage" ordinance, *American Hotel & Lodging Ass'n v. City of Los Angeles*,

[1] No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief. All parties, through counsel, have consented to submission of this brief.

No. 2:14-CV-09603-AB-SS (C.D. Cal. filed Dec. 16, 2014).

Dēmos is a public policy organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. Dēmos has conducted extensive research and advocacy on economic inequality and the negative impacts of low-wage work on the economy, on workers, and on businesses. Dēmos frequently presents its research and expertise through amicus filings in constitutional litigation before the federal appellate courts and the U.S. Supreme Court.

Courage Campaign fights for a more progressive California and country. It is powered by more than 900,000 online member activists. Courage Campaign's long-term goal is to restore the California Dream through grassroots organizing, creating widespread and long-term prosperity for all its people without regard for race, creed, or sexual orientation. Courage Campaign organized an online petition urging the Los Angeles City Council to raise the minimum wage for hotel workers.

The Equal Justice Society (EJS) is transforming the nation's consciousness on race through law, social science, and the

arts. A national legal organization focused on restoring constitutional safeguards against discrimination, EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all people receive equal treatment under the law. EJS uses a three-pronged approach to accomplish these goals, combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies. As part of its mission of restoring the Equal Protection Clause, EJS is interested in safeguarding the clause and its jurisprudence from misuse and dilution.

SUMMARY OF ARGUMENT

Seattle's living wage law fulfills, rather than offends, the Equal Protection Clause of the Fourteenth Amendment.[2] The amendment's legislative history reveals that "fair, living wages" for freedmen were a core concern of the Reconstruction Congress and executive branch, and Congress cannot have intended the Fourteenth Amendment to impede governmental efforts to establish a living wage. Appropriately, modern courts' deference to economic legislation against Equal Protection Clause challenges applies even more strongly to minimum wage laws: amici are unaware of any modern decision invalidating a minimum wage law on an employer's equal protection challenge. And plaintiffs—politically well-represented business entities—cannot realistically claim "animus" here.

The Fourteenth Amendment's deference to living wage laws begins with Reconstruction itself. The amendment's legislative history reveals that its framers sought and heard extensive

[2] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1.

testimony on the availability of "fair, living wages" for freedmen. Government officials responsible for freedmens' affairs testified about federal efforts to ensure such "living wages," and the framers understood these measures as a key element of the free labor system. The framers' intent for the Equal Protection Clause was surely not to be a tool for employers, then or now, to combat the government's efforts to guarantee a living wage.

Seattle's minimum wage law fulfills the intent and spirit of the Fourteenth Amendment by helping all low-income workers, and particularly the city's people of color, who are disproportionately paid low wages. The ordinance's findings note that 70% of the city's American Indian and Alaska Native workers, and over 40% of its African-American, Asian/Pacific Islander, and Hispanic workers, earn less than the new minimum wage. Quibbles about the law's phased implementation schedule pale in significance to the interests of the 30,000 workers whom the law will benefit, and whose interests more closely correspond to those that the amendment's framers sought to protect.

Plaintiffs' attempt to cast municipal wage legislation as motivated by "animus" falls flat because plaintiffs are not, and cannot reasonably compare themselves to, disfavored minorities for which legislative distinctions can trigger animus review. To the contrary, the principal case that plaintiffs cite for their animus argument (involving discrimination in the food stamp program) exposes the awkward reality that franchise *employees* are often recipients of food stamps precisely because of their low wages. Plaintiffs' equal protection claim does not demonstrate animus and lacks support in modern precedent.

ARGUMENT

I. Seattle's living wage law is consistent with the Reconstruction Congress's concern for "fair, living wages" as expressed in the legislative history of the Equal Protection Clause.

The Reconstruction Congress was keenly interested in whether newly-freed slaves would receive "fair, living wages." Because of the demonstrated importance of this issue to the framers of the Fourteenth Amendment, living wage laws deserve special solicitude under the Equal Protection Clause—especially

where, as here, the law benefits substantial numbers of poor workers of color.

A. "Fair, living wages" were a principal concern of the Congress that enacted the Fourteenth Amendment.

Living wages for freedmen were a central concern of Reconstruction almost as soon as the Civil War ended. A Congressionally-commissioned report on conditions in the South noted that employers continued to devise elaborate schemes to underpay freedmen. *See* Maj. Gen. Carl Schurz, *The Condition of the South* 10-11 (1865), *available at* http://bit.ly/1rCH19i. And in a widely-reprinted open letter to "the Colored People of North Carolina" published just five months after the Confederate surrender, Horace Greeley urged freedmen to take immediate steps to demand "fair, living wages." N.Y. Daily Tribune, Sept. 14, 1865, at 4, *available at* http://1.usa.gov/1milCpG.

In hearings of Congress's Joint Committee on Reconstruction, committee members repeatedly asked whether Southern white employers would pay freedmen what Senators and witnesses variously and interchangeably called "fair wages,"

"living wages," or both. For example, Senator Jacob Howard (the Fourteenth Amendment's Senate floor manager) asked an Army colonel in the Freedmen's Bureau[3] whether freedmen would work for "fair wages" and whether white Virginia employers would pay freedmen "fair, living wages." The colonel responded that while Virginia freedmen would be willing to work for "what any northern man would consider fair wages," they were not presently paid "what would be considered living wages—wages to support a man and his family." *Report of the Joint Committee on Reconstruction* (39th Cong., 1st sess.), pt. II, at 124 (Feb. 15, 1866) (testimony of Col. Orlando Brown), *available at* Univ. of Cal. Digital Library, Internet Archive, http://bit.ly/1yVscTc; *see also id.* at 130 (question by Sen. Howard to former Confederate General Robert E. Lee on whether former slave-masters would pay freedmen "fair, living wages for their labor").

[3] The Freedmen's Bureau Bill, passed in 1865, established the Bureau to oversee the affairs of freedmen and war refugees, and distribute food, clothing, fuel, and land. *See* 13 Stat. 507 (Mar. 3, 1865), §§ 2, 4, *available at* Bruce Frohnen, *The American Nation: Primary Sources*, http://bit.ly/1pY1fwh.

Living wages for freedmen became a central concern of the Army and the Freedmen's Bureau. An 1865 Army work plan instructed officers to assist freedmen in obtaining "fair wages for their labor." *Id.* at 186 (testimony of Col. E. Whittlesey). In parts of Georgia and South Carolina, the unregulated labor market yielded wages so low that one Army general established a minimum wage, and another considered relocating the entire freed population of two counties *en masse* to areas that would pay "fair wages." *See id.* at 234 (testimony of Capt. Alexander Ketchum); Eric Foner, *Reconstruction: America's Unfinished Revolution 1863-1877*, at 165 (1988). At prevailing market wages, a Freedmen's Bureau agent observed, "it is one endless struggle to beat back poverty." *Foner*, *supra*, at 166. By 1866, the Bureau had resorted to distributing standard labor contracts, with fixed labor rates that the Bureau determined to be conducive to "prosperous relations between capital and labor" and "satisfactory to the freedmen." *See* S. Exec. Doc. No. 39-6, at 2, 4 (1867), *available at* http://1.usa.gov/ZItPcL.

In light of the Army's reports, the Committee asked a wide range of witnesses—black, white, government, and civilian—whether black workers could earn "fair wages" in the South,[4] and heard mostly negative answers.[5] And while "fair" can refer to parity, the usage of the Committee and the witnesses indicates that "fair wages" were understood to mean wages that could support a family:

> Question. Are they [returned rebels] willing to pay the freedmen fair wages for their work?
> Answer. No, sir; they are not willing to pay the freedmen more than from five to eight dollars a month.
> Question. Do you think that their labor is worth more than that generally?
> Answer. I do, sir; because, just at this time, everything is very dear, and I do not see how people can live and support their families on those wages.

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[4] *See, e.g.*, *Report of the Joint Committee on Reconstruction*, pt. II, at 52 (testimony of Dr. Daniel Norton) (in response to Senator Howard's question whether freedmen could earn "fair wages," answering that such work was scarce, and many freedmen were paid a dollar per month or less); *id.* pt. IV at 2 (testimony of John Recks) (in response to Senator Williams' question whether black workers would work for "fair wages," affirming their eagerness to work for "anything like a fair or reasonable compensation").

[5] To be sure, some witnesses testified that, in their regions, freedmen *could* find work at "fair wages," or that employers *might* pay fair wages under certain conditions. *See*, *e.g.*, *id.* pt. II, at 124 (testimony of Col. Orlando Brown). The important point is that the Senators considered the issue so important to the Reconstruction project that they kept asking the question.

Id. pt. II, at 56 (testimony of Richard Hill).[6]

The Committee ultimately concluded that federal protection was necessary to ensure that freedmen could earn fair wages. The few Southern employers who would "accept the situation" and "employ[] the freedmen at fair wages" were a minority. *Id.* at xvii. To the contrary, the Committee noted, "without [the Bureau's] protection the colored people would not be permitted to labor at fair prices, and could hardly live in safety." *Ibid.*

To be sure, the availability of living wages was only one of many issues facing Reconstruction, and the Committee did not itself suggest a living wage bill. But when the Committee proposed the Fourteenth Amendment, *see id.* at xxii, it was well aware of the Bureau's efforts to ensure living wages for freedmen, and it had been persuaded that such efforts might remain necessary for some time. And as Representative Thaddeus Stevens

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[6] *See also id.* pt. II at 12-13 (testimony of Lewis McKenzie) (stating that "Union whites" in Virginia paid "fair wages," but that other employers' wages were not adequate for clothing and medical care), 54 (testimony of Madison Newby) (stating that Virginia employers "expect colored people . . . to work for ten or eighteen cents a day… [H]e may have a family of six to support on these wages, and of course he cannot do it.").

noted when introducing the amendment to the House, the amendment's basic purpose was "'the amelioration of the condition of the freedmen." Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

The court should interpret the Equal Protection Clause in light of Congress's concern for "fair, living wages" and its intent, through the Fourteenth Amendment, to "ameliorat[e] . . . the condition of the freedmen." At minimum, given Congress's close interest in the Bureau's efforts to ensure "fair, living wages" for freedmen, Congress surely did not intend the Fourteenth Amendment to *impede* those efforts, nor serve as a weapon for employers against such efforts in the future.

B. Seattle's living wage ordinance fulfills a key Reconstruction goal and the Equal Protection Clause should not be interpreted to impede it.

Seattle's living wage ordinance embodies the modern fulfillment of this critical part of the Reconstruction project. Research prepared for the city, and cited in the ordinance, found that 70% of American Indian/Alaska Native workers, 49% of Hispanic workers, 43% of African-American workers, and 41% of Asian/Pacific Islander workers in Seattle earn less than the new

minimum wage of $15/hour. *See* Marieka M. Klawitter *et al.*, *Who Would be Affected by an Increase in Seattle's Minimum Wage?: Report for the City of Seattle, Income Inequality Advisory Committee* 12 (Mar. 21, 2014), http://go.usa.gov/EsmW; Seattle City Ordinance 124490 (June 3, 2014), § 1(2) (citing this data), App. Br. Add. 2a.

This effort to improve the working conditions of poor workers and reduce inequality fulfills, rather than offends, the Fourteenth Amendment's equality principle. *Cf. Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring) ("To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment."). Consequently, the Court's equal protection analysis should be especially deferential, and not subordinate an interest that the Reconstruction Congress demonstrably *was* concerned about ("fair, living wages") to another (protection of a particular corporate business model) that played no part in Congress's thinking.

II. Franchise businesses cannot claim "animus" to circumvent rational basis review.

Plaintiffs' effort to claim an equal protection violation based on alleged "animus" toward franchise businesses amounts to little more than a back-door effort to circumvent the deferential rational basis standard of review that governs their claim. *See Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426 (2010) ("When economic legislation does not employ classifications subject to heightened scrutiny or impinge on fundamental rights, courts generally view constitutional challenges with the skepticism due respect for legislative choices demands.").

Seattle's desire to ensure a modestly quicker implementation of higher wages for employees of franchise businesses does not reflect animus against such businesses, but rather an entirely rational concern for franchise workers, who are often among the lowest-paid workers in our economy. *See, e.g.*, Catherine Ruetschlin, Dēmos, *Fast Food Failure: How CEO-to-Worker Pay Disparity Undermines the Industry and the Overall Economy* (2014) ("*Fast Food Failure*"), http://bit.ly/1ILL4xB. Not only are franchise operators common in the low-paid food service industry

(employing about 43% of restaurant employees nationally) but they are also common in other low-wage industries such as accommodation, food retailers, and gas stations.[7]

Franchise businesses are not, and cannot reasonably compare themselves to, disfavored minorities for which legislative distinctions can trigger animus review. Plaintiffs' reliance on *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), to support their claim of unconstitutional animus is not just far-fetched, but ironic. *See* App. Br. at 45. *Moreno* examined an amendment to the federal Food Stamp Act that excluded persons who lived with unrelated individuals (for any reason) from food stamp benefits. *See id.* at 529-30. Since this restriction did not serve any of Congress's goals for the food stamp program, the Court examined the amendment's legislative history, and found

[7] Amici calculated franchise restaurant employment as a share of total employment by comparing an industry estimate of franchise employment at restaurants (approximately 4.3 million in April 2015) to the latest available Bureau of Labor Statistics estimate of total employment at restaurants and eating places (approximately 9.97 million in March 2015). *See* ADP Research Inst., *ADP National Franchise Report* (Apr. 2015), http://bit.ly/1R4hQvh; Bureau of Labor Statistics, U.S. Dep't of Labor, *BLS Data Viewer*, http://1.usa.gov/1KkAZrS (last visited May 20, 2015).

that the sole stated reason for the provision was to exclude "hippies" and "hippie communes" from the program. *Id.* at 533-34 (quotation marks omitted). The Court noted that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id.* at 534. Because no other justification could be identified for denying food stamps to impoverished households that included a non-family member, the Court struck down the regulation under rational basis review. *See id.* at 534-38.

The economic and political power relationships at play here are almost exactly reversed from those in *Moreno*. The "hippies" targeted by the food stamp provision there had no trade association or organized lobby such as plaintiff International Franchise Association, and little ability to be heard during consideration of the food stamp legislation. By contrast, corporate franchising businesses in Seattle had powerful advocates, and their concerns were directly raised and discussed during the political process leading to Seattle's enactment of the ordinance. *See* Decl. of Robert Feldstein, SER 461-62, ¶¶ 13, 15-17

(describing how city's Income Inequality Advisory Committee heard and considered franchisees' arguments). *Cf. Mtn. Water Co. v. Mont. Dep't of Pub. Serv. Reg.*, 919 F.2d 593, 598-99 (9th Cir. 1990) (noting that, "unlike the hippie communes in *Moreno*, privately-owned water utilities are neither members of a suspect class nor a politically unpopular group prompting 'heightened' scrutiny in equal protection analysis from this court"); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155-56 (9th Cir. 2004) (rejecting equal protection challenge to living wage law and noting "large businesses that occupy and profit from prime real estate can hardly be considered vulnerable").

Moreover, in contrast to the situation in *Moreno*, applying the minimum wage to franchise employees as swiftly as practical is fully consistent with the stated goals of the ordinance. *See* App. Br. Add. 1a (preamble to ordinance). Franchise employees are particularly likely to be paid minimum wage, and thus are significant intended beneficiaries of Seattle's minimum wage law. *See Fast Food Failure*, at 2 (noting that "[f]ast food workers are the lowest paid in the economy"); *cf. Williamson v. Lee Optical of*

Okla. Inc., 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

Indeed, businesses that depend heavily on low-wage workers are causing millions of their employees to turn to food stamps and other public assistance programs to sustain themselves and their families. A report prepared for the City of Seattle Income Inequality Advisory Committee reported that 60% of spending on food stamps generally is provided to members of working families, 52% of families of fast-food workers are enrolled in one or more public programs, and "low wages were the main predictor of public program enrollment." *See* Michael Reich *et al*., Inst. for Research on Labor & Employment, Univ. of Cal., *Local Minimum Wage Laws: Impacts on Workers, Families and Businesses* 15 (Inst. for Research on Labor & Employment, Working Paper No. 104-14, Mar. 2014), http://bit.ly/1AmcM15; *see also Fast Food Failure*, at 19; National Employment Law Project, *Giving Caregivers a Raise: The Impact of a $15 Wage Floor in the Home Care Industry* 2 (Feb. 2015), http://bit.ly/1R3TTnP.

In sum, franchise *workers* in Seattle have much more in common with the *Moreno* plaintiffs than do the businesses claiming unlawful “animus” here.[8]

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[8] The parallels between franchise workers and the *Moreno* plaintiffs can be striking. For example, the Court’s opinion in *Moreno* describes the situation of the lead plaintiff as follows:

> Jacinta Moreno . . . is a 56-year-old diabetic who lives with Ermina Sanchez and the latter’s three children. They share common living expenses, and Mrs. Sanchez helps to care for appellee. Appellee’s monthly income, derived from public assistance, is $75; Mrs. Sanchez receives $133 per month from public assistance. . . . Despite her poverty, appellee has been denied federal food assistance solely because she is unrelated to the other members of her household. Moreover, although Mrs. Sanchez and her three children were permitted to purchase $108 worth of food stamps per month for $18, their participation in the program will be terminated if [Ms.] Moreno continues to live with them.

Moreno, 413 U.S. at 531-32. Compare Ms. Moreno’s situation to a fast-food franchise worker recently profiled in *The New Yorker*:

> [Ms. Tapia] rented a shared room in Inwood, a working-class neighborhood . . . for fifty dollars a week, got a job at a McDonald’s in Inwood, and then a second job, at [another] McDonald’s. She made minimum wage. . . . Money got tighter. She and Ashley received food stamps—a hundred and eighty-nine dollars a month—and, crucially, an earned-income tax-credit refund. But day care was expensive, and Tapia could never get enough hours at work.

William Finnegan, *Dignity*, The New Yorker, Sept. 15, 2014, at 72, *available at* http://nyr.kr/1rTlT4R.

Stripped of the spurious animus argument, the franchise businesses' claim evokes the *laissez-faire* era of *Lochner v. New York*, 198 U.S. 45 (1905), in which courts regularly invoked the Fourteenth Amendment to strike down state economic legislation, and which compelled Justice Black to observe that "of the cases in [the] Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent asked that its benefits be extended to corporations." *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

But the *Lochner* era ended almost eighty years ago. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rejecting employer's Fourteenth Amendment challenge to minimum wage). Plaintiffs have not cited, nor have amici located, a single modern case invalidating a minimum wage law on an employer's equal protection challenge. To the contrary, in the context of living wage laws, this court has aptly described legislative implementation details as "'virtually unreviewable'" under the Equal Protection

Clause. *RUI One Corp.*, 371 F.3d at 1155 (rejecting equal protection challenge to living wage law that only applied to businesses above a certain size in marina area) (quoting *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 316 (1993)).

This judicial deference to legislatures' decisions about implementation details for living wage laws is consistent with the Fourteenth Amendment's legislative history. It would seem absurd to the Reconstruction Congress to suggest that the Equal Protection Clause means that franchised businesses are entitled to relief that would not only rewrite the city council's considered judgment about the need for a fair, living wage, but also condemn thousands of Seattle's workers to seven lean years. The Court should not twist the Equal Protection Clause into a barrier against lifting the poor of all races from poverty by means of "fair, living wages."

CONCLUSION

The district court correctly concluded that plaintiffs are not likely to prevail on the merits of their Equal Protection Clause claim. This Court should affirm the district court's denial of plaintiffs' motion for a preliminary injunction with respect to that claim.

Respectfully submitted,

/s/ Brenda Wright
Brenda Wright
Adam Lioz
Naila Awan
Dēmos
220 Fifth Ave., 5th Floor
New York, NY 10001
(212) 633-1405
bwright@demos.org

/s/ Ronald A. Fein
Ronald A. Fein
Free Speech For People, Inc.
634 Commonwealth Ave #209
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org

DATED: May 22, 2015

Counsel for amici curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,870 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 in 14-point Century Schoolbook type.

DATED: May 22, 2015

/s/ Ronald A. Fein

Ronald A. Fein
Free Speech For People, Inc.
634 Commonwealth Ave #209
Newton, MA 02459
(617) 244-0234
rfein@freespeechforpeople.org

Counsel for amici curiae

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 May 22, 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.

/s/ Ronald A. Fein
Ronald A. Fein
Counsel for amici curiae

May 22, 2015