No. 13-14950-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

M.H., *et al.*,

Plaintiffs-Appellees

v.

DAVID A. COOK, COMMISSIONER OF THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH, in his official capacity,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
ROBERT A. KOCH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2302
Robert.Koch@usdoj.gov

Case No. 13-14950-B

M.H., et al. v. *Cook*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Amicus Curiae United States certifies that, in addition to those listed in the certificate filed by appellees in their Brief Of Appellees, the following persons may have an interest in the outcome of this case:

1. Koch, Robert A., United States Department of Justice, Civil Rights Division, counsel for amicus curiae United States;

2. Gross, Mark L., United States Department of Justice, Civil Rights Division, counsel for amicus curiae United States;

3. Flynn, Diana K., United States Department of Justice, Civil Rights Division, counsel for amicus curiae United States;

4. Samuels, Jocelyn, United States Department of Justice, Civil Rights Division, counsel for amicus curiae United States.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

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INTEREST OF THE UNITED STATES

This case concerns a 12-year-old boy with disabilities who lives with his mother, receives Medicaid-funded services from the State in the community, and wishes to remain in the community. The child sued the State Medicaid agency alleging, *inter alia*, that the manner in which the State delivered services to him placed him at risk of institutionalization in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*

This case involves the proper interpretation of the prohibition against unnecessary segregation of individuals with disabilities of Title II and its implementing regulations. Title II prohibits discrimination against individuals with disabilities in the provision of public services. See 42 U.S.C. 12132. The Attorney General has authority to enforce Title II and to promulgate regulations implementing its broad prohibition against discrimination and unnecessary segregation of individuals with disabilities. See 42 U.S.C. 12133-12134. To that end, the Attorney General issued the integration mandate requiring that "[a] public entity * * * administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The United States enforces Title II and the integration mandate across the country, including States in the Eleventh Circuit. *E.g.*, *United States* v. *Georgia*, No. 1:10-cv-249 (N.D. Ga.); *United States* v. *Florida*, No. 12-cv-60460 (S.D. Fla.). The United States thus has a substantial interest in this appeal.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether a currently non-institutionalized individual with a disability can bring a claim under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, that a state or local government's actions create for that individual a serious risk of institutionalization.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities" and that, still, "individuals with disabilities continually encounter various forms of discrimination, including * * * segregation." 42 U.S.C. 12101(a)(2) and (5). Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(7) (emphasis added).

Title II of the ADA prohibits disability discrimination in public services: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Congress directed the Attorney General to promulgate regulations to implement Title II. 42 U.S.C. 12134.

Pursuant to this delegated authority, the Attorney General issued the integration mandate as part of the regulations: "A public entity shall administer

services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The most integrated setting is one "that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. B at 685. The Attorney General also required that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

In *Olmstead* v. *L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999), the Supreme Court held that, under the ADA and its implementing regulations, "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Id.* at 600, 119 S. Ct. at 2187. The Court found that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Ibid.* The Court also found that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601, 119 S. Ct. at 2187. The Court then held that individuals with disabilities are entitled to community-

based services "when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with * * * disabilities." *Id.* at 607, 119 S. Ct. at 2190 (plurality opinion); see also *id.* at 607, 119 S. Ct. at 2190 (Stevens, J., concurring in part and concurring in the judgment) ("[U]njustified institutional isolation[] constitutes discrimination under the Americans with Disabilities Act of 1990. If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs." (internal citation and quotation marks omitted)).

The Court stated that the issue of the extent of available resources recognizes that "[t]he State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamental alteration' of the States' services and programs." 527 U.S. at 603, 119 S. Ct. at 2188 (plurality opinion) (quoting 28 C.F.R. 35.130(b)(7)); accord *id.* at 607, 119 S. Ct. at 2190 (Stevens, J., concurring in part and concurring in the judgment).

Since *Olmstead*, the Department of Justice issued guidance regarding its interpretation and enforcement of Title II's integration mandate. Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Apr. 23, 2014). In that guidance, the Department stated that "the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent." *Id.* at Question & Answer 6. The Department provided as an example "a public entity's failure to provide community services" that "will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Ibid.*

2. Statement Of The Facts

a. Appellee M.H. is a 12-year-old boy with disabilities who lives with his mother and who receives Medicaid-funded services from the State of Georgia that are community-based, in his home rather than in an institutional setting. Doc. 81 at 3. M.H. sued the head of the State's Medicaid agency in his official capacity regarding the manner in which these services were provided to him under the Georgia Pediatric Program, the State's Medicaid program for medically-fragile

children.[1] Doc. 81 at 3, 6-7. Specifically, M.H. alleged that the State failed to provide him medically-necessary skilled nursing services in violation of the Medicaid Act, 42 U.S.C. 1396 *et seq*. Doc. 81 at 2. He alleged that, without those skilled nursing services, he would have to move from his home into an institution to receive the necessary care. Doc. 81 at 36-41. The State's actions, he alleged, therefore placed him at risk of unnecessary institutionalization in violation of Title II of the ADA, 42 U.S.C. 12132. Doc. 81 at 43-47. He requested injunctive and declaratory relief.[2] Doc. 81 at 38, 47.

In the district court, the United States filed a Statement of Interest on the limited question of what legal standard should govern plaintiffs' at-risk ADA claim. Doc. 171. We argued that "the ADA's protections are not limited to those individuals who are currently institutionalized. * * * Instead[,] it is sufficient for a plaintiff to show that the challenged state action creates a serious risk of institutionalization." Doc. 171 at 12.

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[1] The case originally involved five individual plaintiffs. Doc. 81 at 3-6. Two plaintiffs, S.R. and J.M., settled their claims with the State. Doc. 185. One plaintiff, Z.R., has aged out of the children's system, and one plaintiff, R.E., died recently on April 2, 2014. Appellee Br. 7.

[2] Plaintiffs also alleged a violation of the Fifth and Fourteenth Amendments and sought class certification. Doc. 81 at 41-42; Doc. 93. The district court denied both claims, Doc. 121; Doc. 179 at 16-18, neither of which plaintiffs appealed.

b. The district court granted M.H. declaratory and injunctive relief under both the Medicaid Act and the ADA.[3] Doc. 199 at 33. The court first carefully reviewed the extensive evidence regarding M.H.'s medical conditions and service needs. Doc. 199 at 10-17. The court then found that, under the Medicaid Act, the amount of services the State provided was "arbitrary and capricious" and not based on medical necessity, which "breached the Defendant's duty to ensure that * * * private duty nursing care is sufficient in amount, duration, and scope to reasonably achieve its purpose." Doc. 199 at 29-30. Under the ADA, the court held that M.H. "may succeed on [his] ADA claim if the Defendant's action places [him] at a 'high risk' of premature entry into institutional isolation." Doc. 199 at 31 (citing *Fisher* v. *Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181, 1185 (10th Cir. 2003); *Pashby* v. *Delia*, 709 F.3d 307, 322 (4th Cir. 2013)); see also Doc. 179 at 14-16 (same in deciding defendant's motion for partial summary judgment). The court found that, "because the Defendant was not providing the medically necessary level of care, or was attempting to reduce the level of care below the medically necessary level," M.H. was "at a high risk of entering an institution to receive the medical services for which" he qualifies. Doc. 199 at 31.

[3] The court granted the same relief to R.E. Doc. 199 at 33.

SUMMARY OF THE ARGUMENT

The district court correctly held that an individual need not wait to be institutionalized to raise a claim under Title II of the ADA and its integration mandate concerning unnecessary institutionalization. This Court should join the Tenth, Ninth, and Fourth Circuits in so holding. A non-institutionalized individual with a disability has standing to claim under Title II and the integration mandate that a state or local government's actions create a serious risk of institutionalization for that individual. This standard is dictated by the plain text and intent of the ADA and its regulations; by the Supreme Court's reasoning in *Olmstead* v. *L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999); and by the Department of Justice's explicit guidance on the issue, which warrants deference.

ARGUMENT

A SERIOUS RISK OF INSTITUTIONALIZATION STATES A CLAIM UNDER THE ADA

This Court "review[s] *de novo* questions of statutory interpretation." *United States* v. *Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc).

Individuals with disabilities need not wait until they are institutionalized to assert an integration claim under Title II of the ADA, 42 U.S.C. 12132, and its integration mandate, 28 C.F.R. 35.130(d). By their terms, neither the statute nor the integration regulation applies only to institutionalized individuals. Instead, the plain text of each protects the rights of all "qualified individuals with disabilities."

28 C.F.R. 35.130(d); accord 42 U.S.C. 12132. This clear language directly includes individuals, like M.H., who are individuals with disabilities who currently receive services in the community.

Indeed, protecting individuals with disabilities from the harm of unnecessary institutionalization was one of Congress's intents in passing the ADA. In the findings Congress passed when enacting the ADA, Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2). Congress further found that such discriminatory segregation continues. 42 U.S.C. 12101(a)(5). Congress thus stated that one of "the Nation's proper goals" is to ensure "independent living" for individuals with disabilities. 42 U.S.C. 12101(a)(7). In turn, Congress "provide[d] a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). In Title II of the ADA, Congress prohibited discrimination against individuals with disabilities in the provision of public services, 42 U.S.C. 12132, and directed the Attorney General to promulgate regulations implementing that prohibition, 42 U.S.C. 12134.

To address Congress's concern about the harm of unnecessary segregation and institutionalization, the Attorney General issued the integration mandate, 28 C.F.R. 35.130(d). The integration mandate requires that "[a] public entity * * * administer services, programs, and activities in the most integrated setting

appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. 35.130(d), which is the "setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible," 28 C.F.R. Pt. 35, App. B at 685. The Attorney General further required that public entities "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination" unless the "modifications would fundamentally alter" an entity's service system. 28 C.F.R. 35.130(b)(7).

In *Olmstead* v. *L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999), the Supreme Court recognized the harm of unnecessary institutionalization as discrimination prohibited by Title II and the integration mandate. The Court held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability." *Id*. at 597, 119 S. Ct. at 2185. The Court explained that this holding "reflects two evident judgments." *Id.* at 600, 119 S. Ct. at 2187. "First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Ibid*. "Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id*. at 601, 119 S. Ct. at 2187. These concerns and the potential for harm exist both where individuals

unnecessarily institutionalized seek to return to their communities, as did L.C. in *Olmstead*, and where those with disabilities seek to avoid unnecessary institutionalization in the first place, as does M.H. here.[4]

The Department of Justice issued regulatory guidance that further removes any doubt that suing to *prevent* the harm of unnecessary institutionalization is a cognizable claim under Title II, the integration mandate, and *Olmstead*. See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Apr. 23, 2014). In that guidance, the Department stated that "many people who could and want to live, work, and receive services in integrated settings are still waiting for the promise of *Olmstead* to be fulfilled." *Ibid.* The Department "reaffirm[ed] its commitment to vindicate the right of individuals with disabilities to live integrated lives under the ADA and *Olmstead*." *Ibid.* The Department thus issued the guidance "to assist individuals in understanding their rights and public entities in understanding their obligations" based on the Department's interpretation of the integration mandate "under the ADA and *Olmstead*." *Ibid.*

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[4] While *Olmstead* "allows States to resist modifications that entail a 'fundamental alteration' of the States' services and programs," 527 U.S. at 603, 119 S. Ct. at 2188 (plurality opinion) (quoting 28 C.F.R. 35.130(b)(7)), defendant does not assert a fundamental alteration defense in this case.

In its guidance, the Department answered the very question presented by this appeal: "Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?" Statement of the Department of Justice at Question & Answer 6. The answer, unequivocally, is "[y]es, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation." *Ibid.* The protection against the harm of unnecessary institutionalization is "not limited to individuals currently in institutional or other segregated settings. Individuals *need not wait until the harm of institutionalization or segregation occurs or is imminent*." *Ibid.* (emphasis added).

The Department's interpretation of Title II and its integration mandate—that a non-institutionalized individual with a disability can bring a claim for a serious risk of institutionalization—warrants deference. Specifically, the Department's views on Title II "warrant respect," *Olmstead*, 527 U.S. at 597-598, 119 S. Ct. at 2185-2186, and its interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation," *Auer* v. *Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997) (citation and internal quotation marks omitted). This interpretation is a consistent implementation of the prohibition on unnecessary institutionalization and segregation of individuals with disabilities in Title II, the integration mandate, and *Olmstead*. Indeed, the prohibition on unnecessary institutionalization would be hollowed if not countermanded if

individuals with disabilities were forced to suffer the significant harm of unnecessary institutionalization merely in order to seek relief from it. The law does not demand this Hobson's choice. Cf. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 238, 129 S. Ct. 2484, 2491 (2009) ("[H]aving mandated that participating States provide a [free appropriate public education] for every student [with a disability], Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act.").

The Department's interpretation also aligns with standard Article III standing requirements. To have Article III standing, a plaintiff must allege 1) an actual or imminent injury, 2) caused by the defendant, 3) that would be redressed by a favorable court decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136 (1992). At-risk ADA claims by their nature satisfy these standings requirements because they involve threats to health, safety, and welfare, as exemplified in the guidance: a plaintiff typically alleges 1) either an actual injury from an existing denial of or failure to provide services, or an imminent injury from a threatened cut to services, 2) caused by the defendant, 3) that would be redressed if the defendant's actions were enjoined. See Statement of the Department of Justice at Question & Answer 6.

The Department's interpretation moreover is consistent with the opinion of every Court of Appeals to squarely address the issue. In *Fisher* v. *Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), the Tenth Circuit held that "disabled persons who * * * stand imperiled with segregation" could bring a claim "under the ADA's integration regulation without first submitting to institutionalization." *Id.* at 1182. The court reasoned that "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized." *Id.* at 1181. The court concluded that the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Ibid.* The plaintiffs in *Fisher* moreover "face[d] a substantial risk of harm" because they were "at high risk for premature entry" to an institution due to the state policy at issue in the case. *Id.* at 1184 (internal quotation marks omitted).

In *M.R.* v. *Dreyfus*, 663 F.3d 1100 (9th Cir. 2011), amended by 697 F.3d 706 (9th Cir. 2012), the Ninth Circuit held that "[a]n ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization." *Id.* at 1116. The court held that "[i]nstitutionalization …

creates an unnecessary clinical risk that the individual will become so habituated to, and so reliant upon, the programmatic and treatment structures that are found in an inpatient setting that his or her ability to function in less structured, less restrictive, environments may become severely compromised." *Id.* at 1118 (citation and internal quotation marks omitted). The court also afforded "considerable respect" to the Department's view on the integration mandate, as expressed in a statement of interest in the district court similar to what the Department filed in this case. *Id.* at 1117 (citing *Olmstead*, 527 U.S. at 597-598, 119 S. Ct. at 2185-2186). The court deferred to the Department's "reasonable interpretation of its own statutorily authorized regulation" as "controlling unless plainly erroneous or inconsistent with the regulation." *Ibid.* (quoting *Auer*, 519 U.S. at 461, 117 S. Ct. at 911). The court concluded that the Department's serious-risk-of-institutionalization standard "is not only reasonable; it also better effectuates the purpose of the ADA." *Id.* at 1117-1118.

In *Pashby* v. *Delia*, 709 F.3d 307 (4th Cir. 2013), the Fourth Circuit held that individuals who "face a risk of institutionalization" and "must enter institutions to obtain * * * services for which they qualify" could bring an ADA claim. *Id.* at 322. The court reasoned that "nothing in the plain language of the regulations * * * limits protection to persons who are currently institutionalized." *Ibid.* (quoting *Fisher*, 335 F.3d at 1181). The court also was "especially swayed

by the DOJ's determination that 'the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.'" *Ibid.* (quoting the Statement of the Department of Justice).

In short, M.H. warrants relief under the ADA if the State's actions place him at a serious risk of institutionalization. This standard best effectuates the broad prohibition of discrimination against individuals with disabilities in public services under Title II, the integration mandate, and *Olmstead*. The standard also implements the Department's reasonable interpretation of its own regulation and comports with every court of appeals decision that has squarely addressed the issue.[5]

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[5] In *Amundson* v. *Wisconsin Department of Health Services*, 721 F.3d 871 (7th Cir. 2013), the Seventh Circuit never reached the question of the proper legal standard under Title II and the integration mandate. See *id.* at 873-874. Plaintiffs challenged the State's service rates but failed to allege that the rates might lead to institutionalization, so the court credited the State's assertion that the rates could operate "without landing any * * * disabled person in an institution." *Ibid.* In the vacated opinion *Bill M.* v. *Nebraska Department of Health and Human Services Finance and Support*, 408 F.3d 1096 (8th Cir. 2005), vacated by 547 U.S. 1067, 126 S. Ct. 1826 (2006), the Eighth Circuit also never reached the legal standard question. The court held that plaintiffs had standing to bring an ADA claim because of allegations that the State's delivery of services "jeopardize[d] * * * health and safety," which "alleged concrete and particularized harm sufficient to satisfy the first element of standing." *Id.* at 1099. This vacated holding accords with the above discussion regarding standing and the nature of at-risk claims, but the court then disposed of the case on other grounds. *Id.* at 1100.

CONCLUSION

The Eleventh Circuit should hold that a non-institutionalized individual with a disability can bring a claim under Title II, its integration mandate, and *Olmstead* for a state or local government's actions that create for that individual a serious risk of institutionalization.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Robert A. Koch
MARK L. GROSS
ROBERT A. KOCH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2302
Robert.Koch@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the attached BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3858 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word, in 14-point Times New Roman font.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

Dated: April 23, 2014

CERTIFICATE OF SERVICE

I certify that on April 23, 2014, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney