No. 16-3784

United States Court of Appeals
For the Eighth Circuit

JAMES STUART, individually and on behalf of all others similarly situated; CAREDA L. HOOD,
Plaintiffs-Appellees,
v.
STATE FARM FIRE AND CASUALTY COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court for the Western District of Arkansas, Texarkana Division
Civil Action No. 4:14-CV-04001-SOH

BRIEF OF *AMICI CURIAE* AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure the amici curiae disclose as follows:

American Insurance Association is an incorporated association that has no parent corporation and no stock.

Property Casualty Insurers Association of America is a not-for-profit 501(c)(6) corporation, has no parent corporation, and no publicly-held corporation owns stock in PCI. PCI has one wholly-owned for-profit subsidiary, Independent Statistical Service, Inc.

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STATEMENT OF IDENTITY OF AMICI CURIAE, THEIR INTERESTS IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE

American Insurance Association ("AIA"), Property Casualty Insurers Association of America ("PCI") and National Association of Mutual Insurance Companies ("NAMIC") are leading national trade associations representing property and casualty insurers writing business in Arkansas, nationwide and globally. Their members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA, PCI and NAMIC advocate sound public policies on behalf of their members in legislative and regulatory forums at the state and federal levels and file *amicus curiae* briefs in significant cases before federal and state courts, including this Court. *See, e.g., In re State Farm Fire & Cas. Co. (Labrier)*, 872 F.3d 567 (8th Cir. 2017). This allows them to share their broad national perspectives with the judiciary on matters that shape and develop the law. Their interests are in the clear, consistent and reasoned development of law that affects their members and the policyholders they insure.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the

interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

Amici are authorized to file this *amicus curiae* brief with leave of court pursuant to Fed. R. App. P. 29(a)(2).

STATEMENT PURSUANT TO FED. R. APP. P. 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), Amici state that no party's counsel authored this brief in whole or part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than Amici, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

This case is part of a nationwide trend of state-by-state putative class action lawsuits against insurers on what plaintiffs label "labor depreciation." When a class is certified in one of these cases, or even when a motion to dismiss is denied, it has a tendency to spawn numerous new lawsuits that burden the court system and can impact the insurance marketplace as a whole. What starts as one lawsuit against a single insurer soon mushrooms into numerous cases against nearly the entire industry, as occurred in Arkansas and Missouri regarding "labor

depreciation." This burdens the court system, the insurance industry and, indirectly, consumers who are impacted by trends in the insurance marketplace.

The panel's opinion ("Panel Opinion") affirming (with slight modification) the district court's class certification order conflicts with Supreme Court authority and conflicts with this Circuit's class certification precedent in *In re State Farm Fire & Cas. Co. (Labrier)*, 872 F.3d 567 (8th Cir. 2017) and *Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 780 (8th Cir. 2013). If allowed to stand, the Panel Opinion will also create a circuit split.

Class certification decisions must be made with a view towards how an individual case would be tried, which allows the court to assess whether the case could be tried as a class action. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046-48 (2016). Here, there can be no reasonable dispute that an insurer in State Farm's position would be entitled at the trial of an individual plaintiff's or class member's case to present fact and expert testimony demonstrating that the total amount paid was sufficient to comply with State Farm's obligation under the policy to pay the "actual cash value" of the covered property damage. That same right must be available in this case, and could not be provided without conducting thousands of mini-trials on the over 32,000 claims at issue. To deprive an insurer of that right simply because of a desire to have class treatment would violate not

only Rule 23, but also the Rules Enabling Act, Due Process Clause and the Seventh Amendment.

En banc review is necessary to correct the Panel Opinion, avert confusion in this Circuit's class certification precedent, avoid a circuit split, and prevent unnecessarily proliferation of class action litigation on the "labor depreciation" issue and similar issues within this Circuit.

ARGUMENT

I. WITHOUT *EN BANC* REVIEW, COURTS IN THIS CIRCUIT ARE LIKELY TO BE BURDENED WITH NUMEROUS ADDITIONAL SIMILAR CLASS ACTION LAWSUITS

When one district court certifies a class against a single insurer on an issue of potentially industrywide application, as the district court did here, this frequently leads to numerous "copycat" filings of essentially-identical class action lawsuits against various other insurers.[1] In some instances, plaintiffs' lawyers have sued every insurer with any significant market share in the jurisdiction. This has occurred, in some jurisdictions, with respect to the issue presented here: whether, when the replacement-cost-less-depreciation methodology is used to estimate the "actual cash value" of property, the amount deducted for depreciation must always be based only on the depreciation applicable to the portion of the replacement cost

[1] Many insurers use standard insurance policy forms or language developed by the Insurance Services Office, Inc. or American Association of Insurance Services, Inc., which draft policy forms and obtain the required regulatory approval for the use of those forms in each jurisdiction.

that is attributable to the cost of materials. Numerous such suits were filed in Arkansas and Missouri.[2] These "labor depreciation" cases were also brought in Nebraska and Minnesota until the state supreme courts in those jurisdictions rejected the plaintiffs' legal theory.[3]

If the panel's decision here is not corrected, the remaining jurisdictions in this Circuit—Iowa, North Dakota and South Dakota—likely will be among the next venues in this serial "labor depreciation" litigation, which is also currently active in the Fifth and Sixth Circuits.[4] And plaintiffs' lawyers no doubt will file similar cases against insurers on new theories, where they attempt to isolate and challenge the insurers' property damage estimates on one of the numerous variables taken into account in estimating damage on property insurance claims.

When such "copycat" putative class actions are filed, it burdens the federal district courts in the relevant jurisdiction, and substantially increases insurers' cost of doing business in that jurisdiction, impacting the insurance marketplace. This is likely to occur throughout this Circuit, if this Court does not grant *en banc* review.

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[2] The Missouri federal court litigation came to an end following this Court's opinion reversing the class certification order in *Labrier*.

[3] *Henn v. Am. Family Mut. Ins. Co.*, 894 N.W.2d 179 (Neb. 2017); *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780 (Minn. 2016).

[4] *See, e.g.*, *Mitchell v. State Farm Fire & Cas. Co.*, No. 18-90043 (5th Cir.) (Rule 23(f) petition granted); *Hicks v. State Farm Fire & Cas. Co.*, No. 18-5104, Fed. App. 0510N (6th Cir. Oct. 15, 2018) (affirming denial of motion to dismiss; class certification issues not yet decided).

Unless the Panel Opinion is corrected, defendant insurers facing the burdens and expenses of discovery and the cost of a class action trial may be compelled to settle even unmeritorious cases. And a decision that exerts pressure on insurers to settle unmeritorious claims will ultimately harm policyholders. This is because individual insurers must take an increase in loss costs into account when setting rates, which will result in upward pressure on rates.

As the Supreme Court has recognized, a defendant "[f]aced with even a small chance of a devastating loss" in a certified class action may be "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). This "pressure to settle" "even unmeritorious claims" is "heightened" when "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement"). For property-casualty insurers, this pressure can be intensified by their significant regulatory reporting requirements. And as soon as one insurer decides to settle a class action, that tends to have a "snowball effect," resulting in a rash of new class action lawsuits against other insurers.

In light of the burden that class action lawsuits impose and the settlement pressure they exert, it is essential that district courts thoroughly conduct the "rigorous analysis" that is required on class certification, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), and "give careful scrutiny" to "whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods*, 136 S. Ct. at 1045 (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:49, at 195-196).

II. THE ISSUES PRESENTED WARRANT *EN BANC* REVIEW

En banc review should be granted because the Panel Opinion: (a) conflicts with Supreme Court precedent on class certification; (b) conflicts with other precedent of this Court; and (c) creates a circuit split.

A. The Panel Opinion Conflicts With Supreme Court Precedent

As the Supreme Court has explained, in deciding whether common questions predominate over individual issues, a court should evaluate how an individual plaintiff's or putative class member's case would be tried. *See Tyson Foods*, 136 S. Ct. at 1046-48 (evaluating class certification issues through the lens of how an individual case would be tried); *see also Labrier*, 872 F.3d at 572. Here, a jury would be instructed that the insurance policy provides for payment of "the amount it would cost to repair or replace damaged property, less depreciation." Panel

Opinion, at 7. But the Panel Opinion failed to focus on how this question would be tried, instead assuming that one component of this calculation ("labor depreciation") could be "segregated" from the remainder of the determination of actual cash value. *Id.*

If an individual case (such as those of the named plaintiffs here) were tried, the plaintiffs and State Farm would have the right to present testimony by one or more fact and/or expert witnesses, such as contractors, regarding the age and condition of damaged items, and the estimated and/or actual cost of repair or replacement, and depreciation.[5] Suppose, for example, that a damaged roof requires replacement, at a total cost of $10,000, consisting of $4,000 for materials and $6,000 for labor. The adjuster estimated that the roof was 10 years old and had 40-year shingles, and thus applied 25% depreciation ($2,500). *See Labrier*, 572 F.3d at 574, 576 (this Court explained a similar depreciation calculation, and found the methodology to be "an eminently practical and reasonable method for making an initial *estimate* of actual cash value at the time of loss," which, in the event of litigation, would be "subject to review by a jury . . . to determine the amount of [the insured's] loss"). If the $2,500 in depreciation is divided between the materials and labor components, $1,000 of depreciation was applied to the materials

[5] Where the total size of an individual claim is small and the dispute cannot be resolved informally, it might be adjudicated in a small claims court or by appraisal, an alternative dispute mechanism (similar to arbitration) provided for in most property insurance policies.

component and $1,500 of depreciation was applied to the labor component. In fact, however, it turns out that, according to the previous owner of the home who had the roof installed and contrary to the adjuster's assumptions, the roof was actually 20-years-old and had 30-year shingles. Thus, the fact finder concludes at trial that the true and correct depreciation was 66.6% ($6,666.67). Separated into the materials component and labor component, this is $2,666.67 of depreciation for the materials component and $4,000 of depreciation for the labor component. The fact finder thus concludes that the correct total depreciation would be $2,666.67, and the actual depreciation applied by the insurer was $2,500.

In this example, although the insurer's original application of depreciation to the labor component was inconsistent with a subsequent Arkansas Supreme Court ruling prohibiting such depreciation, there is no breach of contract. And where there is no breach of contract, the class member lacks Article III standing. As Chief Justice Roberts has explained, "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods*, 136 S. Ct. at 1053 (Roberts, C.J., concurring); *see also Halvorson*, 718 F.3d at 778 ("In order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision."); *Indigo LR, LLC v. Advanced Ins. Brokerage of Am. Inc.*, 717 F.3d 630, 634 (8th Cir. 2013) (plaintiff that was fully paid lacked standing).

The foregoing example is just one of a multitude of scenarios in which a fact finder would need to look beyond the narrow issue of "labor depreciation"—which the Panel Opinion incorrectly characterized as segregable—to ascertain what amount, if any, is owed under the policy. In this case, for example, State Farm asserts that plaintiff James Stuart admitted he was paid more than a local contractor charged for the repairs and, due to an error, was paid twice for the same invoice. (State Farm Pet. for Rehearing at 7; State Farm Br., at 8; ECF Doc. 87, at 17-18.) State Farm also asserts that Stuart conceded that State Farm could have fairly applied more depreciation on his claim than it did. (State Farm Pet. for Rehearing at 7; State Farm Br. at 9 n.6.) With respect to plaintiff Carla Hood's claim, State Farm asserts that carpet replacement did not require replacement of baseboards and repainting of walls. (State Farm Pet. for Rehearing, at 7.)

It is rare that disputes on property insurance claims involve only one minor component that is "easily segregated," as the Panel Opinion assumed. In most instances, when disputes arise, there is more than one area of disagreement between the insured and insurer that needs to be negotiated or resolved by adjustment, appraisal or litigation. Insurance claim professionals address these types of issues on a daily basis.

At an individual trial, the plaintiff would need to establish "the amount it would cost to repair or replace damaged property, less depreciation," not merely

that one component of the depreciation was too high. Contrary to the Panel Opinion, this was not a question of damages but one of liability. The trial court could not bar State Farm from presenting expert testimony or other evidence demonstrating that its prior payment was sufficient and nothing more was owed under the policy.

The Panel Opinion also conflicts with Supreme Court precedent because a court cannot "giv[e] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, 136 S. Ct. at 1048; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 366 (2011) ("a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims"). To try a case in a manner that would preclude a defendant from presenting such evidence would contravene not only class action law but the Due Process Clause and the Seventh Amendment. *See, e.g.*, *Cimino v. Raymark Indus.*, 151 F.3d 297, 319-21 (5th Cir. 1998) (defendant had the right to individual jury trials on causation issues).

B. The Panel Opinion Conflicts With Other Precedent of This Court

This Court should also grant *en banc* review because the Panel Opinion conflicts with other precedent of this Court, including *Halvorson*, *Labrier*, and *Indigo*.

In *Halvorson*, this Court reversed a class certification order because deciding breach of contract and bad faith claims against the defendant insurer would require determining "whether the claim payment was reasonable," and a "class action will not be a superior method of adjudicating this case because the reasonableness of any claim payment may have to be individually analyzed." *Halvorson*, 718 F.3d at 780. The Court further explained that "[a]nswering the question of whether [the insurer's] claim processing methodology breached its contract under North Dakota law necessitates individual fact inquiries for each member of the class." *Id.*

Similarly here, in determining "actual cash value," the insurance adjuster must:

1) identify which items of property were damaged as a result of the loss event;
2) determine whether the damage is covered under the terms of the policy, based on the cause of damage and whether the items damaged are covered by the policy;
3) determine which items can be repaired and which of them require replacement;
4) estimate the cost of repair and/or replacement;
5) decide which of the damaged building components warrant depreciation; and
6) determine how much depreciation is appropriate based on, among other relevant factors, the age and condition of the item.

Each of these decisions requires individualized factual assessments that can be subject to debate when policyholders dispute the sufficiency of their payment.

After a windstorm, for example, there might be some shingles missing on the roof, a gutter that is dislodged, and an old fence that is down. The adjuster must first determine if each of these conditions was caused by the windstorm or was preexisting. The gutter or fence, for example, may have been blown down by the windstorm, or may have been in that condition for years due to neglect (a cause of loss excluded by most policies). For each of the items that the adjuster concludes was damaged as a result of the windstorm, the adjuster then determines whether the item can be repaired—whether the gutter, for example, can be simply reattached—or must be replaced. Computer software is often used to estimate the repair or replacement cost using estimated prices in the area. That is, however, only an estimate, and may be higher or lower than the actual prices that different local contractors charge to perform the work.

One of the components of an actual cash value estimate is depreciation. As this Court explained in *Labrier*, depreciation is a "decline in an asset's value because of use, wear, obsolescence, or age." *Labrier*, 872 F.3d at 574 (quoting BLACK'S LAW DICTIONARY (9th ed. 2004)). In order to determine the amount of depreciation, the adjuster must evaluate the degree of pre-loss wear and tear and the condition of the item, and estimate or find out the age of the item. Straight-line

depreciation, for example, is calculated based on the remaining useful life of the item. *See id.* (this Court explained an example of how straight-line depreciation is applied). An item in excellent condition for its age might be assessed lighter depreciation, and an item with severe wear and tear for its age might be assessed heavier depreciation. All of this is intended to ensure that the actual cash value payment is consistent with the principle of indemnity, under which "[t]he insured who suffers a covered loss is entitled to receive full, but not more than full, value for the loss suffered, to be made whole but not be put in a better position than before the loss." *Id. at* 573; *see also Adams*, 430 S.W.3d at 678 (explaining that "[i]ndemnity is the basis and foundation of all insurance law," and that insurance is intended "to reimburse the insured for the loss sustained, no more, no less") (quoting *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017, 1022-23 (Okla. 2002) (Boudreau, J., dissenting)).

None of this is an exact science, and it is an ongoing process on many claims. As this Court recently explained, when depreciation is being determined, there can be "conflicting opinion as to the reasonableness of the resulting estimate." *Labrier*, 872 F.3d at 574. After the insured reviews the estimate, he or she may provide additional information, which results in modification of the estimate. The insured may obtain a contractor's estimate and provide that to the

insurer, and then the insurer may discuss the estimate with a contractor and, if appropriate, make further revisions.

Under most policies, amounts withheld for depreciation are paid when the repairs are completed, or in some cases when a contract is signed for the repairs. In some cases, the insured will decide to do some, but not all, of the repairs. The adjuster will then attempt to match up the work actually performed with the work described on the estimate and determine what portion of the amount withheld for depreciation should be paid. Individual fact determinations of "reasonableness" are made at every step in this process. When these claims result in litigation, the fact finder must make numerous individualized determinations. The Panel Opinion thus should have followed *Halvorson*, which held that a class could not properly be certified in a case involving such "reasonableness" determinations on individual claims. *See Halvorson*, 718 F.3d at 780; *Kartman v. State Farm Mut. Auto. Ins. Co.*, 534 F.3d 883, 888 (7th Cir. 2011) (class certification properly denied under Rule 23(b)(3) because "each plaintiffs claim of underpayment required individualized determination on the merits").

The Panel Opinion also conflicts with *Labrier*, which reversed a class certification order in a case involving the same "labor depreciation" issue at issue here (under Missouri law). In *Labrier*, this Court explained that "actual cash value" "is a value that must be estimated," and "[c]onflicting estimates must be

determined by a jury, unless the parties agree as to the amount of the damage or have it determined by an appraisal method agreed to in the policy." *Labrier*, 872 F.3d at 574. "[A] jury could reject [the insurer's] estimate based on other valuation evidence it found more probative." *Id.* Ultimately, this Court held, in reversing the class certification order, the amount owed under the policy "may only be determined based on *all the facts* surrounding particular insured's partial loss," and thus common issues did not predominate. *Id.* at 577 (citing *Halvorson*) (emphasis added).

The Panel Opinion distinguished *Labrier* on the grounds that State Farm's policy in this case defines "actual cash value" as "the amount it would cost to repair or replace damaged property, less depreciation." Panel Opinion, at 6-7. But that distinction does not mean that the adjuster—and ultimately a jury—does not have to make the numerous claim-by-claim factual determinations described above. Regardless of whether the question is what constitutes "fair market value" (as in *Labrier*) or replacement cost less depreciation (as here), numerous individualized decisions must be made as to the nature and extent of damage, the items requiring replacement or repair, and their age and condition. Contrary to the Panel Opinion, estimating "actual cash value" when defined by the policy is not a "prescribed formula," but a totality-of-the-circumstances undertaking, taking into account "all the facts surrounding particular insured's partial loss." *Labrier*, 872

F.3d at 577. The Panel Opinion appears to misunderstand the insurance claim adjustment process. It cites no legal basis—and there is none—on which "labor depreciation" could properly be segregated from every other component of a property insurance estimate when a jury is determining "actual cash value" under the State Farm policy.

The Panel Opinion also conflicts with other precedent of this Court when it concludes that a plaintiff or class member who received the full amount due under the policy would have standing to sue. Panel Opinion, at 8. This conclusion is directly in conflict with *Halvorson*, 718 F.3d at 779, in which class members whose health care providers accepted amounts paid by the insurer as payment in full were found to lack standing, and *Indigo*, in which a plaintiff who was fully paid was held to lack standing. *Indigo*, 717 F.3d at 634.

If left uncorrected, the sharply conflicting results between the Panel Opinion, *Labrier*, *Halvorson* and *Indigo* will leave district court judges and three-judge panels in this Circuit confused when faced with future motions for class certification, not only in other "labor depreciation" class actions but in many other consumer class actions that involve issues similar to those presented here. This Court should grant *en banc* review to resolve this conflict and avert intractable confusion in this Circuit's class certification law.

C. The Panel Opinion Creates a Circuit Split

The Panel Opinion also creates a circuit split on whether a legal issue that has been resolved can be a predominating common question under Rule 23(b)(3). The Panel Opinion holds that Plaintiffs' theory "that State Farm violated its contractual obligations by depreciating both materials and labor when calculating ACV" was "a common question well suited to classwide resolution." Panel Opinion, at 5. But, as the Panel Opinion also recognizes, this issue was *decided* by the Arkansas Supreme Court as a matter of controlling law before this lawsuit was filed. *Id.* at 3 (citing *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675, 679 (Ark. 2013)).[6] The Sixth Circuit, in contrast, has expressly concluded that a legal issue that has already been decided by the district court—let alone resolved, as here, by the state supreme court—*cannot* be a proper common question. This is because the class certification decision must focus on what issues are to be tried, and whether they can fairly and efficiently be tried classwide. A legal issue that has been resolved is irrelevant to whether a class should be certified. *See Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011); *Sprague v. General Motors Corp.*, 133 F.3d 388, 397-98 (6th Cir. 1998).

[6] Although *Adams* was controlling Arkansas law for the time period applicable to this lawsuit, it was superseded prospectively by statute in Ark. Code Ann. § 23-88-106 (2017).

Rather than allow the Panel Opinion to create an express and direct circuit split on this question, the Court should grant *en banc* review.

CONCLUSION

Amici respectfully urge the Court to grant State Farm's petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 4,370 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 2010 in 14 point characters with Times New Roman font.

Dated: December 27, 2018

/s/ Wystan M. Ackerman
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on December 27, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: December 27, 2018 /s/ *Wystan M. Ackerman*
Attorney for *Amici Curiae*