No. 09-20091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A.A., by and through his parents and legal guardians, MICHELLE BETENBAUGH and KENNY AROCHA; MICHELLE BETENBAUGH, individually; and KENNY AROCHA, individually,
Plaintiffs-Appellees,

v.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-08-2934

BRIEF OF *AMICUS CURIAE* THE LIPAN APACHE TRIBE OF TEXAS IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT

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The Lipan Apache Tribe of Texas, as *Amicus Curiae*, respectfully submits this brief, with the consent of all parties, in support of Appellees A.A., Michelle Betenbaugh, and Kenny Arocha.

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INTEREST OF AMICUS CURIAE

The Lipan Apache Tribe of Texas ("Lipan Apache" or "Tribe"), a state-recognized Indian Tribe,[1] is comprised of approximately 900 members. The Tribe is motivated to participate in this litigation because (i) A.A. is a member of the Tribe; (ii) the Tribe can uniquely speak to tribal religious and cultural beliefs and asserts that those beliefs are entitled to protection under both the Texas Religious Freedom Restoration Act ("TRFRA") and the U.S. Constitution; and (iii) this Court's decision will impact all Lipan Apache children and other tribal children with similar cultural and religious beliefs that attend public schools within the Court's jurisdiction. *Amicus* is concerned that prohibiting A.A. from participating in his Tribe's cultural expression and religious beliefs through wearing his hair long or in braids and reversing the District Court's decision will unduly burden A.A.'s sincere religious beliefs and A.A.'s expression of his Indian identity, and could lead to more restrictive policies for other Lipan Apache school children.

INTRODUCTION

The Lipan Apache Tribe is one of seven distinct Apache Nations identified by ethnographers. Each of the seven Apache Nations has its own cultural values and histories. In January 1838, the Lipan Apache and the Republic of Texas executed the Treaty of Live Oak and, over the years, the Lipan Apache entered into

[1] Though the Lipan Apache is a state-recognized tribe, the Lipan Apache is also incorporated as a 501 (c)(3) non-profit corporation.

an additional four treaties with either the Republic of Texas or the United States. *See* Tx. Atty. General Opinion GA-0339 (July 18, 2005). In addition, the Texas Senate and House of Representatives passed resolutions formally acknowledging the Tribe and noting that the Tribe has resided in Texas for about 300 years. H.R. No. 812, March 18, 2009; S.R. 438, March 18, 2009.

Despite having lived in Texas and northern Mexico for hundreds of years, the Lipan Apache were almost destroyed by war until only a handful remained on the Mescalero Reservation. KENMOTSU, NANCY A. AND MARIAH F. WADE, AMISTAD NATIONAL RECREATION AREA, AMERICAN INDIAN TRIBAL AFFILIATION STUDY PHASE I: ETHNOHISTORIC LITERATURE REVIEW 81 (The Texas Department of Transportation Environmental Affairs Division and The National Park Service 2002).[2] Scholars have now documented that a significant number of the Lipan Apache decided to blend with the Mexican culture around them in order to escape being placed on reservations. The Lipans were so successful that "by 1853, their association with Mexico was sufficiently pronounced that [contemporaries] concluded that the Lipan were not native to the new state of Texas, but were intruders from Mexico." *Id.* The Lipan Apache lived a dual existence: to the

[2] This study is available online at http://www.nps.gov/history/history/online_books/amis/aspr-34/chap3.htm.

outside world they were Mexican, but within their homes, their Indian culture and tradition thrived.

Due to hostility and discrimination, some were forced to hide their practice of Lipan Apache religion and culture. In the Twenty-First Century, the Lipan Apache is the incarnation of an Apachean renaissance and decolonization. The 900 enrolled members of the Lipan Apache are genealogically proven to be the descendants of the historic American Indian Nation known as the Lipan Apache. A.A. and his father became members of the Lipan Apache Tribe after demonstrating through genealogical records that they are direct descendants of the historically recognized Lipan Apache ancestors.

Tribal families are reviving traditional practices by wearing braids, dancing traditional dances and singing traditional songs, telling stories, and speaking the native language without the fear of being hunted and destroyed. Fathers, such as Mr. Arocha, raise their sons, like A.A., to follow the traditional religious beliefs of their Lipan Apache ancestors with confidence that the children will not be harmed for expressing their Apache identity and religion. The Needville Independent School District ("NISD"), is trying to prevent these freedoms, but the United States Constitution and the TRFRA protect the rights of all Texans, including the Lipan Apache, to practice their religions and express their cultural identity in lawful manners.

ARGUMENT

I. The District Court correctly held that NISD's grooming code and exemption violated A.A.'s freedom of religious exercise.

The District Court applied the existing law to the facts in a way that was neither novel nor a departure from well-established precedent developed by this Court and the Supreme Court. The decision concurs with similar decisions by many other courts around the country when addressing Native American hair, religion and free speech. Accordingly, the District Court decision should be affirmed.

A. The Lipan Apache and A.A. have sincerely held religious beliefs.

A.A. correctly states that his hair identifies him as an Indian.[3] ROA 2149: 5-7.[4] The Lipan Apache believe that uncut, braided hair on a male not only expresses cultural identity but has religious significance. A Lipan Apache man's hair is also uncut to represent his soul and his spiritual connection to the Earth. While the hair can be free-flowing, Lipan Apaches believe that there is a specific practice to traditional hair braiding and each part of the braid is infused with religious significance. Bernard F. Barcena, Jr., Lipan Apache Tribe of Texas Tribal Chairman, "The Significance of Hair & Hair-Braiding in Lipan Apache Religious Belief," May 27, 2009.

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[3] Throughout this brief, the terms "Indian," "Native American," and "American Indian" are used interchangeably.

[4] "ROA" refers to "Record on Appeal."

Traditional Lipan Apache hair practices are gender-based. For example, women are at times required to cut their hair to give to the men for hair extensions, but men never cut their hair. A male's hair must remain uncut unless he is mourning a family member's death, at which time the hair is cut.

A.A.'s uncut, braided hair is not, as the Appellant attempts to characterize it, a mere "hair style" or a personal choice that lacks a substantive message. Appellant Br. at 20 (intentionally mischaracterizing the case as an issue involving "freedom to choose a hair style"). This Circuit recognizes that long hair on Native Americans, like A.A., conveys a substantive message of identity in addition to its religious significance. *Diaz v. Collins*, 114 F.3d 69, 72-73 (5th Cir. 1997); *see also Alabama and Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1992).

In addition, displaying long braided hair in a variety of ways is a distinguishing characteristic of traditional Lipan Apache men that historians and ethnographers have recognized for nearly two centuries. For example, in a circa 1828 depiction of a Lipan Apache couple, the man is depicted with a braid almost to his feet. BERLANDIER, JEAN LOUIS, THE INDIANS OF TEXAS IN 1830, Plate 1 (John C. Ewers ed., Smithsonian Institution Press 1969)[5] In 1866, an individual who resided with the Lipan Apaches for eleven months made the following observation:

[5] To view a copy of the depiction of Lipans from the 1828 expedition on the internet, *see* U.S.

> The Lipan warrior wore his hair cut off on the left side even with the top of his ear; the right side was long, almost reaching the ground when turned loose. They kept it folded up and tied with red strings. When done up in this manner it came to the shoulders. They often put little trinkets in their hair.

DENNIS, T.S. AND MRS. T.S. DENNIS., THE LIFE OF F.M. BUCKELEW, THE INDIAN CAPTIVE, AS RELATED BY HIMSELF, 90-91 (Herring Publishing House 1925).

Many years later, the Lipan Apaches continued to maintain these practices. "Their hair is worn either loose or fastened at the nape, sometimes braided and decorated with buckles or placques of silver, but they never cut it. . . . To the hair which nature gave them they add that of others, sometimes their wives', sometimes even horsehair, in order to make a braid that reaches to their knees." BERLANDIER at 128-129. The modern Lipan Apache beliefs evolved from these centuries-old practices.

The District Court correctly held that A.A.'s religious belief that his hair be worn long is sincere. ROA 995. The hair is an expression of both his religious beliefs and his identity as a Native American.

National Park Service, "American Indian Tribal Affiliation Study, Chapter 3: Ethnohistory, 1750-1880, " Figure 14, *available at* http://www.nps.gov/history/history/online_books/amis/aspr-34/chap3.htm.

B. A religious belief qualifies for First Amendment or TRFRA protection even if it is not consistently interpreted.

The Supreme Court does not require consistent interpretation or practice for a religious belief to be protected by the First Amendment. "The guarantee of free exercise is not limited to beliefs which are shared by all members of the religious sect." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981). Not only does the practice not have to be exactly consistently applied by all of the religious practitioners in order to be protected as free exercise of religion, but "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714. The courts recognize and protect individual religious practices and do not require uniformity among practitioners.

Furthermore, practices can be inconsistent among practitioners over time and still be protected religious beliefs. *Id.* The expression of religious hair beliefs has evolved over time within the Tribe; Lipan Apache men continue to avoid cutting the hair and ascribe spiritual significance to the uncut hair, but it is no longer tied up with red strings nor routinely adorned with trinkets. *See* Dennis, 90-91. The hair is braided in one or more braids, or it is worn free flowing, and A.A.'s hair, whether braided or free-flowing, conforms to the current Lipan Apache practice. Lipan Apaches do not now and never have worn their hair in buns for

religious purposes as the Appellant asserts. Appellant Br. at 9. Some tribes may have that practice, but the Lipan Apaches do not.

C. A religious belief is protected even without membership in a religious organization or sect.

Although Mr. Arocha and A.A. are members of the Lipan Apache Tribe, membership in an organization or religious sect is not required in order for a religious practice to be protected by the Constitution. Lack of church membership, for example, was deemed "irrelevant" by the Supreme Court in protecting a litigant's right to refuse to work on Sunday in violation of his religious beliefs. *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989). Membership alone does not create sincerity and lack of membership does not cast doubt on sincere religious beliefs.

D. A religious belief is protected without evaluating the time period during which the belief has been practiced.

The District Court properly found that A.A. has a sincere religious belief in wearing his hair uncut and braided. The record supports the District Court's decision to enjoin NISD from infringing on this belief. Dr. Riding In testified that, for some tribes, long braided hair constitutes both a religious practice and a component of cultural expression. PI Hr'g Tr., 49: 3-13 Oct. 17, 2008. The Lipan Apache is one of those tribes.

Contrary to Appellant's allegations, Mr. Arocha and A.A. have adhered to these traditional practices for a number of years and the beliefs are not newly formed. Appellant Br. at 6. Even if a religious belief is new, however, that belief is still protected. The Supreme Court rejected the argument that the length of time since a belief had been formed should factor into any determination of whether the practice of that belief is burdened. The Court stated, "[t]he timing of [plaintiff's] conversion is immaterial to our determination that her free exercise rights have been burdened." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987). Thus, the right to practice and express a sincere belief, and whether such exercise is improperly burdened, is not limited by the timing of the practitioner's conversion.

II. NISD's acts pressure A.A. to hide his religious beliefs and deny his Native American heritage and identity.

If this Court overturns the District Court's decision, the punitive exemption proposed by NISD would require A.A. to hide his growing hair under a shirt for twelve years while he attends public school. Imposing this exemption will dissuade A.A. from following his father's footsteps and adhering to his tribal religious beliefs.

A substantial burden on the free exercise of religion exists if the government action at issue "truly pressures the adherent to significantly modify his religious

behavior and significantly violates his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). The effect is significant when it "forces an adherent to choose between, on one hand, enjoying some generally available, non-trivial benefit and, on the other hand, following his religious beliefs." *Id.*

Public education is a generally available, non-trivial benefit. The District Court correctly held that NISD's exemption requiring A.A. to hide his hair interfered with A.A.'s religious beliefs to the extent that A.A. will, over the course of his educational career in the school district, be forced to choose between his education and his religion. If A.A. is required to hide his hair in his clothing, he will be prohibited from expressing both his religious beliefs and his cultural identity as a Lipan Apache. The Lipan Apache language even has a specific word for a man's braided hair, calling the man's plait *ketsài'rái*, which is differentiated from a woman's braid. The long hair conveys a particularized message – that the wearer is Native American – in addition to expressing religious faith.

Wearing long hair by practitioners of Native American religions is well-recognized as a protected expression. The District Court's decision in this case is in line with decisions from across the country, and conforms to this Court's prior decisions. In *Diaz v. Collins*, this Court held that the Native American custom of wearing long hair was both cultural and religious and is protected under the First Amendment. *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997). *See also*

Warsoldier v. Woodford, 418 F.3d 989, 992 (9th Cir. 2005) (recognizing the Cahuilla Tribe's tenet that hair can only be cut upon a relative's death); *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975) (acknowledging the wearing of long braided hair to be a tenet of plaintiff's religion); *Gallahan v. Hollyfield*, 516 F.Supp. 1004, 1006 (E.D. Va. 1981), *aff'd* 670 F.2d 1345 (4th Cir. 1982) (recognizing that the Cherokee plaintiff had a religious belief that his hair was a sense organ that should not be cut).

Under the dress code "exemption" devised by NISD, A.A. will be forced to modify his hair in order to appease the school's desire that A.A. look more like the other children in the school. This so-called exemption would result in A.A. enduring twelve years of degrading, uncomfortable and impractical education at schools in the NISD. While his hair becomes longer as he matures, hiding the hair in his clothing will become impossible. It is not clear, however, what NISD expects to teach a child through this exercise, except perhaps that the child is not welcome in the school district. Not only will A.A. be prohibited from expressing his religious beliefs and cultural identity, he will be discouraged from the beliefs and faith that his parents and community strive to impart to him.

A.A.'s long hair is not indicative of a rebellious failure to adhere to rules. It is exactly the opposite. It represents devout adherence to and interpretation of the traditional religious practices of his people, the Lipan Apache. The school's policy

of a bun or hiding the hair is, as stated by the Superintendant, an attempt to force A.A. to resemble the other children to the maximum extent possible. ROA 1986:5-12; 2289:2-5. The school does not have a legitimate interest in that kind of conformity at the expense of A.A.'s religious faith. *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972) (The First Amendment protects sincere religious expression from "hydraulic insistence on conformity to majoritarian standards."). A.A. should be allowed to continue to adhere to the religious rules of his forbears, and should not be punished or otherwise discouraged from his right to do so.

NISD asserts that, so long as A.A. is not required to cut his hair, but only hide it, his rights are not violated. *See, e.g.*, Appellant Br. 12-13. However, that is tantamount to saying that one could wear a yamuka or a rosary or a cross so long as it is disguised as or hidden beneath something else. Texas courts have already held that "hiding" requirements such as those proposed by NISD constitute an undue burden on the free exercise of religion. In *Chalifoux v. New Caney Independent School District*, the Court found that a school placed an undue burden, even for the sake of a dress code designed to prevent gang activity, on the student's religious expression when the school required the student to hide his rosary. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659, 671 (S.D. Texas 1997). Similarly, NISD's requirement that A.A. hide his hair down his shirt as it grows for the next twelve years only to make him look more like the other children

in his school imposes an undue burden on A.A.'s religious expression. The bun option neither comports with any Lipan Apache practice, religious or secular, nor allows A.A. to express his American Indian identity in any manner that is generally recognized.

III. Because NISD's policy and exemption violate both A.A.'s right to free exercise of religion and his right to free speech, a heightened standard of scrutiny applies.

When multiple constitutional rights are in danger, courts take a closer look at the burden imposed on the individual. As explained in detail in the Appellee's Brief, TRFRA is a sufficient, non-constitutional basis upon which to affirm the District Court. Appellee Br. 30-32. This Court could also affirm the District Court because A.A.'s long hair represents both the particularized and recognizable message that A.A. is Indian and expresses his religious beliefs, and NISD failed to prove that its hair policy and exemption created for A.A. was more than reasonably related to a substantial state interest.

The endangerment of multiple rights is evaluated under a "hybrid claim" doctrine. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 881 (1990). The *Smith* Court excluded free exercise claims "hybridized" with other constitutional wrongs from its lowered standard of scrutiny. *Id.* at 881 ("[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action

have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.") As the District Court noted, this Circuit also "specifically exempts religion-plus-speech cases" from the ambit of *Smith*'s lower level of scrutiny, even when a law is neutral and generally applicable. *A.A. v. Needville Indep. Sch. Dist.*, No. H-08-2934, at 25 (S.D. Tex. 2009) (citing *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1217 (5th Cir. 1991)). Because this claim involves both free religious exercise and free speech, NISD must prove *more* than a reasonable relation to a substantial state interest. *Alabama and Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1332 (E.D. Tex. 1992) (citing *Smith*, 494 U.S. at 881-82).

A. A Lipan Apache man's long braided hair expresses both his identity as a Native American and his religious beliefs.

Lipan religion and culture are intertwined and inseparable. Like many Indian religions, describing the religion, without describing the tribe's culture and worldview, would be a fruitless undertaking. An Indian identifies himself with his tribe, and that tribe adheres to certain spiritual beliefs that permeate the tribe's culture and outlook. Anastasia Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. LAW REV. 1291, 1294-95 (1996).[6] Moreover, even tribal governments are not purely

[6] "[I]t is difficult to describe one Native American religion, because Native Americans identity themselves by tribe, and many beliefs differ by tribe. Native American religions reflect traditions

secular because the "unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment." *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5th Cir. 1991).

Because this separation of tribe, government, culture and religion is impossible in the Native American context, an Indian's expression about one, to some degree, is a concomitant expression about all of them. *See* PI Hr'g Tr., 44:13-24, Oct. 17, 2008 (Dr. James Riding In testifying that healing, dancing, values and beliefs are all part of Indian spirituality). The Arochas' display of long braided hair expresses both Indian identity and spiritual beliefs. The Arochas' choice to display their long braids and Indian identity embodies "the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. As an example, A.A.'s refusal to cover his long braids with a wig at Halloween was a simultaneous expression of his identity and exercise of his religion. *Needville*, No. H-08-2934, at 4.

These expressions of Indian culture and religion do not stoop to the level of a bald assertion of personal taste, and can be distinguished from *Karr v. Schmidt*,

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that have existed in the Americas for over 30,000 years and a rich plurality of religions have evolved . . . Native Americans typically view religion more in terms of culture than in terms of what most Americans would consider religion. Notably, no traditional Native American language has one word that could translate to 'religion.' For Native Americans, the spiritual life is not separate from the secular life." *Id.*

460 F.2d 609, 614 (5th Cir. 1972). In *Karr*, the plaintiff "brought this suit not because his hair conveys a message but 'because I like my hair long.'" The Eastern District of Texas explicitly distinguished *Karr*'s holding from Indian cases, finding that "*Karr* did not state any facts to support a claim that the wearing of long hair is a form of expressive activity. In contrast, the testimony [of the Indians] was compelling evidence that long hair in Native American culture and tradition is rife with symbolic meaning." *Alabama and Coushatta*, 817 F. Supp. at 333-34. Therefore, NISD's reliance on *Karr* for the proposition that hair can never be a protected expression of free speech is misplaced.

B. NISD's grooming code and exemption present a substantial and undue burden on A.A.'s religious and speech expression.

The long hair of Indian men is iconic. *See Needville*, No. H-08-2934, at 29. The long hair of the Lipan, however, reaches much further into the human soul than mere icon. Because a Lipan Apache male's display of long braids is an expression of culture and religion intertwined, that symbolic display constitutes a "hybrid claim," under the *Smith* analysis. The NISD policy and exemption therefore must meet a higher level of scrutiny. *Herman*, 939 F.2d at 1217 (5th Cir. 1991) (recognizing *Smith*'s heightened level of scrutiny for hybrid claims). The appropriate standard must be something greater than *Smith*'s rational basis. The Eastern District of Texas' use of "*more* than a reasonable relation to a substantial

state interest" is therefore appropriate. *Alabama and Coushatta*, 817 F. Supp. at 332.

Being charitable to the NISD's intentions, the District Court noted that, even if the intent of the exemption requiring hiding the hair is for purposes of order or hygiene, the exemption does not achieve that goal. The District Court found that, because NISD's female students wear their hair long and exposed, it is unreasonable to think that "order and hygiene" is somehow different on a male head to the extent that a boy must wear his hair short or hidden. *See Needville*, No. H-08-2934, at 22-23. Furthermore, the fact that females in the District sport long, braided, freely-exposed hair disintegrates any contention that the NISD policy has a reasonable relation to hygiene. *Id.* Rather, short hair on men is merely an American cultural choice. *See, e.g., Brownlee v. Bradley County Bd. of Ed.*, 311 F.Supp. 1360, 1367 (E.D. Tenn. 1970) ("long hair on males is contrary to long established practice in the United States . . . in the present state of taste, style, and culture. . .). Clean hair is hygienic, and whether that hair is short or long has no effect on whether it is clean.

One need not look further than the portraits on American coins to see that long hair on American males has been out of style for the past two hundred years. For an Indian, however, as numerous courts have recognized, wearing long hair is much more than a mere hair style. As a result, the NISD must be prohibited from

infringing on A.A.'s constitutional right to display his Native American identity and exercise his religious beliefs merely because of the NISD's culturally preferred haircut or stated desire to make its students look like one another. *See generally, Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659 (S.D. Tex. 1997) (holding that free exercise and freedom of expression rights protected students' religious display of Christian icons at school even though school's purpose was to prevent gang activity). NISD's desire to impose a uniform hair style on its male students it not a sufficient state interest to violate A.A.'s rights to free speech and freedom of religion.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* the Lipan Apache Tribe of Texas urges affirmance of the decision of the District Court so that A.A., and other similarly situated school children, can be raised to follow the traditional religious beliefs of their parents and Lipan tribal school children can be allowed to express their Native American identity through wearing long, braided hair.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2009, eight copies of the foregoing and one electronic copy on CD were mailed via FedEx to the Clerk of the Court. In addition, all counsel of record listed below were served with a copy via United States mail in paper form accompanied by an electronic copy on CD.

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STATEMENT OF CONFORMITY

Pursuant to Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.3, the undersigned certifies:

1. This Brief complies with the type-volume limitations of Fed. R. App. P 32(a)(7)(B) because:

This Brief contains 4,094 words in 346 lines, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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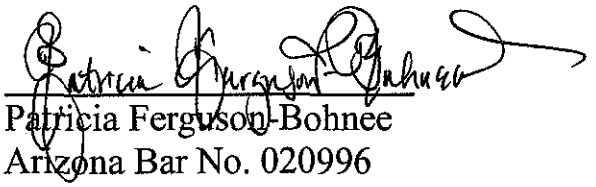

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