CA Nos. 12-35946

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SETH BAKER, JESSE BERNSTEIN, MATTHEW DANZIG, JAMES JARRETT, NATHAN MARLOW, and MARK RISK, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington, No. 2:11-cv-00722-RSM
(Honorable Ricardo S. Martinez)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) states that it is a non-profit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, nor has it issued any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING *EN BANC*

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a public interest law firm and policy center headquartered in Washington, D.C., with supporters in all 50 States, including many in the State of Washington.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this and other federal courts in cases that examine limitations on the power of federal courts to exercise subject matter and/or personal jurisdiction over parties and proceedings. *See, e.g.*, *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2946 (2011); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

WLF strongly supports enforcing the federal appellate jurisdiction statutes Congress enacted to prevent multiple, piecemeal appeals from a single district court proceeding. By strictly limiting the occasions on which a party may appeal an adverse ruling, those rules "prevent[ ] the debilitating effect on judicial

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[1] Pursuant to Fed. R. App. P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. The brief is being filed with the consent of all parties.

administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 170 (1974). The Supreme Court decided in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978), that allowing a plaintiff to appeal a class certification denial immediately as of right, instead of from a final judgment after trial, violates the policy against multiple, piecemeal appeals Congress adopted when it enacted 28 U.S.C. § 1291. Federal appellate courts are not free to reconsider that policy or decide that allowing a plaintiff an immediate class certification appeal as of right would further it.

WLF is concerned that the panel decision, even if not foreclosed by *Livesay*, would seriously undermine judicial administration by, in essence, providing plaintiffs an absolute right to immediate review of district court orders denying a motion to certify a plaintiff class under Fed. R. Civ. P. 23. Indeed, the decision could well result in numerous appeals from a single action. Affording appeals-as-of-right to unsuccessful class-certification movants is contrary to § 1291, contrary to prior decisions of this Court, inconsistent with Rule 23(f) (which makes clear that immediate appeals from class certification orders should proceed at the sole discretion of the appeals courts), and unfair to defendants.

STATEMENT OF THE CASE

This rehearing petition involves an issue of exceptional importance regarding the subject-matter jurisdiction of the federal appeals courts. Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States," subject to limited exceptions. 28 U.S.C. § 1291. At issue is whether § 1291 provides this Court jurisdiction to review the district court's March 27, 2012 order granting the motion of Defendant-Appellee Microsoft Corp. to strike Plaintiffs-Appellants' class allegations.

Appellants are five individuals who filed suit against Microsoft in 2011, alleging that Xbox consoles they purchased from Microsoft were defectively designed. On October 16, 2012, the district court granted Appellants' motion to dismiss their lawsuit with prejudice. On November 15, 2012, Appellants filed a notice of appeal from the October 16 judgment. Appellants did not, of course, object to the dismissal, which they had requested. Rather, they sought review of the March 27, 2012 order striking class allegations, an order which they claim was merged into the October 16 judgment and therefore reviewable on an appeal from that judgment.

Microsoft has consistently maintained—in the district court, in a December 2012 motion to dismiss the appeal, and in its principal appellate brief—that the

Court lacked jurisdiction to hear the appeal because the order striking class allegations was not a "final decision" of the district court within the meaning of 28 U.S.C. § 1291. It relied on a decision of this Court holding that a plaintiff who procures dismissal of his lawsuit following denial of his class-certification motion does not thereby transform the order denying his motion into a final decision appealable under § 1291, *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979), and it pointed out that this Court reads *Huey* to mean that a "plaintiff must be willing to proceed to trial, albeit reluctantly, on his individual claim in order to obtain eventual review" of a class-certification denial. *Marks v. San Francisco Real Estate Bd.*, 627 F.2d 947, 949 (9th Cir. 1980). The panel rejected Microsoft's jurisdictional argument without discussing either *Huey* or *Marks*. It upheld jurisdiction solely on the basis of *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), a decision handed down after this case was fully briefed.

The panel did not address Microsoft's contention that the March 27, 2012 order striking class allegations did not merge with the October 16 judgment and thus was not a "final decision" within the meaning of 28 U.S.C. § 1291. Rather, the panel determined that the only relevant issue under § 1291 was whether the fact that Appellants had requested dismissal of the lawsuit deprived their appeal of the requisite "adversity." The panel concluded that Appellants possessed sufficient

adversity to warrant exercise of appellate jurisdiction, noting that *Berger* had rejected just such an absence-of-adversity contention:

> [*Berger* held] that "in the absence of a settlement, a stipulation that leads to a dismissal with prejudice does not destroy the adversity in that judgment necessary to support an appeal. . . ." We distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. . . . As this case did not involve settlement, *Berger* establishes that "[w]e have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision."

Slip op. at 10-11 (quoting *Berger*, 741 F.3d at 1064, 1065).

Turning to the merits, the panel concluded that the district court abused its discretion when it struck the class-action allegations from the complaint. *Id.* at 17-18. The panel thus reversed the district court's March 27, 2012 order and remanded for further proceedings consistent with its opinion. The panel did not address how the district court should proceed in the absence of a putative class representative with a live claim—each of the five Appellants having voluntarily dismissed his individual claims with prejudice.

SUMMARY OF ARGUMENT

Rehearing *en banc* is urgently needed in order to resolve the intra-circuit conflict regarding the scope of the Court's jurisdiction. *Berger* and the panel in

this case both held that a plaintiff who has been denied class certification by the district court may obtain immediate appellate review of that denial by stipulating to dismissal of his complaint with prejudice and then filing an appeal from the final judgment. In direct conflict with those holdings, *Huey* had earlier held that the Court lacked jurisdiction to review the district court's denial of class certification even though the district court had dismissed the complaint with prejudice when the plaintiff announced he would not proceed to trial after class certification was denied. *Huey*, 608 F.2d at 1236 & n.1. Those decisions cannot be reconciled; only an *en banc* rehearing can resolve the conflict.

In the absence of an *en banc* decision, panels addressing this issue will be faced with conflicting Ninth Circuit decisions in *Huey* and *Berger*. The conflict is not merely hypothetical: the *Huey*-versus-*Berger* dichotomy is raised in at least two cases now pending before Ninth Circuit panels. Ninth Circuit precedent suggests that those panels should not choose between the conflicting precedents but should instead issue a call for *en banc* review. Rather than waiting for that call and thereby permitting the current confusion to continue, the Court should grant Microsoft's petition and resolve the conflict.

Rehearing *en banc* is also warranted because the panel's expansive reading of 28 U.S.C. § 1291 is inconsistent with the proper understanding of that statute.

As the Supreme Court has explained, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The panel decision undermines § 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of adverse class-certification orders. The decision is also inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. Finally, rehearing *en banc* is warranted because the panel decision is inconsistent with Supreme Court precedent and creates a direct conflict with the decisions of at least two other courts of appeals.

ARGUMENT

I. REHEARING *EN BANC* IS WARRANTED TO CLEAR UP THE CONFUSION CAUSED BY CONFLICTING PANEL DECISIONS REGARDING THE MEANING OF 28 U.S.C. § 1291

The panel held that an interlocutory order denying class certification becomes an immediately appealable, final order when the district court dismisses the action with prejudice, "even when such dismissal is the product of a stipulation." Slip op. at 11. That holding directly conflicts with the holding of a prior panel in *Huey*. *En banc* review is warranted to resolve the conflict. *See* Fed.

R. App. P. 35(a)(1) (*en banc* review warranted where "necessary to secure or maintain uniformity of the court's decisions.").

Huey cannot plausibly be distinguished. The relevant jurisdictional statute, 28 U.S.C. § 1291, has not been amended in the years since *Huey* was decided. Nor have any intervening Supreme Court decisions altered the understanding of that statute. Indeed, the Supreme Court issued its most directly relevant precedent, *Livesay*, the year before this Court decided *Huey*, and *Huey* relied directly on *Livesay* in concluding that the Court lacked jurisdiction under 28 U.S.C. § 1291 to review the class-certification order.

Huey was a putative class action alleging securities fraud violations. The trial judge denied the plaintiff's motion for class certification. The plaintiff then filed a petition to certify the issue for immediate appeal under 28 U.S.C. § 1292(b), asserting that the case could not proceed to trial in the absence of class certification because the cost of trial would exceed the amount of the plaintiff's individual claim. The trial court declined to grant the petition and instead called the case for trial. When the plaintiff failed to appear for trial and informed the court that he would not be going forward with the case on an individual basis, the trial court dismissed the case for want of prosecution. *Huey*, 608 F.2d at 1236. Plaintiff appealed from the dismissal, seeking review of the class-certification decision.

On appeal, the Court concluded that it lacked jurisdiction to review the district court's denial of class certification. *Id.* at 1238-40. The Court said that its jurisdictional ruling was governed by "the policy against piecemeal appeals recently expressed by the Supreme Court in [*Livesay*]." *Id.* at 1238. It concluded that "[t]he policy against piecemeal appeals applies to this case" even though it acknowledged that the district court had issued a final, appealable judgment when it dismissed the lawsuit with prejudice. *Id.* at 1239. It explained that although "ordinarily" "all interlocutory rulings merge in the final judgment and are reviewable on the appeal therefrom," the "circumstances [*i.e.*, Huey's procurement of dismissal of his own case so that he could appeal the class-certification ruling] warrant a limited exception to the merger rule." *Id.* at 1240. Accordingly, because the class-certification ruling did not merge with the final decision dismissing the case with prejudice, the class-certification ruling was not a "final decision" for purposes of § 1291, and thus the Court lacked jurisdiction to hear an appeal from that ruling. *Ibid.*

Under circumstances that cannot meaningfully be distinguished from *Huey*, both *Berger* and the panel in this case reached the opposite conclusion and

exercised jurisdiction over appeals from orders denying class certification.[2] In their opposition to the motion to dismiss the appeal, Appellants sought to distinguish *Huey* by noting that it involved a final order dismissing the case for want of prosecution under Rule 41(b), while this case involves "an appeal of a voluntary dismissal with prejudice pursuant to Rule 41(a)." Appellants Opp. to Mot. to Dismiss at 9. Their effort to distinguish *Huey* is unavailing. The "policy against piecemeal appeals"—cited by *Huey* as the basis for concluding that § 1291 did not grant the Court jurisdiction to hear an appeal from the class-certification order—is implicated regardless whether the plaintiff procures a dismissal with prejudice directly (by stipulating to dismissal under Rule 41(a)) or indirectly (by refusing to appear at trial and thereby inducing the trial court to dismiss with prejudice).

Indeed, if anything, "the policy against piecemeal appeals" applies with even greater force here than in *Huey*. The plaintiff in *Huey* made a half-hearted effort to assert that he had acted for a purpose other than to procure an immediate right to appeal the class-certification order. *Huey*, 608 F.2d at 1236-38. Appellants, on the other hand, adopt no pretense that they stipulated to dismissal with prejudice for

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[2] The defendant in *Berger* brought *Huey* to the attention of the Court only in a *see also* footnote in its reply brief on its motion to dismiss for lack of appellate jurisdiction. It did not mention *Huey* in its merits brief. In contrast, Microsoft cited *Huey* repeatedly in both its motion to dismiss the appeal and its merits brief. The panel nonetheless made no reference to *Huey* in its decision.

any reason other than to procure immediate appeal of the interlocutory order denying class certification. Accordingly, *Huey's* rationale for creating a "limited exception to the merger rule," *id.* at 1240, applies with even greater force here than it did in *Huey*.

Nor can *Huey* be dismissed as some long-forgotten precedent that is out of step with more recent Ninth Circuit case law. In the 35 years since *Huey* was issued, the Court has repeatedly (and recently) cited it with approval. *See, e.g.*, *Somers v. Apple, Inc.*, 729 F.3d 953, 961 (9th Cir. 2013). In *Marks v. San Francisco Real Estate Bd.*, the Court relied on *Huey* to hold that it lacked jurisdiction to review the trial court's class-decertification order, even though all agreed that the case was properly before the Court on appeal from a dismissal with prejudice for want of prosecution. *Marks*, 627 F.2d at 952 (Sneed, J., concurring in the result) ("to undertake review of the decertification issue in this case is inconsistent with the policies expressed by this court in *Huey*"); *id.* (Kennedy, J.) ("I am in full agreement with Judge Sneed that it would be contrary to the purpose of [*Livesay*] to review the decertification order here.").

The *Berger* panel cited several Ninth Circuit decisions in support of its assertion that a plaintiff becomes entitled to appellate review of interlocutory orders by stipulating to dismissal with prejudice and then filing an appeal. It

interpreted those decisions as confirming that a plaintiff willing to assume the risks entailed by such a strategy (*i.e.*, the risk that if it loses its appeal, it will be out of court altogether) ought to be rewarded by being granted an immediate appeal. *Berger*, 741 F.3d at 1065-66. WLF agrees with Microsoft that the cited decisions do not bear the weight *Berger* imputes to them. Microsoft Reh. Pet. at 11-12. Perhaps more importantly, none of the cited cases involved appellate review of class certification. *See, e.g., Concha v. London*, 62 F.3d 1493 (9th Cir. 1994) (order denying remand to state court); *Omstead v. Dell, Inc.*, 594 F.3d 2082 (9th Cir. 2010) (order staying proceedings and compelling arbitration). *Huey* is the only pre-*Berger* Ninth Circuit case that is directly on point because it is the only one that addressed jurisdiction to review class-certification orders.

In the absence of *en banc* review, panels will be faced with a clear conflict in Court decisions. Indeed, the *Huey*-or-*Berger* conflict has been squarely posed by the parties in at least two cases now pending before Ninth Circuit panels: *Bobbitt v. Milberg LLP*, No. 13-15812; and *Smith v. Microsoft Corp.*, No. 14-55807.

The majority rule among federal appellate courts is that the earlier of the two conflicting precedents (in this case, *Huey*) should be followed. *See, e.g., Wade v. Hewlett-Packard Development Co.*, 493 F.3d 533, 542 (5th Cir. 2007); *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004). The Eighth Circuit follows a

minority rule that grants a court freedom "to choose which line of cases to follow," based on which line the court finds more persuasive. *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000). The Ninth Circuit does not appear to have a clear rule governing this issue. *See Greenhow v. Sec'y of HHS*, 863 F.2d 633, 636 (9th Cir. 1988) (stating that none of several possible approaches to choosing between conflicting precedents has "an unimpaired claim to being the law of the circuit"). Thus, in the absence of *en banc* review in this case, the panels hearing *Bobbitt* and *Smith* will have no meaningful option but to call for *en banc* review. *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) (*en banc*). Granting *en banc* review here will provide those panels with the guidance they require.

II. REHEARING *EN BANC* IS WARRANTED BECAUSE THE PANEL'S EXPANSIVE READING OF § 1291 IS INCONSISTENT WITH THE PROPER UNDERSTANDING OF THE STATUTE

Rehearing *en banc* is also warranted because the panel and *Berger* both failed to address the key question at issue in these cases: is an interlocutory order denying class certification suddenly transformed into a "final decision" within the meaning of 28 U.S.C. § 1291 when the district court enters a stipulated order dismissing the case with prejudice? As *Huey* explained, the correct answer to that question is "no." Orders denying class certification do not merge in the judgment (and thus are unreviewable in an appeal under § 1291 from the final order of

dismissal) when the final order of dismissal results from the plaintiff's refusal to proceed to trial, and the plaintiff uses the order as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling on class certification. *Huey*, 608 F.2d at 1240. By failing to address the issue, the panel implicitly adopted an expansive reading of § 1291 that is inconsistent with the proper understanding of that statute.

The Supreme Court explained in *Livesay* that Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. In *Livesay*, the Supreme Court examined and rejected the "death knell" doctrine, under which several courts of appeals had been exercising jurisdiction over appeals from district court orders that did not resolve all issues in the case. Under that doctrine, some appeals courts examined the impact of the district court order on the individual case. If those courts concluded that the costs of trying the individual's case so far exceeded the potential judgment (considering the plaintiff's resources) that further pursuit of the plaintiff's claim was improbable, the order was deemed a "final decision" and thus subject to appeals court jurisdiction under § 1291. In rejecting the "death knell" doctrine as a basis for permitting appeals from orders denying class certification, *Livesay* concluded that the doctrine "would have a serious debilitating effect on the

administration of justice" by permitting "multiple appeals" within a single case. *Livesay*, 437 U.S. at 473-74.

Huey correctly recognized that Congress's "policy against piecemeal appeals" that drove *Livesay*'s interpretation of § 1291 in the context of class-certification appeals filed *before* entry of a final judgment is equally applicable in the context of class-certification appeals filed *after* a dismissal with prejudice entered when the plaintiff refuses to proceed to trial. *Huey*, 608 F.3d at 1239. As the Court explained, if § 1291 were interpreted to permit a plaintiff to obtain immediate review of every order denying class certification by procuring a dismissal with prejudice:

> [T]he policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's refusal under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Ibid. (quoting *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 446 (3d Cir. 1977)).

The panel decision directly conflicts with decisions of the Third and Tenth Circuits, both of which explicitly concurred with *Huey*'s understanding of *Livesay* and its interpretation of § 1291 in the context of appeals from orders denying class certification. *Camesi v. UPMC*, 729 F.3d 239, 245 n.1 (3d Cir. 2013); *Bowe v.*

First of Denver Mortg. Investors, 613 F.2d 798, 800-01 (10th Cir. 1980). *See* Circuit Rule 35-1 (*en banc* review warranted where panel decision conflicts with existing opinion of another appeals court and affects a rule of national application). The panel decision includes *no* discussion of those courts' conclusions that an order denying class certification does not merge with a final order dismissing a case with prejudice when dismissal is procured by the plaintiff, and thus that the class-certification order is not a "final decision" for purposes of § 1291.[3]

Rather, the panel focused solely on "adversity" and concluded that the requirements of § 1291 are satisfied even when the plaintiff has stipulated to dismissal with prejudice, because such stipulations "do not destroy the adversity in that judgment necessary to support an appeal." Slip op. at 10. But the panel's interpretation of § 1291's finality requirement fails to take heed of Congress's goal of preventing piecemeal appeals. Indeed, given that the panel did not resolve the class-certification issue but simply remanded the case to the district court for

[3] The argument favoring *en banc* review becomes all the more compelling when one considers that *Camesi* and *Bowe*—the federal appeals court decisions with which the panel decision directly conflicts—relied on *Huey* to support their conclusions that appellate jurisdiction was inapplicable under facts materially identical to the facts of this case. *En banc* review to address inter-circuit conflicts is particularly appropriate when, as here, a Ninth Circuit decision influenced other circuits to rule one way and then a later Ninth Circuit decision created the inter-circuit conflict by contradicting the initial Ninth Circuit decision.

further consideration, one can reasonably anticipate that Appellants will file additional class-certification appeals if the district court denies their requested certification, as Microsoft likely will argue it should.

Furthermore, the panel decision is inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. By creating a means by which plaintiffs can essentially appeal class-certification orders as of right, the panel undermines congressional direction that appeals court acceptance of such appeals be discretionary. *See* Advisory Committee Notes Accompanying 1998 Amendments to Rule 23 (under Rule 23(f), "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. . . . Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive."). The panel granted Appellants an appeal-as-of-right, even though the Court had previously rejected their Rule 23(f) request to appeal from the district court's class-certification order. Moreover, the panel decision effectively eliminates Rule 23(f)'s directive that petitions for interlocutory appeals be filed expeditiously. While Rule 23(f) requires such petitions to be filed within 14 days after a ruling on the class-

certification motion, the panel decision permits plaintiffs to delay their appeal until up to 30 days after entry of the stipulated dismissal with prejudice—a dismissal that may well be entered months after a ruling on the motion, as was the case here.

Finally, by adopting a one-sided rule that favors plaintiffs over defendants, the panel decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. *Livesay*, 437 U.S. at 476 (rejecting "death knell" doctrine in part because "the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well."). The panel created a pathway for plaintiffs by which they can always obtain pre-trial appellate review of class-certification orders while not creating a similar pathway for defendants.

CONCLUSION

WLF requests that the Court grant the petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rules 29-2 and 32-1, I hereby certify:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 29-2(c)(2) because: this brief contains 4,147 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 proportionately spaced typeface using WordPerfect X5 Times New Roman.

/s/ Richard A. Samp
Richard A. Samp
Attorney for Washington Legal Foundation

Dated: April 13, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 2015, I electronically filed the foregoing brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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/ Richard A. Samp
Richard A. Samp