No. 19-2246

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In re George Burciaga,

Debtor.

Appeal from the United States District Court for the Northern District of Illinois

George Burciaga,

Debtor-Appellant,

v.

Case No: 1:18-cv-05293

Hon. Manish S. Shah

Alex Moglia, Trustee for the Bankruptcy Estate of George Burciage,

Trustee-Appellee

BRIEF AND ARGUMENT OF AMICI CURIAE NACBA AND LEGAL AID CHICAGO IN SUPPORT OF GEORGE BURCIAGA DEBTOR-APPELLANT, AND IN SUPPORT OF REVERSAL.

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Short Caption: Burciaga v. Moglia

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Legal Aid Chicago - *amicus* supporting Debtor-Appellant.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Legal Aid Chicago - *amicus* supporting Debtor-Appellant.

- (3) If the party or amicus is a corporation:
 - i) Identify all its parent corporations, if any; N/A and
 - ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ <u>David S. Yen</u>

Date: <u>September 17, 2019</u>

Attorney's Printed Name: David S. Yen

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Attorney's Signature: /s/ Susana Heredia Croke Date: September 17, 2019

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 - i) Identify all its parent corporations, if any; and N/A
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TABLE OF AUTHORITIES

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Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677
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730 ILCS 5/3-7-66
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740 ILCS 107/49
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Other Authorities

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE Amicus Legal Aid Chicago

Legal Aid Chicago (formerly known as the Legal Assistance Foundation), is the largest provider of free civil legal services in Cook County, Illinois. Each year Legal Aid's lawyers and non-lawyer advocates represent thousands of clients in a wide range of civil legal matters. Legal Aid's practice areas include bankruptcy, consumer, housing, public benefits, workers' rights, immigration, education and family law. Legal Aid's Consumer Practice Group represents debtors to protect them from unlawful collection practices and fraudulent, deceptive or unfair schemes, and, in appropriate circumstances, to help them secure a fresh start by obtaining relief under the Bankruptcy Code.

Legal Aid's Immigrants and Workers' Rights Practice Group ("IWR") represents clients across a wide range of employment-related issues. Of particular relevance for this appeal, Legal Aid represents individuals who have fallen victim to wage theft. Funded by the Illinois Lawyers' Trust Fund, IWR staff have successfully helped low-wage workers recover stolen wages by filing administrative complaints with the Illinois and U.S. Departments of Labor, or in federal court under the Fair Labor Standards Act. Even when a judgment or administrative award is entered for the full amount of stolen wages, the actual recovery is often only a fraction of what was stolen.

All of Legal Aid's practice groups represent clients whose subsistence frequently depends on the slender protections afforded by exemptions embodied in Illinois law. Legal Aid's knowledge and experience with exemptions generally, and with debtors who struggle to support themselves and their families in the face of underpayment of wages, delayed pay, or outright wage theft, will assist this Court in understanding important aspects of the question this case presents.

Amicus NACBA

The National Association of Consumer Bankruptcy Attorneys, or NACBA, is a non-profit organization of almost 3000 consumer bankruptcy attorneys practicing throughout the country. Incorporated in 1992, NACBA is the only nationwide association of attorneys organized specifically to protect the rights of consumer bankruptcy debtors. Among other initiatives and directives, NACBA works to educate the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA also advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys.

NACBA has filed numerous amicus briefs in cases involving the rights of consumer debtors. See, e.g., Schwab v. Reilly, 560 U.S. 770 (2010); United States Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); In re Sterling, 933 F.3d 828 (7th Cir. 2019).

NACBA's breadth of experience will assist this Court in understanding how the Illinois exemption for unpaid wages comports with the policies embodied in the Bankruptcy Code generally.

Authority to File Amicus Brief

Both parties have, through their counsel, consented to the filing of an amicus brief by Legal Aid Chicago and NACBA.

SUMMARY OF THE ARGUMENT

In Illinois, specified amounts of wages are protected from creditors. 735 ILCS 5/12-803. This comprehensive protection satisfies all of the tests for determining whether the subject wages can be claimed as exempt in bankruptcy. No magic words or phrases determine whether assets are exempt under Illinois law, and the Illinois General Assembly is not required to use any particular words or phrases for the exemptions that apply to unpaid wages to be effective in bankruptcy.

The limits on wage garnishment found in the Federal Consumer Credit Protection Act (CCPA) do not themselves create an exemption that can be asserted in bankruptcy, but neither do they preempt any State from providing an exemption for unpaid wages that is couched in similar terms. Thus in *In re Brissette*, 561 F.2d 779 (9th Cir. 1977), the court held that a California statute that incorporated the limits on garnishment found in the CCPA was an exemption statute that was adopted for use in bankruptcy proceedings.

The Illinois Legislature has sought in several ways to enable workers to earn and retain a basic level of compensation so that they can support themselves and their families. Since 2004, the minimum wage in Illinois has been greater than the Federal minimum wage because the Illinois General Assembly determined that a greater amount was necessary for workers to sustain themselves. For a few years the limits on wage garnishment in Illinois were still tied to the Federal minimum wage; however, in 2005, the General Assembly amended the garnishment statute so

that the amount of wages that were totally exempt from collection was linked to the greater of the federal or Illinois minimum wage.

Workers throughout Illinois are often owed wages above and beyond their weekly or biweekly earnings. The reasons can be benign – some employers issue paychecks only once a month – or odious, as when an employer engages in wage theft. When workers are eventually paid their accrued back wages, the money is usually needed to catch up on basic necessities that have been deferred, or for debts with a particular urgency, such as past due rent or utility bills. Many workers resort to filing for bankruptcy before their back wages are paid because their bills cannot wait, or because their regular wages are being garnished. It would be a perverse interpretation of Illinois law and the Bankruptcy Code if a worker who was impelled into bankruptcy because he or she could not make ends meet due to unpaid wages, would also lose the right to benefit when those delayed wages are eventually paid.

ARGUMENT

- I. A MINIMUM OF 85% OF UNPAID WAGES IS EXEMPT IN ILLINOIS.
 - A. A creditor's collection remedy against unpaid wages is limited to the lesser of 15% of wages or the amount by which the weekly disposable income exceeds 45 times the applicable hourly minimum wage.

As Debtor's brief has demonstrated, unpaid wages in Illinois can only be reached by a creditor through garnishment or a citation to discover assets. Under either procedure, the creditor may take no more than the lesser of 15% of wages or

the amount by which weekly disposable income exceeds 45 times the applicable hourly minimum wage.

The Illinois Appellate Court has held that these limitations apply even to the collection of criminal fines from a convicted person. In *People v. Despenza*, 318 Ill. App. 3d 1155, 744 N.E.2d 912 (Ill. App. Ct. 2001), the trial court had entered an order to withhold 50% of the defendant's compensation. This order exceeded the maximum wage amount subject to collection, which was determined according to 735 ILCS 5/12-803, and the order was therefore vacated and remanded so that an order complying with those limits could be entered. A similar withholding order was vacated in *People v. Gathing*, 334 Ill. App. 3d 617, 620–21, 778 N.E.2d 215, 217–18 (Ill. App. Ct. 2002).

In *People v. Mancilla*, 331 Ill. App. 3d 35, 770 N.E.2d 1262 (Ill. App. Ct. 2002), the trial court had ordered the withholding of 25% of the defendant's compensation from his employment with the Department of Corrections. The defendant objected to this order. The State argued that the defendant had waived any objection to the order. The Appellate Court held that it had appellate jurisdiction to review the withholding order because it was void, as no wage deduction proceeding under the Code of Civil Procedure had been conducted.

While the Illinois Supreme Court has not recently interpreted the wage garnishment or citation to discover assets remedies, in a recent case, where the State of Illinois sought to collect from money that a prisoner had saved from his prison wages, the Court held that requiring the prisoner to turn over those funds

was contrary to the intent of the legislature. *People ex rel. III. Dep't of Corr. v. Hawkins*, 2011 IL 110792, ¶ 34.

In *Hawkins*, the defendant was a prisoner who had worked in a prison job for many years. *Id.* ¶ 8. Pursuant to statute, the Department of Corrections had withheld a portion of his wages to offset the costs of imprisonment, and the remainder of the wages were paid to him. *Id.* ¶ 12; *see* 730 ILCS 5/3-12-5. Over the years he had saved approximately \$11,000, which first went into his prison account, but then was transferred to an outside account. *Hawkins*, 2011 IL 110792, ¶ 8. The Attorney General sued to recover the costs of imprisonment from the assets of the prisoner. *Id.* ¶ 9. The prisoner's only asset was the outside account containing the money he had saved from his prison wages. *Id.* ¶ 19.

The Illinois Supreme Court held that "such wages were *not* assets 'which ought to be subjected to the claim of the Department under' section 3-7-6." *Id.* ¶ 32. In so holding, the Court observed that the stated legislative purpose was to ensure that upon their release prisoners will have learned a skill and a work ethic and also will have "saved some money to come back into the community." *Id.* ¶ 33, *quoting* 86th Ill. Gen. Assem., Senate Proceedings, May 25, 1989, at 429 (statements of Senator Collins). The Court also reasoned that the Department's literal interpretation "produces a result that is absurd, unjust, and . . . not contemplated by the legislature." *Id.* ¶ 34. Since the Department had conceded that the prisoner's account contained only wages already subject to withholding under section 3-12-5, they could not be subject to further attachment. *Id.*

While *Hawkins*, unlike *Despensa*, *Gathing*, and *Mancilla*, did not involve a creditor's attempt to recover from unpaid wages, its conclusion, that collection from a debtor's wages should be scrutinized in light of the legislature's policy concerning wages, comports with those cases and supports the conclusion that the legislature intended to provide comprehensive protection of the exempt wages across all venues. These cases bolster the Debtor's argument that wage garnishments and citations to discover assets are exclusive remedies for creditors seeking to reach a debtor's wages. There is no implied exception or overriding policy reason that can breach the protection of exempt wages.

B. The Federal Consumer Credit Protection Act does not preempt the exemptions in Illinois for unpaid wages.

The Federal Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1671-1677, places limits on wage garnishment. 15 U.S.C. § 1673. The CCPA does not itself create an exemption that can be asserted in bankruptcy. *Kokoszka v. Belford*, 417 U.S. 642 (1974). *Koskoszka* was cited as authority by two cases relied upon by the trustee, *In re Thum*, 329 B.R. 848 (Bankr. C.D. Ill. 2005), and *In re Koeneman*, 410 B.R. 820 (Bankr. C.D. Ill. 2009). However, while the CCPA does not create a bankruptcy exemption, neither does it preempt any State from providing an exemption for unpaid wages that is couched in similar terms. Thus in *In re Brissette*, 561 F.2d 779 (9th Cir. 1977), the court held that a California statute that incorporated the limits on garnishment found in the CCPA was an exemption statute that was adopted for use in bankruptcy proceedings, a process that the court

referred to as "double adoption." *Brissette*, 561 F.2d at 784, 786. As the court observed,

Superficially, it may seem to be anomalous that the CCPA is not an exemption statute to which the Bankruptcy Act refers, and at the same time it becomes an exemption statute for all practical purposes via California law. The process of double adoption, however, is entirely consistent with Bankruptcy Act policy.

Id. at 786. The court rejected any claim that the California exemption of a portion of wages was preempted by the CCPA, noting that such preemption would result in stripping the wage earner of his entire exemption, which the court recognized as a "totally unacceptable result." Id. The court rightly recognized such an outcome as "inconsistent both with the purposes of Congress in creating the CCPA, as well as Congress' intention to provide debtors protection from their creditors in bankruptcy pursuant to provisions of state law." Id. at 786–87.

- II. A FINDING THAT UNPAID WAGES ARE NOT EXEMPT WOULD BE CONTRARY TO CLEARLY EXPRESSED INTENT OF THE ILLINOIS GENERAL ASSEMBLY THAT WORKERS SHOULD BE ABLE TO USE THEIR EARNINGS TO SUPPORT THEMSELVES AND THEIR FAMILIES.
 - A. The limitations on garnishments or citations against wages are designed to allow workers to use protected wages to support a basic standard of living.

The minimum wage in Illinois did not exceed the federal minimum wage for many years. In 2004, the minimum wage in Illinois was increased to \$6.50 an hour, which was more than the federal minimum wage at the time, \$5.15 an hour. For a few years the limits on wage garnishment in Illinois were still tied to the Federal minimum wage. But in 2005, the legislature amended the garnishment statute so that the amount of wages that were totally exempt from collection was linked to the

greater of the Federal or Illinois minimum wage. See Pub. Act 094-0306, approved July 21, 2005, effective January 1, 2006. The same legislature also applied those protections to wage assignments, effective upon enactment. Pub. Act 094-0305, amending 740 ILCS 170/4. The legislature made these changes to enable workers in Illinois to use the increase in their wages for their intended purpose – to provide for necessities first, and only after basic needs have been met, to apply any extra funds towards payment of past debts. The trustee's position would put debtors making only the minimum wage at risk of losing all of their earnings, if the "wild card" exemption has been fully used on other assets.

B. Workers who are paid irregularly are as much in need of the protected portion of their wages as workers who are always paid on a regular basis.

The inability to exempt protected but unpaid wages would primarily affect debtors who do not receive an even flow of earned income. These debtors should not be prevented from using the amount that the Illinois legislature has determined is necessary to meet basic needs.

The reasons for irregular payment can range from the benign to the criminal. For some debtors, such as the Koenemans, the employer's payroll practices may leave them vulnerable to having unpaid wages seized by the bankruptcy trustee. In their case, the trustee sought turnover of all of the husband's regular paycheck, which on the date of the petition had been earned but was paid a few days postpetition, which came to \$2,037.50. *Koeneman,* 410 B.R. at 822. Employees represented by unions who do not go on strike may receive a lump sum because

their raises are negotiated to be paid retroactively. Other debtors, by the nature of their jobs, do not have a smooth flow of income. Debtors such as real estate agents who receive commissions based on sales that are sporadic are one such group.

Recently many workers whose compensation derives from federal, state or local governments have experienced interruptions in their income due to those governments' budgetary problems. Furloughed government employees and employees of government contractors may not be paid during government shutdowns or budget impasses, and may consider filing for bankruptcy. Mahita Gajanan, 'We'll Have No Other Option Than Declaring Bankruptcy.' How the Shutdown Could Impact Government Workers for Months, TIME (January 18, 2019), https://time.com/5504923/government-shutdown-economic-impact/.

In such situations it can hardly be said that a debtor who files for bankruptcy relief is gaming the system. Rather it is the trustee who is taking advantage of the irregular stream of income. A debtor who is paid regularly will have had the use of her income during the months before filing bankruptcy to pay for basic needs, such as food, rent, clothes, or automobile maintenance. When she files for bankruptcy she has unpaid wages equal to one pay period, typically two weeks' pay.

Compare the regularly paid debtor to someone whose income is variable. A prototypical example is a real estate agent who is paid only when the sale of a house closes. In the three months before he files for bankruptcy, he has been the procuring agent for the sale of twelve houses, but only two of the sales have closed. Because of this he has scrimped on basic necessities and has fallen behind on his bills. When

he files for bankruptcy he is owed the equivalent of two and a half months' pay. If the trustee's position is accepted, this debtor, who has been living on one quarter of his normal income and has had greater financial hardship than the regularly paid debtor, will lose all of the money he is owed. This result is contrary to the Illinois legislature's policy of ensuring that working residents of the state will have enough money to pay for their basic needs.

C. Denial of any exemption for unpaid wages would result in an absurd and unjust result for debtors who are the victims of wage theft.

Employees whose employers commit wage theft also stand at an arbitrary disadvantage under the trustee's position. "Wage theft" refers to "the failure to pay workers the full wages to which they are legally entitled," including failure to pay the minimum wage, failure to comply with overtime pay requirements, employee misclassification, requiring employees to work off the clock, failing to provide required meal or rest breaks, stealing tips, and the many other ways employers violate basic fair pay standards. David Cooper & Teresa Kroeger, Economic Policy Institute, Employers Steal Billions From Workers' Paychecks Each Year 4, 7 (May 10, 2017), available at https://www.epi.org/files/pdf/125116.pdf. Wage theft is widespread across the country and across industries, costing workers and local economies billions of dollars annually. Id. at 2–3. Based on their analysis of data from the ten most populous states, Cooper and Kroeger concluded that in those ten states, 2.4 million workers—or approximately 17 percent of the eligible low-wage workforce—lost \$8 billion each year in unpaid minimum wages. Id. In Illinois, the

study found that surveyed minimum-wage-eligible workers experienced average weekly underpayment of \$53, an average of \$2,800 per year, or approximately 20% of the wages they are legally entitled to. *Id.* at 10, 52.

A 2009 study by the Center for Urban Economic Development of the University of Illinois at Chicago, National Employment Law Project, and the UCLA Institute for Research on Labor and Employment surveyed over 4,000 workers in low-wage industries in Chicago, Los Angeles and New York, and found that 26 percent were paid less than the required minimum wage in the previous work-week, and more than two thirds experienced at least one pay-related violation, such as failure to pay overtime, not being paid for all hours worked, and stolen tips. Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 2–3, 5 (2009), available at https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf. The report estimates that workers surveyed lost an average of 15 percent, or \$2,634, of their annual wages due to workplace violations. Id. at 50.

Several industry-specific studies have uncovered similar rates of wagerelated violations. For instance, a 2012 University of Illinois study of car wash
workers in Chicago found widespread violations of wage and hour laws. Robert
Bruno et al., Univ. of Ill. at Urbana-Champaign, Clean Cars, Dirty Work (2012),
available at https://ler.illinois.edu/wp-content/uploads/2015/01/Clean-Cars-Dirty-Work Bruno-Quesada-Manzo.pdf. The study found that over three quarters of the
surveyed workers earned below the Illinois minimum wage. Id. at 2. Further, while

more than 80% of the respondents worked over 40 hours in the prior week, less than 2% earned the legal overtime rate of time and a half. *Id.* On average, the surveyed workers lost \$84.87 a week by not being paid mandatory minimum wages and overtime rates, an average of \$4,413.24 a year, or almost one-third of their annual income. *Id.* Nationwide studies indicate widespread wage theft in some of the largest and fastest-growing sectors of the economy, including the fast food industry, the warehouse and logistics industry, and port truck drivers. *See* Catherine Ruckelshaus *et al.*, National Employment Law Project, *Who's the Boss: Restoring Accountability for Labor Standards in Outsourced Work* 11, 17, 22 (May 2014), available at https://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/.

Wage theft does not only happen in small businesses. A 2018 report by Good Jobs First analyzed more than 4,000 wage and hour cases, and their research found wage theft at some of the largest corporations—more than half of the cases involved Fortune 500 companies or Fortune Global 500 companies. Philip Mattera, Good Jobs First and Jobs with Justice Education Fund, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers' Wages* 8 (June 2018), available at https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/wagetheft report revised.pdf.

While the amount of wage theft per day or week may be small, as the above studies show, it does add up. Also, claims or lawsuits based on violations of the federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, can go back for two years,

or three years if the employer's violations were willful. 29 U.S.C. § 255. Thus a not atypical debtor who is the victim of wage theft may have a claim for unpaid wages ranging from about \$2,600—the yearly shortfall found by Bernhardt *et al.*, in *Broken Laws, Unprotected Workers*—to over \$8,800 (two years of the average stolen wages found by Bruno *et al.*, in *Clean Cars, Dirty Work*). These are amounts that bankruptcy trustees in Illinois have shown themselves to be willing to seize for the benefit of the bankruptcy estates they are administering. In *Koeneman* the amount in question was \$2,037.50; in *Thum* the after tax amount was \$2,133.42.

As wage theft, and efforts to combat it, proliferate, the most successful lawsuits can garner much greater amounts. For example, a group of car wash employees in New York recently received a multi-million dollar recovery. By the summer of 2019, the 106 workers who eventually signed on as plaintiffs will have received a share of roughly \$8.5 million. Tracy Tullis, *A Multimillion-Dollar Payday, at the Carwash*, N.Y. Times, February 22, 2019,

https://www.nytimes.com/2019/02/22/nyregion/car-wash-wage-

dispute.html?searchResultPosition=2, see also Michael Gartland, Long Island gas station workers win \$285K in wage theft legal battle against ex-owner, N.Y. Daily News, September 2, 2019, https://www.nydailynews.com/new-york/ny-metro-gas-station-wage-theft-adhikaar-keshtgar-20190902-xqtrvnd3ufantfxaw26xnyuica-story.html. But such successes are newsworthy precisely because they are rare; "the really surprising twist to this unlikely story: the carwasheros, as they call themselves, won." Tullis, Multimillion-Dollar Payday, at the Carwash. These

examples do illustrate that whatever remains of the \$4,000 wild card exemption, 735 ILCS 5/12-1001(b), may not be sufficient to protect the money owed to debtors who are victims of wage theft.

Frequently, employees are in need of bankruptcy relief precisely because of nonpayment of wages or salary. Often they cannot delay filing of bankruptcy until wages are paid because they need to restore disconnected utility service, or need to prevent repossession of a vehicle. If paid on a regular basis, they would be able to choose how to spend money for family needs, or to pay for unexpected expenses without having to borrow at high interest rates. Faced with a loss of income, for many low-income debtors in financial distress, high-interest, small-dollar loans—payday loans and title loans—and not bankruptcy, are their first resort. But if the delay in payment persists, the spiraling cost of those loans may lead them to filing bankruptcy.

It would be a perverse interpretation of Illinois law and the Bankruptcy Code if workers who were impelled into bankruptcy because they could not make ends meet due to unpaid wages, would also lose access to their wages when eventually paid. Such a result is one that the protections enacted by the Illinois legislature were designed to prevent.

CONCLUSION

For the reasons stated above, and in Debtor's brief, this Court should find that Illinois' protections against wage garnishment are an exemption that should be recognized in bankruptcy, and reverse the decisions of the District Court and the Bankruptcy Court.

Respectfully submitted,

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RULE 29(a)(E) STATEMENT

Pursuant to Fed. R. App. P. Rule 29(a)(E), this is state that:

- (i) No party's counsel authored this brief in whole or in part;
- (ii) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief;
- (iii) No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

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RULE 32(g) CERTIFICATION

I hereby certify that this amicus brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 3991 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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PROOF OF SERVICE

I hereby certify that on September 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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