[ORAL ARGUMENT NOT YET SCHEDULED]

No. 14-5194

In the United States Court of Appeals
for the District of Columbia Circuit

AMIR MESHAL,

Plaintiff-Appellant,

v.

CHRIS HIGGENBOTHAM, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 1:09-cv-02178-EGS

Brief of The Constitution Project as *Amicus Curiae* in Support of Plaintiff-Appellant

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Rita Siemion
Scott Roehm
The Constitution Project
1200 18th Street, NW
Suite 1000
Washington, DC 200036
(202) 580-6920

Agnieszka M. Fryszman
Alysson Ford Ouoba
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue, N.W.
Suite 500 East
Washington, DC 20005
(202) 408-4600
afryszman@cohenmilstein.com

Counsel for *Amicus Curiae* The Constitution Project

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and Amici Curiae

The parties, intervenors, and other *amici curiae* appearing in this Court are listed in the Brief for Plaintiff-Appellant. *Amicus Curiae* The Constitution Project is a bipartisan, non-profit organization based in Washington, D.C. Pursuant to Rule 26.1, *amicus* certifies that, other than The Constitution Project, none of the entities filing this brief are corporate entities or are owned in whole or in part by other corporate entities.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiff-Appellant.

C. Related Cases

Counsel is unaware of any cases related to this appeal other than those listed in the Brief for Plaintiff-Appellant.

D. Relevant Statutes and Regulations

Counsel is unaware of any statutes or regulations related to this appeal other than those provided in the Addendum to Brief for Plaintiff-Appellant.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Counsel for *Amicus Curiae*

COMPLIANCE WITH RULE 29

A. Consent to File

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b), *amicus* certifies that all parties have consented to the filing of this brief.

B. Authorship and Funding

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that this brief was authored by amicus and counsel listed on the front cover. No party or party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person besides *amicus* and their counsel contributed money that was intended to fund preparing or submitting this brief.

C. Not Practical to Join in Single Brief

Pursuant to Circuit Rule 29(d), *amicus* certifies that it is not practicable to join all other *amici* in this case in a single brief. Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* The Constitution Project certifies that a separate brief is necessary. The Constitution Project seeks to address the importance of safeguarding civil liberties at the same time as the Government works to protect the United States from international terrorism and to bring to this Court's attention the critical role of the Judiciary in preserving liberty under the separation of powers framework. Counsel believes that the briefs of the other

amici will focus on other issues, such as FBI policies and procedures, different aspects of the remedy provided by *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 393 (1971), and international law obligations to provide a remedy for torture. These are not the issues The Constitution Project seeks to highlight, and there would be no efficiencies nor synergies gained by addressing these issues in a joint brief. In addition, The Constitution Project does not have expertise in some of the areas the other *amici* intend to brief. Because the issues raised in this brief are not adequately addressed in the other briefings, and because the bipartisan consensus developed by The Constitution Project on these critical separation of powers issues merits consideration, The Constitution Project respectfully submits this separate brief.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel states that *amicus curiae* The Constitution Project is organized as a corporation. There is no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Counsel for *Amicus Curiae*

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The Constitution Project is an independent, bipartisan organization that promotes and defends constitutional safeguards. The Constitution Project brings together legal and policy experts from across the political spectrum to foster consensus-based solutions to pressing constitutional challenges. Through a combination of scholarship, advocacy, policy reform, and public education initiatives, The Constitution Project seeks to protect our constitutional values and strengthen the rule of law.

After September 11, 2001, The Constitution Project created its Liberty and Security Committee, a blue-ribbon committee of prominent Americans, to address the importance of safeguarding civil liberties while working to preserve our national security. In its work, the Committee emphasizes the need for all three branches of government to play a role in protecting constitutional rights. The Constitution Project appears regularly before federal courts in cases that raise these important constitutional questions. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *Boumediene v. Bush*, 553 U.S. 723 (2008).

The Constitution Project has received the consent of all parties to this action to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Meshal, a United States citizen held incommunicado by the FBI for four months and abused in an effort to extract evidence for a U.S. criminal proceeding, seeks damages from the responsible government officials under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

The district court described the conduct alleged in this case as "deeply troubling" and "appalling." *Meshal v. Higgenbotham*, 2014 WL 2648032, at *1 (D.D.C. June 13, 2014). The district court also observed that to deny Mr. Meshal a remedy "raises serious concerns about the separation of powers, the role of the judiciary, and whether *our* courts have the power to protect *our* own citizens from constitutional violations by *our* government when those violations occur abroad." *Id*. (emphasis in original). Nonetheless, the district court declined to provide a remedy under *Bivens*, erroneously concluding that "[o]nly the legislative branch can provide United States citizens with a remedy for mistreatment by the United States government on foreign soil." *Id.*

Fundamental to our system of government is the power of the Judiciary to act as a check against Executive branch violations of constitutional rights, such as the Fourth and Fifth Amendment violations alleged in this case. History teaches us that the oversight and accountability provided by the Judicial branch is particularly

important when national security concerns are asserted by the Executive because that is when individual rights and liberties are often most at risk.

The district court's reluctant conclusion that "when a citizen's rights are violated in the context of military affairs, national security, or intelligence gathering *Bivens* is powerless to protect him" is, as the district court itself recognized, an "approach [that] undermines our essential constitutional protections in the circumstances when they are often most necessary." *Id.* at *12 (citation omitted).

Bivens is intended to provide a damages remedy against federal officials who violate fundamental constitutional rights, especially where no other remedy exists. The district court incorrectly believed its hands were tied by recent decisions of the Courts of Appeals and that it could not recognize a *Bivens* remedy here. But the facts of this case fall into the core *Bivens* framework recognized by the Supreme Court. The district court has the authority and the responsibility to hear Mr. Meshal's claim, a claim involving constitutional violations by agents of the Executive branch that the district court itself described as "deeply troubling." *Id.* at *1. The Constitution Project urges this Court to reverse the decision below.

BACKGROUND

Mr. Meshal, an American citizen living overseas, alleges he was detained for four months without access to counsel, despite repeated requests for an attorney, and interrogated by FBI agents who attempted to obtain a confession so that Mr. Meshal could be charged with a federal crime and tried in a United States court. *Meshal*, 2014 WL 2648032, at *1-3. Mr. Meshal alleges he had been living in Somalia when fighting erupted, causing him, along with thousands of other civilians, to flee to Kenya. *Id.* at *1. In Kenya, he was arrested and ultimately turned over to three FBI agents. *Id.* at *2. He alleges he was mistreated by the FBI agents, including by being threatened with transfer to countries where he would be tortured or made to disappear. *Id.* He alleges that Defendants in fact had him transferred to Somalia and Ethiopia. *Id.* at *3. He was held in abysmal conditions, handcuffed, and isolated. *Id.* During his detention, he lost approximately eighty pounds. *Id.* After four months of coercion and abuse, Mr. Meshal was released without charge and returned to the United States. *Id.* He was never charged with any crime. *Id.*

ARGUMENT

A. THE CONSTITUTION ASSIGNS THE JUDICIAL BRANCH THE TASK OF PROVIDING A CHECK ON UNCONSTITUTIONAL OR UNLAWFUL EXECUTIVE CONDUCT

"[T]he central judgment of the Framers of the Constitution [was] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). To prevent the accumulation of power and ensure that the conduct of the Government is constrained by the law, the Constitution authorizes each branch to act as a check on the others. This constitutional division of power "is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty.'" *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring) (citation omitted); *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) ("[T]he constitutional plan that allocated powers among three independent branches . . . serves not only to make Government accountable but also to secure individual liberty.").

Integral to this system of checks and balances is the ability of the Judiciary to decide whether the Executive or Legislative branches have acted outside of their constitutional authority and to redress abuses of power. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Zweibon v. Mitchell*, 516 F.2d 594, 604-05 (D.C. Cir. 1975) (en banc) ("[T]he judiciary must remain vigilantly

prepared to fulfill its own responsibility to channel Executive action within constitutional bounds."). This role serves not only to keep the Executive and Legislative branches firmly within their constitutional authority, but also to preserve and protect the rights of the People. As James Madison explained,

> If they [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

1 *Annals of Cong*. 439 (1789) (Joseph Gales ed., 1834). The role of the judiciary in protecting individual rights against Executive or Legislative branch overreaching has repeatedly been reaffirmed by the Supreme Court. *Boumediene*, 553 U.S. at 745 (the Judiciary plays a key role in "maintain[ing] the 'delicate balance of governance' that is itself the surest safeguard of liberty") (citation omitted); *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317 (1972) (judicial oversight of domestic security surveillance by the Executive branch "accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government"); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) ("Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders

to protect the liberties they valued."); *Marbury*, 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

The central role assigned to the Judiciary to assure redress for constitutional violations is the basis for the *Bivens* damages remedy. As Justice Harlan explained, "the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment" and some form of damages is the only possible remedy in cases such as this one: individuals in Mr. Bivens' shoes will not be able to obviate the harm with injunctive relief, nor is the exclusionary rule a remedy where there is no criminal prosecution. *See Bivens*, 403 U.S. at 407-10 (Harlan, J., concurring); *see also id.* at 392 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.") (citation omitted); *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[J]usticiable constitutional rights are to be enforced through the courts . . . unless such rights are to become merely precatory."). Judicial recognition of a *Bivens* remedy is thus a limited but vital tool in maintaining the institutional balance inherent in the separation of powers, serving to ensure official accountability while safeguarding constitutional rights that would otherwise go

unprotected. Moreover, the *Bivens* damages remedy is far from extraordinary: "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395; *id.* at 397.

Recognition of a *Bivens* remedy in this case does not impinge on the role of the Legislative branch. The district court recognized that Congress had not provided an alternative remedy. *Meshal*, 2014 WL 2648032, at *6. But it concluded that congressional inaction precluded recognition of a *Bivens* cause of action by the Judiciary. *Id.* at *11-12. The district court's reasoning stands *Bivens* on its head. As Appellant points out, the entire point of *Bivens* is to remedy constitutional violations except where Congress has chosen an alternative remedial scheme. Br. for Pl.-Appellant at 42-46. The handful of statutes cited by the district court, *Meshal*, 2014 WL 2648032, at *12, were passed by different Congresses to address a variety of other concerns. For example, the Military Claims Act, 10 U.S.C. § 2733, was originally enacted in 1956 as part of Public Law 85-729, well before *Bivens* was decided, and authorizes compensation for damage to property or personal injury caused by members of the Armed Forces or the Coast Guard and incident to noncombat activities. The cited statutes do not establish a remedial scheme intended to remedy the constitutional violations alleged here and do not demonstrate that Congress intentionally declined to

provide a private cause of action for Fourth and Fifth Amendment claims by United States citizens against agents of the FBI.

To the contrary, Congress has, as Appellant demonstrates, expressly preserved the availability of a cause of action under *Bivens* for violations of the Constitution. Br. for Pl.-Appellant at 44-45. Indeed, the Government has showcased *Bivens* in submissions to the United Nations as an example of the United States' commitment to the rule of law: "Under U.S. law, redress may include . . . [s]uing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,' *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)." U.S. Dep't of State, Common Core Document of the United States of America: Submitted with the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights and concerning the International Covenant on Civil and Political Rights ¶¶ 156-58 (2011).

Here, the district court held that Mr. Meshal stated a plausible claim for relief under the Fourth and Fifth Amendments to the Constitution. *Meshal*, 2014 WL 2648032, at *5. The parties agreed that Mr. Meshal has no alternative remedy for his claims of constitutional violations by the Executive and that "as in *Bivens*, it is 'damages or nothing.'" *Id.* at *6 (citation omitted). The facts of this case fall squarely into the core *Bivens* framework. In such a case, recognition of a *Bivens*

remedy upholds, not undermines, the fundamental checks and balances principles enshrined in the Constitution and embraced by the Founders.

B. NATIONAL SECURITY, FOREIGN AFFAIRS, AND EXTRATERRITORIALITY ARE NOT SPECIAL FACTORS THAT LIMIT THE JUDICIARY'S ROLE IN PROTECTING THE RIGHTS OF A U.S. CITIZEN HELD BY THE FBI AND SUBJECTED TO COERCIVE INTERROGATIONS DURING A CRIMINAL INVESTIGATION

Wilbur Bivens was arrested by agents of the Federal Bureau of Narcotics who manacled him and threatened to arrest his family. *Bivens*, 403 U.S. at 389. The agents searched his apartment and took Mr. Bivens to the federal courthouse in Brooklyn where he was interrogated, booked, and subjected to a visual strip search. *Id.* Surely, if the agents had taken Mr. Bivens from his apartment, held him for four months, threatened him with transfer to countries where he would be tortured or made to disappear, and finally released him without charge, the Supreme Court would have found a constitutional violation by those federal agents that was capable of redress through "a particular remedial mechanism normally available in the federal courts." *Id.* at 397.

Mr. Bivens and Mr. Meshal were both detained by federal agents, the Federal Bureau of Narcotics and the Federal Bureau of Investigation, respectively. Both men were interrogated in order to obtain evidence for a criminal prosecution in a United States Court.

But relying on the Supreme Court's warning that "special factors may counsel hesitation" in recognizing a *Bivens* remedy, *id.* at 396, the Government argued below that the national security and foreign affairs context of Mr. Meshal's claim required dismissal because the claims necessitated inquiry into sources of intelligence and the extent to which other countries cooperate in apprehending and detaining suspects. *Meshal*, 2014 WL 2648032, at *6.

Believing its hands were tied by recent decisions of the Courts of Appeals,[1] the district court held that "when a citizen's rights are violated in the context of military affairs, national security or intelligence gathering *Bivens* is powerless to protect him." *Id.* at *12. The district court recognized that its approach "undermines our essential constitutional protections in the circumstances when they are most often necessary." *Id.* (citation omitted).

The district court's sweeping categorical conclusion ignores a long tradition of Supreme Court cases upholding judicial scrutiny in the national security context. This line of cases holds that the Constitution limits the power of the Government over its own citizens regardless of whether the Government acts overseas or national security concerns are implicated. In addition, as discussed below, a wide

[1] Appellants address the district court's application of the recent Courts of Appeals decisions in detail in their brief, Br. for Pl.-Appellant at 23-47, and *amicus* does not repeat that discussion here. Those decisions include: *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012).

range of prudential doctrines are available to the court to protect the Government's legitimate national security interests short of dismissing any and all *Bivens* actions that touch on foreign relations, national security or intelligence gathering.

The Supreme Court has repeatedly warned that judicial scrutiny is particularly important in the national security context, because that is when individual rights and liberties are most at risk:

> National security tasks, by contrast, are carried out in secret . . . . [I]t is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation. . . . We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

Mitchell v. Forsyth, 472 U.S. 511, 522, 524 (1985); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) ("[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.").

The idea that national security concerns require uncritical deference from the Judiciary has long been rejected by the Supreme Court:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that

> any of its provisions can be suspended during any of the great exigencies of government.

Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120-21 (1866). For example, in cases involving the political question doctrine, another doctrine rooted in the separation of powers, the Supreme Court has repeatedly cautioned that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986) (citation omitted); *Baker v. Carr*, 369 U.S. 186, 211 (1962). In recent years, the Supreme Court has repeatedly decided cases involving highly sensitive issues of national security without "weaken[ing] our Nation's ability to deal with danger." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); *see also Boumediene*, 553 U.S. at 797 ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.").

Although the Constitution vests the Executive and Legislative branches with responsibility for foreign policy and national security, the Judiciary has a vital role in ensuring that the exercise of that power remains within constitutional limits. *See, e.g.*, *Boumediene*, 553 U.S. 723; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *cf. Marbury*, 5 U.S. (1 Cranch) 137. Far from intruding upon

the other branches, this scrutiny reinforces the separation of powers by fulfilling the Judiciary's prescribed role.

In addition, the Supreme Court has long held that the Constitution limits the power of the government even when it acts outside the United States. *See, e.g.*, *Boumediene*, 553 U.S. at 765 ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44, (1885))); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) ("[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."). Thus, the fact that Mr. Meshal, a United States citizen, was abused by government agents acting overseas is not a special factor that counsels hesitation in adopting a *Bivens* remedy.

Finally, a wide range of case specific doctrines are available to the court to limit discovery, narrow claims, or even permit dismissal based on a particularized showing. For example, where the disclosure of information would be inimical to national security, that information may be withheld under the state secrets doctrine, *see United States v. Reynolds*, 345 U.S. 1 (1953), or may permit dismissal where the removal of the privileged evidence renders it impossible for the plaintiff to put forward a *prima facie* case, *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Other cases may be non-justiciable under the *Totten* doctrine,

which concerns disputes over governmental contracts for espionage, *see Totten v. United States*, 92 U.S. 105 (1875) (barring judicial review of claims arising out of an alleged contract to perform espionage activities), or the political question doctrine, which recognizes that certain disputes have been committed to the political branches, *see Baker*, 369 U.S. 186. And absolute or qualified immunity may shield certain officials from liability. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U. S. 491 (1975) (concerning the absolute immunity of legislators in their legislative functions); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (presidential aides are entitled only to qualified immunity). Some of these doctrines have been raised in this case. Defs.' Mot. to Dismiss Pl.'s Am. Compl. at 18-45, *Meshal v. Higginbotham*, No. 09-cv-2178 (D.D.C. June 23, 2010) (seeking dismissal on qualified immunity grounds).

These doctrines can provide the Judiciary with tools to address the national security concerns raised by the Government while preserving the critical role of the court in ensuring that Executive and Legislative branches adhere to constitutional boundaries. Although these prudential doctrines may limit the ability to proceed in any particular case, they do so within the framework of judicial review. By contrast, precluding a remedy under *Bivens* for any case which implicates foreign affairs or national security improperly sidelines the Judiciary and removes the

essential check on potential abuse by the Executive or Legislative that the Founders believed essential to prevent tyranny.

The district court's conclusion that no *Bivens* remedy can be recognized in any case touching military affairs, national security, or intelligence gathering sweeps too broadly. The district court's decision should be overturned.

CONCLUSION

For the above reasons, this Court should reverse the district court's order dismissing Mr. Meshal's claims under the *Bivens* doctrine for damages resulting from the violation of his constitutional rights.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Agnieszka M. Fryszman
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue, N.W.
Suite 500 East
Washington, DC 20005
(202) 408-4600
afryszman@cohenmilstein.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:
    a. This brief contains 3,586 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(&)(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:
    a. This brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2010* in *Times New Roman*, 14-point font.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: **December 22, 2014**

/s/ Agnieszka M. Fryszman
Counsel for *Amicus Curiae*