RECORD NOS. 13-5113(L); 13-5114

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

ELECTRONIC PRIVACY INFORMATION CENTER,

Plaintiff – Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TRANSPORTATION SECURITY ADMINISTRATION,

Defendant – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE*
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AMERICAN CIVIL LIBERTIES UNION, ELECTRONIC FRONTIER FOUNDATION, AND OPENTHEGOVERNMENT.ORG
IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* Citizens for Responsibility and Ethics in Washington ("CREW"), the American Civil Liberties Union ("ACLU"), the Electronic Frontier Foundation ("EFF"), and OpenTheGovernment.org, hereby submit their Certificates as to Parties, Rulings, and Related Cases as follows:

A. Parties and *Amici*. Plaintiff-appellant in Case No. 13-5113 is the Electronic Privacy Information Center ("EPIC") and defendant-appellee is the U.S. Department of Homeland Security ("DHS"). Plaintiff-appellant in Case No. 13-5114 is EPIC and defendant-appellee is the Transportation Security Administration ("TSA"). CREW has been granted leave to participate as an *amicus curiae* in this Court. Also appearing as *amici curiae* with CREW are the ACLU, EFF, and OpenTheGovernment.org. No *amici* appeared before the district court.

B. Rulings Under Review. Under review are the order and memorandum opinion of the district court in *EPIC v.* DHS, Case No. 10-cv-1992, issued on March 7, 2013 (Judge Royce C. Lamberth), and the order and memorandum opinion of the district court in *EPIC v. TSA*, Case No. 11-cv-290, issued on March 7, 2013 (Judge Royce C. Lamberth). The district court opinion in *EPIC v. DHS* is available at 928 F. Supp. 2d 139, and in the Joint Appendix at JA

001-022. The district court opinion in *EPIC v. TSA* is available at 928 F. Supp. 2d 156, and in the Joint Appendix at JA 256-276.

C. Related Cases. The two cases now before this Court were consolidated on July 30, 2013. Neither has previously been before this Court. Counsel for *amici curiae* is aware of no other related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(c).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae the ACLU, EFF, and OpenTheGovernment.org submit this corporate disclosure statement.[1]

The ACLU does not have a parent company, and is not a publicly-held company with a 10 percent or greater ownership interest. The ACLU is a nationwide non-profit, non-partisan organization.

EFF does not have a parent company, and is not a publicly-held company with a ten percent or greater ownership interest. EFF is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

OpenTheGovernment.org is a project of the Fund for Constitutional Government, which does not have a parent company, and is not a publicly-held company with a 10 percent or greater ownership interest. The Fund for Constitutional Government is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

[1] CREW already has filed a corporate disclosure statement with the Court.

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INTEREST OF AMICI CURIAE

CREW is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Toward that end, CREW frequently files Freedom of Information Act ("FOIA") requests to access and make publicly available government documents that reflect on, or relate to, the integrity of government officials and their actions, including with the DHS. CREW frequently litigates to seek access to records agencies have withheld under Exemption 5 of the FOIA, and participates as an *amicus* in these cases to ensure Exemption 5 is not expanded beyond the parameters Congress and the courts have established.

The ACLU is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has found the FOIA to be an invaluable tool in protecting civil liberties, and has participated in numerous FOIA cases in this Court and other courts, both as direct counsel and as *amicus curiae*.

EFF is a not-for-profit membership organization with offices in San Francisco, California, and Washington, D.C. EFF works to inform policymakers

and the general public about civil liberties and privacy issues related to technology, and to act as a defender of those rights and liberties. In support of its mission, EFF frequently files FOIA requests to access a broad range of documents created by a variety of federal agencies. EFF participates as an *amicus* in this case to protect the public's ability to access government information.

OpenTheGovernment.org is a Washington, D.C.-based non-partisan coalition of journalists, consumer and good government groups, environmentalists, librarians, labor unions, and others whose mission is to increase government transparency to ensure that policies affecting our health, safety, security, and freedoms place the public good and well-being above the influence of special interests, and to promote democratic accountability. OpenTheGovernment.org takes a multi-prong approach to accomplishing its mission through public education, advocacy, and collaboration with government agencies to decrease secrecy.

RELEVANT STATUTES AND REGULATIONS

The statute at issue is the Freedom of Information Act, 5 U.S.C. § 552, relevant portions of which have been produced in the opening brief of the appellant.

SUMMARY OF THE ARGUMENT

The district court's conclusion that Exemption 5 of the Freedom of Information Act ("FOIA") justifies withholding discrete factual material is contrary to law and precedent. In holding the requested test results, fact sheets, and data concerning radiation exposure pertaining to the Advanced Imaging Technology ("AIT") machines used by the Department of Homeland Security and the Transportation Security Administration were protected from compelled disclosure under Exemption 5, the district court applied the wrong legal standard based on a misinterpretation of D.C. Circuit precedent. Contrary to the finding of the district court, purely factual material can be withheld only where it is either so inextricably intertwined with deliberative material it cannot be segregated or the factual material itself would reveal deliberative material. Neither is the case here. Properly applied, Exemption 5 does not protect from public disclosure the factual material at issue.

Moreover, adopting the district court's approach would eviscerate the carefully drawn distinction between factual and deliberative material established by Congress and the courts to ensure Exemption 5 is not applied in a manner that undermines the basic purpose of the FOIA. In enacting Exemption 5, Congress hewed to the FOIA's goal of opening up government action to the light of public scrutiny. Toward that end, Congress and subsequent courts interpreting

Exemption 5 drew a clear demarcation between deliberative material, which falls within the exemption to protect the governmental interest in confidentiality in the deliberative process itself, and factual material, which is not deliberative – even if used by the agency to reach a decision – and therefore falls outside the protection of Exemption 5. The district court's decision erases that distinction and, unless overturned, will allow agencies to shroud their decisions in total secrecy and undermine the integrity disclosing factual information brings to agency deliberations. It also will deprive the public of access to the kind of data routinely sought and routinely made available under the FOIA.

ARGUMENT

THE FACTUAL MATERIAL SOUGHT HERE DOES NOT FALL WITHIN THE PROTECTION OF EXEMPTION 5 OF THE FOIA.

A. Exemption 5 Protects Factual Material Only Where It Is Inexplicably Intertwined With Deliberative Material Or Itself Reveals Deliberative Material.

Exemption 5 of the FOIA provides a narrow exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has interpreted this language to mean "the public is entitled to all such memoranda or letters that a private party could discover in litigation with

the agency." *EPA v. Mink*, 410 U.S. 73, 85 (1973). Those incorporated privileges include the deliberative process privilege on which DHS and the TSA relied here.

With Exemption 5, as with the FOIA as a whole, Congress was mindful of not "permitting indiscriminate administrative secrecy." H. Rep. No. 1497, at 31 (1966). Toward that end, Congress directed that Exemption 5 be applied "'as narrowly as consistent with efficient Government operation.'" *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting S. Rep. No. 813, at 9 (1965)). This Circuit likewise has been sensitive to the concern that Exemption 5 not be misused by an agency to "develop a body of 'secret law'. . . hidden behind a veil of privilege." *Coastal States Gas Corp.* at 867. In applying Exemption 5, the court has emphasized its "narrow scope . . . and the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Id.* at 868.

The deliberative process privilege incorporated in Exemption 5 is intended to "prevent injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), that would occur if agencies were required to "'operate in a fishbowl.'" S. Rep. No. 813, at 44; *see also* H. Rep. No. 1497, at 31. Courts have recognized three policy purposes served by this privilege: (1) encouraging open and candid discussions between superiors and subordinates on matters of policy without fear of public criticism or ridicule; (2) protecting

against the premature disclosure of policies before they are actually adopted; and (3) guarding against the public confusion from disclosing reasons and rationales the agency did not ultimately adopt. *See*, *e.g.*, *Coastal States Gas Corp.*, 617 F.2d at 866 (citation omitted). To advance these purposes, the privilege protects "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes." *Soucie v. David*, 448 F.2d 106, 1077 (D.C. Cir. 1971). The scope of exemption 5, like all of the FOIA's exemptions, is interpreted narrowly consistent with the FOIA's underlying goal of opening up government activities to the light of public scrutiny. *See*, *e.g.*, *Coastal States Gas Corp.*, 617 F.2d at 868.

Before adopting the current language of Exemption 5, Congress considered a formulation that would have extended the exemption to "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy."[1] While "designed to permit 'all *factual* material in Government records . . . to be made available to the public,"[2] this proposal was criticized for permitting a document to be disclosed "because the document did not deal 'solely' with legal or

[1] Hearings on S. 1160, S. 1336, S. 1758, & S. 1879 before the Subcommittee on Admin. Practice & Procedure of the S. Comm. on the Judiciary, 89th Cong. 7 (1965) (quoted in *EPA v. Mink*, 410 U.S. at 90).

[2] S. Rep. No. 1219, at 7 (1964) (emphasis in original) (quoted in *EPA v. Mink*, 401 U.S. at 90).

policy matters." *EPA v. Mink*, 410 U.S. at 90. On the other hand, in adopting the formulation that is substantially the same as the current version, Congress did not intend to authorize "the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion." *Id.* at 91.

As currently written, the deliberative process component of Exemption 5 does not protect material that does not implicate the interests the exemption seeks to serve. This includes "purely factual material . . . that is severable," which must be produced in response to a FOIA request. *EPA v. Mink*, 416 U.S. at 91; *see also Soucie*, 448 F.2d at 1077. Disclosing facts and factual summaries causes no harm to the decision making process, as it reveals nothing about the deliberations or recommendations themselves and therefore does not discourage candor in deliberative discussions. Indeed, the requirement that facts be disclosed actually enhances the integrity of agency deliberations. *See Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (noting courts require disclosure of factual information "because the prospect of disclosure is less likely to make an advisor omit or fudge raw facts.").

The distinction the court drew in *EPA v. Mink* between factual and deliberative material has its roots in the D.C. Circuit's opinion in *Soucie v. David*, where the court noted Exemption 5 protects factual information "only if it is

inextricably intertwined with policy-making processes." 448 F.2d at 1077. Two years later, in *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974), this Circuit again addressed the scope of protection Exemption 5 affords factual material, and carved out yet another exception to disclosure for factual information that itself reveals the agency's deliberative process. At issue in *Montrose Chemical Corp.* were summaries of more than 9,200 pages of evidence developed at a hearing that were prepared by EPA assistants for the sole purpose of helping the EPA administrator make a determination. In ruling that the summaries were properly withheld under Exemption 5, the court reasoned "[t]o probe the summaries of record evidence would be the same as probing the decision-making process," as the summaries would reveal what materials the decision maker considered significant and how those materials were evaluated. 491 F.2d at 68. The summaries resulted from "an evaluation of the relative significance of the facts recited in the record" in which the assistants who prepared the summaries exercised judgment to "separat[e] the pertinent from the impertinent." *Id.*

Courts have extracted from this the principle that "[t]o fall within the deliberative process privilege, materials must bear on the formulation or exercise of agency policy-oriented *judgment*." *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992) (emphasis in original) (citations

omitted). Accordingly, factual summaries that reveal the deliberations and give-and-take of the consultative process fall within the protection of Exemption 5.

This is not to say every factual compilation falls within the protection of Exemption 5 because it reflects a judgment as to what is material to the decision at hand. Indeed, if that were the case "every factual report would be protected as part of the deliberative process," a position this Circuit has rejected roundly. *Playboy Enterprises, Inc. v. Dep't of Justice*, 677 F.2d 931, 935 (D.C. Cir. 1982).[3] Instead, "when material could not reasonably be said to reveal an agency's or official's mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable." *Petroleum Info. Corp.*, 976 F.2d at 1435.

Viewed as a whole, this precedent recognizes two narrow limitations to the general rule that factual materials may not be withheld under the deliberative process privilege incorporated into Exemption 5. First, factual material that is inextricably intertwined with – and therefore not segregable from – deliberative

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[3] In *Playboy Enterprises, Inc.*, the D.C. Circuit reasoned:

> Anyone making a report must of necessity selects the facts to be mentioned in it; but a report does not become a part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as a part of the deliberative process.

677 F.2d at 935.

material may be withheld. Second, factual material that itself reveals deliberations, such as that "reflect[ing] an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter," *Petroleum Info. Corp.*, 976 F.2d at 1435, also is protected.

It must be emphasized, however, these are the two exceptions to the general rule that agencies must distinguish between factual and deliberative material, and produce the factual material in response to a FOIA request. *See Wolfe v. Dep't of Health & Human Serv.*, 839 F.2d 768 (D.C. Cir. 1988). "[T]he fact/opinion distinction 'offers a quick, clear, and predictable rule of decision,' for most cases." *Id.* at 774 (quoting *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)). Under that distinction, factual information "that do[es] not embody agency judgments" and is therefore "unlikely to diminish officials' candor or otherwise injure the quality of agency decisions" must be disclosed. *Petroleum Info. Corp.*, 976 F.2d at 1436.

B. The Material At Issue Falls Into Neither Exception To Required Disclosure For Factual Material Under Exemption 5.

The district court here misapplied this precedent to conclude in *EPIC v. TSA*, 928 F. Supp. 2d 156 (D.D.C. 2013), 2013 U.S. Dist. LEXIS 31344 ("*TSA*"), that Exemption 5 protected from disclosure portions of a letter of assessment pertaining to the TSA's acquisition of Advanced Imaging Technology machines

and four memoranda regarding Automated Target Recognition ("ATR") testing results and recommendations. *Id.* at *26-*27. Similarly, in *EPIC v. DHS*, 928 F. Supp. 2d 139 (D.D.C. 2013), 2013 U.S. Dist. LEXIS 31330 ("*DHS*"), the court held the agency properly relied on Exemption 5 to withhold portions of a draft fact sheet on radiation exposure, a working document on radiation exposure, two drafts of an AIT health and safety fact sheet, and a December 23, 2010 preliminary FDA progress report. *Id.* at *35-*36. In both cases, the court reasoned the materials were "part of the agency's deliberative process" and therefore properly withheld under Exemption 5 on that basis alone.[4] *TSA*, at *26; *DHS*, at *35.

In reaching this conclusion, the district court charted a course not sanctioned by any precedent and in conflict with the underlying goals of the FOIA. As this Circuit has made quite clear, factual information is not properly withheld under Exemption 5 merely because it is part of the deliberative process. *See*, *e.g.*, *Petroleum Info. Corp.*, 976 F.2d at 1436; *Mead Data Ctr., Inc.*, 575 F.2d at 935 ("Raw facts with informational value in their own right" are not exempt). Yet that is the essence of the district court's holding, a holding that if allowed to stand will

[4] In *TSA* the district court committed the additional error of holding other material not at issue was properly exempt as within the deliberative process privilege, reasoning "whether or not some of the material withheld was 'purely factual' is of no moment because this factual material was critical to the agency's deliberative process in determining whether to implement ATR." *TSA*, at *29. We know of no case supporting this view of the protection Exemption 5 provides purely factual materials.

"swallow the rule" that generally purely factual material cannot be withheld under Exemption 5. *Nat'l Whistleblower Ctr. v. Dep't of Health & Human Serv.*, 849 F. Supp. 2d 23, 38 (D.D.C. 2012). The fact that here, as often is the case with decision making processes, "the issues ultimately being addressed ha[d] a prominent factual component,"[5] does not, standing alone, transform that factual component into protected deliberations under Exemption 5. *Nat'l Courier Ass'n v. Bd. of Governors of Fed. Reserve Sys*., 516 F.2d 1229, 1242 (D.C. Cir. 1975) ("Purely factual material is . . . not deliberative, and the agency has no good reason to withhold it."); *Bristol-Myers Co. v. FTC*, 424 F.2d 925, 929 (D.C. Cir. 1970) ("Purely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended.") (internal quotations omitted).

Not only did the court venture into uncharted territories, but it ignored the two recognized paths for applying the exemption to factual material: (1) where it is inextricably intertwined with deliberative material, and (2) where the factual material itself would reveal deliberations by "reflect[ing] an agency's preliminary positions or ruminations about how to exercise discretion on some policy matter." *Petroleum Info. Corp.*, 976 F.2d at 1435. Neither exception to the general rule

[5] *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993).

requiring disclosure of purely factual material is satisfied here, and the district court did not suggest otherwise. In fact, the court did not even evaluate the extent to which the factual material was inextricably intertwined with deliberative material, believing such an inquiry unnecessary because the factual materials were "part of" the deliberative process. *DHS,* at *14; *TSA,* at *18. Nor did the court explain how, if at all, revealing the factual material at issue would reflect a specific exercise of discretion or judgment by the decision-maker, or otherwise would be tantamount to probing the decision-making process. Absent these findings, the district court had no viable basis for concluding the purely factual material at issue properly is exempt under the FOIA.

C. This Circuit's Opinion In *Ancient Coin* Does Not Support Withholding The Requested Factual Material As Deliberative.

The district court ignored the abundant precedent holding factual material such as that at issue here cannot be protected as deliberative, relying instead on a case from this Circuit the court read out of context and misapplied, *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504 (D.C. Cir. 2011). The issue in *Ancient Coin* was whether factual summaries that had been culled by an agency committee "from the much larger universe of facts presented to it" could be withheld under Exemption 5. *Id.* at 513. In concluding the materials were exempt, the court reasoned they "reflect an exercise of judgment as to what issues

are most relevant to the pre-decisional findings and recommendations," and therefore fell within Exemption 5 because their disclosure would reveal the agency's "pre-decisional deliberative process." *Id*. at 513-14. Far from establishing a new basis for withholding factual material under Exemption 5, *Ancient Coin* merely applies prior precedent that facts reflecting the deliberations and agency thought process may themselves be deliberative and therefore exempt under the FOIA.

Here, by contrast, the requested records were not "culled" from a "much larger universe of facts." Nor do the requested factual materials represent a "synthesis" or "condensation"[6] of a "massive" body of evidence.[7] And most critically, unlike *Ancient Coin*, they do not reveal judgment or the exercise of discretion[8] but instead, as even the district court conceded, were simply "part of the agency's deliberative process." *TSA,* at *26. This is a far cry from factual material that reflects the deliberations themselves, the narrow exception carved out in *Montrose Chemical* and applied in *Ancient Coin*. Accordingly, the district court erred in holding *Ancient Coin* dictated that the requested materials be withheld under Exemption 5.

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[6] *Montrose Chemical Corp.*, 491 F.2d at 68.

[7] *Petroleum Information Corp.*, 976 F.2d at 1435 n.6.

[8] *Ancient Coin*, 641 F.3d at 514.

D. Accepting The District Court's Analysis Would Threaten The Integrity Of The Decision Making Process And Undermine The Goals Of The FOIA.

Finally, expanding the scope of Exemption 5 to include the kinds of purely factual materials at issue would drastically undermine the purpose of the FOIA and create an exception to disclosure that would encompass virtually any factual material gathered as part of an agency's deliberative process. The underlying purpose of the deliberative process privilege is to protect the efficacy and integrity of agency decision making. Revealing the purely factual components of an agency's decision making process, such as the testing data sought here, will not diminish officials' candor or otherwise injure the quality of agency decisions." *Petroleum Info. Corp.*, 976 F.2d at 1436.

Moreover, virtually every agency decision making process contains some factual component. Protecting that component merely because it is "part of the agency's deliberative process," as the court ruled below,[9] would eviscerate the line between factual and deliberative material carefully drawn by Congress and the courts. This in turn would diminish the quality of the decision making process, as requiring disclosure of factual information makes it "less likely" "an advisor [will] omit or fudge raw facts." *See Quarles v. Dep't of Navy*, 893 F.2d at 392.

[9] *TSA*, at *26; *DHS*, at *35.

This danger is especially acute given the quintessentially factual nature of the material requested here: test results, fact sheets, and data. Agencies consider this kind of material routinely in making decisions, and FOIA requesters seek this kind of material routinely to probe the efficacy and legitimacy of agency decisions. If the public loses access to factual material merely because it was part of the deliberative process, agencies will have no accountability for the quality of their decisions, and the public will be deprived of the evidence it needs to fully evaluate agency decisions.

FOIA was enacted to safeguard the right of citizens to know "what their Government is up to,"[10] and to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[11] Permitting agencies to shroud even the factual components of the decision making processes in secrecy – the direct result of the holdings below – thwarts these goals and undermines the integrity of agency decisions. This Court should therefore continue to recognize the demarcation between facts and deliberations in the deliberative process privilege Congress and prior precedent have established.

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[10] *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

[11] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decisions and rule the factual materials at issue are not properly protected from disclosure under Exemption 5 of the FOIA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: October 15, 2013

/s/ Anne L. Weismann
Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of October, 2013, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 15th day of October, 2013, I caused the required copies of the Brief of *Amici Curiae* to be hand filed with the Clerk of the Court.

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