IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 16-4006

UNITED STATES OF AMERICA
Plaintiff/Appellee,

v.

RANDY JOE METCALF, also known as RANDY JOE WEYKER
Defendant/Appellant.

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF APPELLANT

On Appeal from the United States District Court
For the Northern District of Iowa-Dubuque

No. 2:15-cr-01032-LRR-1
The Honorable Linda R. Reade,
Judge, U.S. District Court

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Dated: December 21, 2016

s/Ilya Shapiro
Ilya Shapiro

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INTEREST OF *AMICI CURIAE*

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

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The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

This case concerns *amici* because it implicates the violation of the right to be free from double jeopardy, as well as the increasing federalization of criminal law, both of which go against the Constitution's protections for individual liberty.

No person other than *amici* or *amici*'s counsel authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The George Zimmerman case was the most recent example of a highly publicized, controversial episode in which a state acquittal results in vociferous public demands for federal re-prosecution under the Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009 ("HCPA"), 18 U.S.C. § 249. There will no doubt be future cases where emotions run high. This Court should hold that § 249(a)(1) is not authorized by the Thirteenth Amendment, because waiting risks that a case will capture the public's imagination in a way that will make it more painful and institutionally costly for the Court to invalidate the provision.

HCPA § 249(a)(1) adds yet another provision to the federal criminal code that will be used by the government to preempt adequate state prosecution or to re-prosecute people who have already been prosecuted by state authorities. The federal government will face enormous public pressure to re-prosecute or preemptively prosecute in the high-profile, racially-charged cases that § 249(a)(1)

often covers, which increases the chances of double prosecutions and the unnecessary expansion of federal criminal jurisdiction.

Instances where state authorities have dealt inappropriately with a crime that § 249(a)(1) prohibits are exceedingly rare. And yet there was considerable pressure on Congress to pass a federal hate-crimes law. Emotions run high in cases in which the defendant is accused of a hate crime. These are exactly the kinds of cases for which the guarantee against double jeopardy was written. Sadly, the government's ability to re-prosecute and take over otherwise adequate prosecution is likely a large part of HCPA's purpose, at least to its supporters. The breadth of § 249(a)(1), which includes all violent crimes in which the perpetrator acts "because of the actual or perceived race, color, religion, or national origin" of the victim, further increases the chances of double prosecution and intrudes on the core police powers of the states. Actual hatred is not an element of the crime.

Although there is a dual-sovereignty exception to the Fifth Amendment's guarantee that persons will not face a second prosecution for the same offense, that exception does not apply to federal re-prosecutions brought under § 249(a)(1). For the reasons discussed in the *amicus* brief of U.S. Civil Rights Commissioners Gail Heriot and Peter Kirsanow, § 249(a)(1) is not a legitimate exercise of authority under Section 2 of the Thirteenth Amendment. The provision does not prohibit slavery or involuntary servitude. Nor is it a prophylactic measure intended to assist

in preventing the return of slavery or involuntary servitude. The federal government thus does not have jurisdiction over the prohibited acts in Section 249(a)(1), and the dual sovereignty rule does not apply to a government that lacks jurisdiction. See *United States v. Lanza*, 260 U.S. 377, 384 (1922).

ARGUMENT

I. THE DUAL-SOVEREIGNTY RULE, WHICH ALLOWS THE UNITED STATES TO SUBJECT AN ACCUSED TO WHAT WOULD OTHERWISE BE DOUBLE JEOPARDY, DOESN'T GIVE CONGRESS INDEPENDENT AUTHORITY TO PASS LEGISLATION

A. Double-Jeopardy Protections and the Explosive Growth of Federal Criminal Jurisdiction Are in Deep Tension with Each Other

The rule against double jeopardy is a cherished right of the American people. Blackstone wrote that it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 W. Blackstone, *Commentaries on the Laws of England* 329 (1769). A quarter-century later that universal maxim was enshrined in the Bill of Rights, which provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 795 (1969) (holding that "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted" and applying the guarantee against the states via the incorporation doctrine).

In *United States v. Lanza*, 260 U.S. 377 (1922), the Supreme Court, by adopting a "dual sovereignty rule," made it clear that the right not to be put twice

in jeopardy is by no means absolute. It held that the federal government cannot be ousted from jurisdiction over a legitimate federal crime by an earlier state prosecution. At least one scholar has taken issue with the dual-sovereignty rule as a matter of original meaning. See Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause*, 41 UCLA L. Rev. 693, 709-15 (1994).[1]

At this point, *amici* note only that, in an earlier day, the dual-sovereignty rule would have been a small exception to an otherwise robust protection against double jeopardy—a mere curiosity. But the reach of federal criminal law has

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[1] Not until *Lanza* was this Court squarely presented with the issue of successive state and federal prosecutions for the same act. *See Abbate v. United States*, 359 U.S. 187, 193 (1959) (successive prosecutions for same act first "directly presented" to the Court in *Lanza*). The Court expressed concern that weak state enforcement could undermine the federal government's ability to enforce Prohibition, which may have significantly influenced the Court to adopt a broad dual-sovereignty rule. *See Lanza*, 260 U.S. at 385; Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. Soc. Change 383, 401 (1986) ["Murchison, *The Dual Sovereignty Exception*"] ("[A]n important force influencing [the *Lanza* Court] was its inclination, as well as the public's, to support enforcement authorities during the early years of prohibition.").

Legislative history shows that Congress did not intend or anticipate a dual-sovereignty exception when it passed the Eighteenth Amendment, and pre-Prohibition legal authorities did not uniformly recognize this exception to double jeopardy. *See* Murchison, *The Dual Sovereignty Exception* at 398; Daniel A. Braun, *Praying to False Sovereigns: The Rule of Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 23 (Fall 1992) (arguing that "the rule permitting successive prosecutions is not a vital or cherished component of the federal system . . . [and] has been the subject of disagreement and doubt"). This Court nevertheless affirmed the dual-sovereignty rule after Prohibition. *See Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

become astonishingly broad of late. *See generally* James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former attorney general Edwin Meese III, chair of the ABA Task Force on Federalization of Criminal Law, there were at least 3,000 federal crimes as of 1997. *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 Fed. Sentencing Rep. 129, 129 (1998). The number of federal crimes has only grown in the intervening two decades.

In most cases, the conduct Congress has added to the list of prohibited activities was already illegal under state law. Indeed, at this point, the overlap is extraordinary and creates the potential for federal re-prosecutions after state acquittals to become a routinely available option. And in many cases, that potential has become a reality.

B. The Federal Government Has Re-Prosecuted Individuals for the Conduct at Issue in Their State Trials, Often After Public Pressure

Consider these high-profile examples: In 1992, four police officers involved in the Rodney King beating were acquitted in state court. Following the L.A. riots and great public pressure, the government filed federal civil rights charges against the four officers. Ultimately, two of the officers were convicted in that case. Jim Newton, *2 Officers Guilty, 2 Acquitted*, L.A. Times, Apr. 18, 1993, at A1.

In 1991, Gavin Cato, a black seven-year-old, was run over and killed by a member of a Hasidic cleric's motorcade in the Brooklyn neighborhood of Crown Heights. Cato's death sparked a riot, and a few blocks from the accident scene a crowd spotted and descended on Yankel Rosenbaum, a history student visiting from Australia, who was stabbed four times and died a few hours later. One of those in the crowd, Lemrick Nelson, was acquitted of Rosenbaum's murder in state court in 1992. Following the acquittal, "Jewish and other civic leaders pressed for federal intervention." Andy Newman, *Penalty in Crown Hts. Case Means a Little More Jail Time*, N.Y. Times, Aug. 21, 2003, at B2. U.S. Senator Alfonse D'Amato "vigorously demanded a Federal grand jury investigation." Joseph P. Fried, *Crown Heights Case "Very Difficult,"* N.Y. Times, Jan. 30, 1994, § 4 at 31. In 1994, the federal government charged Nelson with violating Rosenbaum's civil rights for attacking him because he was Jewish and using a public street. Nelson was convicted 1997 and sentenced to 19 1/2 years in prison, but the conviction was overturned because the judge had gone too far in ethnically balancing the jury. At the second federal trial, Nelson was convicted of stabbing Rosenbaum but not of causing his death, and was sentenced to 10 years in prison. Newman, *supra*, at B2.

After two Pennsylvania men were acquitted in state court of the most serious charges arising from the 2008 beating death of a Mexican immigrant, the federal government won criminal convictions against them for violating the victim's civil

rights under the Fair Housing Act. *United States v. Piekarsky*, 687 F.3d 134 (3d Cir. 2012) (defendants' prosecution not barred on double jeopardy grounds); Sabrina Tavernise, *2 Pennsylvania Men Guilty in 2008 Killing of Mexican*, N.Y. Times, Oct. 15, 2010, at A22. In that case, the Justice Department filed charges following the state trial after public outcry and after Governor Ed Rendell wrote DOJ a letter requesting that it consider bringing civil rights charges against the defendants. *Piekarsky*, 687 F.3d at 139.

Even when the federal government declines to re-prosecute, that decision is made despite strong public pressure to bring charges after a state acquittal. For example, in 2006, eight staff members at the Bay County, Florida, Sheriff's Office Boot Camp, a detention center for young offenders, were charged in the death of 14-year-old Martin Lee Anderson. Video records showed guards coercing Anderson to exercise. All defendants were acquitted of aggravated manslaughter in the state trial. Susannah A. Nesmith, *Boot-Camp Death: 7 Guards, Nurse Acquitted in Boot Camp Death*, Miami Herald, Oct. 13, 2007, at A1. The Florida NAACP organized protests and requested that the Justice Department investigate possible civil rights violations. Stephen D. Price, *Hundreds March Calling for Justice*, Tallahassee Democrat, Oct. 24, 2007, at 1A. After a thorough investigation, DOJ declined to pursue federal charges. Press Release, U.S. Dep't of

Justice, Federal Officials Close the Investigation into the Death of Martin Lee Anderson (Apr. 16, 2010), available at http://bit.ly/2hBPCjm.

Pressure from the other direction has been weak to non-existent. The ACLU, which one might assume would take a stand against double jeopardy in keeping with its traditional role as an advocate for the accused, has had a split personality here. The national and Los Angeles ACLU boards publicly disagreed during the Rodney King trial, with the national board announcing that the federal case should not have been brought and the L.A. board supporting the federal prosecution. Renee Tawa, *ACLU Takes Position at Odds with L.A. Board*, L.A. Times, Apr. 5, 1993, at A20. The ACLU initially called for a federal investigation of George Zimmerman for the shooting death of Trayvon Martin, but later rescinded that position on double-jeopardy grounds in a letter to Attorney General Holder. Josh Gerstein, *ACLU Pulls Statement on Zimmerman*, Politico, July 22, 2013, http://politi.co/2hBIaoh; Letter from Laura W. Murphy & Jesselyn McCurdy, ACLU, to Eric H. Holder, Jr. (July 18, 2013), available at http://bit.ly/2gWRtv7.

In *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 499 (2d Cir. 1995), Judge Guido Calabresi discussed several cases in which the federal government had prosecuted individuals after state acquittals. While he expressed no opinion about the cases' merits, he noted that "there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged

contexts" and that it was "to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted." *Id*. It "is especially troublesome," he stated, "that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern." *Id*.[2]

C. When There Is at Best Only the Most Attenuated Federal Interest at Stake, the Intrusion into State Police Powers and the Potential for Double Prosecutions Impose Unacceptable Burdens on the Criminal Justice System and the Accused's Fundamental Rights

The dual-sovereignty rule is arguably an inevitable byproduct of a federal system. *Amici* do not argue otherwise. But if a dual-sovereignty rule gives the federal government the power to re-prosecute persons who have already been convicted or acquitted in state court for the same conduct, there must be a genuine

[2] Proponents of the federalization of crime argue that the risk of abuse in connection with the dual-sovereignty rule is small. The Justice Department has its own internal guidelines, known as the "*Petite* Policy," after *Petite v. United States*, 361 U.S. 529 (1960), under which double prosecutions are limited to cases that meet certain standards. But the standards are vague and manipulable. For example, they authorize prosecutions whenever "substantial federal interests" have been "unvindicated." These interests are undefined. Moreover, courts have noted that the policy is merely an internal rule and have routinely refused to enforce it on motions from the accused. *See, e.g.*, *United States v. Harrison*, 918 F.2d 469, 475 (5th Cir. 1990) (*Petite* Policy an "internal rule" that "criminal defendants may not invoke"); *accord United States v. Schwartz*, 787 F.2d 257, 267 (7th Cir. 1986); *United States v. Snell*, 592 F.2d 1083, 1087-88 (9th Cir. 1985); *United States v. Ng*, 699 F.2d 63, 71 (2d Cir. 1983); *United States v. Howard*, 590 F.2d 564, 567-58 (4th Cir. 1979); *United States v. Thompson*, 579 F.2d 1184, 1189 (10th Cir. 1978); *United States v. Wallace*, 578 F.2d 735, 740 (8th Cir. 1978). Whatever DOJ determines in any case, the "*Petite* Policy" is not a substitute for the Constitution.

federal interest at stake. At minimum, the criminal statute at issue must be promulgated pursuant to one of Congress's enumerated powers.

The Supreme Court in *Lanza* held that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." 260 U.S. at 382. This rule only applies, however, "'to cases where the act sought to be punished is one over which both sovereignties have jurisdiction.'" *Id*. at 384 (quoting *Southern Ry. Co. v. R.R. Comm'n*, 236 U.S. 439, 445 (1915)). For the reasons discussed in the appellant's brief, as well as the *amicus* brief for Commissioners Heriot and Kirsanow, HCPA § 249(a)(1) is not a legitimate exercise of Congress's authority under the Thirteenth Amendment. Section 249(a)(1) does not prohibit slavery or involuntary servitude. Nor is it a prophylactic measure intended to assist in preventing the return of slavery or involuntary servitude. The federal government thus does not have jurisdiction under the Thirteenth Amendment over the acts proscribed in § 249(a)(1).

If Congress fails to remain within its enumerated powers, this Court must step in. The alternative is a criminal justice system in which federal prosecutors have a blank check to enforce racial justice and due process protections are a cruel joke. Every alleged offense will result in two bites at the apple. If double-jeopardy protections can be so easily dispensed with, what of our other fundamental rights?

II. HATE CRIME LAWS ARE ESPECIALLY LIKELY TO GENERATE DOUBLE PROSECUTIONS DUE TO THEIR EMOTIONALLY CHARGED NATURE AND CONTESTABLE FACTS

A. The Federal Government Often Faces Considerable Pressure to Re-Prosecute High-Profile, Racially Charged Cases, But There Is Scant Evidence That States Fail to Prosecute Them

Emotions run high in cases in which the defendant is accused of a hate crime. These situations are exactly the kind for which prohibitions on double jeopardy were created. Sadly, the fact that the HCPA gives the federal government the power to re-prosecute is likely a large part of the Act's purpose—at least in the minds of some. For example, after the Rodney King and Yankel Rosenbaum acquittals, the government faced enormous public pressure to charge the defendants, with Senator Alfonse D'Amato urging a grand jury investigation in the latter case. Similarly, after the *Piekarsky* defendants were acquitted of the most serious charges in state court, *supra*, the federal government faced public demands, including from Governor Ed Rendell, to re-prosecute them in federal court.

There was considerable pressure to pass a federal hate-crimes law, despite the lack of evidence that state authorities were falling down on the job. In 2007, thousands of demonstrators, led by Al Sharpton and Martin Luther King III, encircled the Robert F. Kennedy Justice Department Building in Washington, demanding that the government "crack down harder on hate crimes." *Rally Urges Hate Crimes Prosecution, New AG Responds*, CNN.com, Nov. 16, 2007,

http://cnn.it/2hK7HaO. The Human Rights Campaign sent 300 clergy from all 50 states to lobby for the bill's passage. Anna Palmer, *A Hate Crime Offensive, But Bill Faces Stiff Opposition*, Roll Call, May 4, 2009, available at http://bit.ly/2hBJt6E. Victims and relatives of victims, in coordination with traditional civil rights and LGBT groups, lobbied, made public appearances, and otherwise helped in the public relations effort to pressure Congress. *See* James Warren, *Hate Crimes Measure Has GOP Senators on the Spot*, Chicago Trib., Oct. 1, 2000, at C2; Andrea Stone, *11 Years After Shepard's Death, Mom Pushes for Hate Crime Law*, USA Today, Sept. 7, 2009, http://usat.ly/2hBF9US.

In spite of the pressure on the federal government to preemptively prosecute or re-prosecute that often arises in racially charged cases, when testifying before a congressional committee, Attorney General Holder was only able to cite one case in which state authorities dealt, in his opinion, inappropriately with a crime that the HCPA prohibits—a 2007 California case in which state hate-crime charges were dismissed (though the two defendants were convicted in state court of misdemeanor assault and battery charges and served four and eight months in jail, respectively). The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Senate Comm. on Judiciary, 111th Cong. 171 (2009) (statement of

Attorney General Eric H. Holder, Jr.).[3] On the other hand, both Wyoming and Texas successfully prosecuted the individuals responsible for the murders of Matthew Shepard and James Byrd, Jr.—for whom the statute was named—and Texas has executed one of Byrd's killers. Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. Times, Nov. 5, 1999, at A1; Allan Turner, *Hate Crime Killer Executed*, Houston Chron., Sept. 21, 2011, http://bit.ly/2hKhLk8. Cases in which state authorities unreasonably fail to bring adequate prosecutions seem to be quite rare, though *amici* believe they occur. The "current burdens" imposed by § 249(a)(1) on the criminal justice system and the fundamental rights of the accused, however, "must be justified by current needs." *Shelby County v. Holder*, 133 S. Ct. 2612, 2619 (2013) ("'the [Voting Rights] Act imposes current burdens and must be justified by current needs'") (quoting *Nw. Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

B. Section 249(a)(1)'s Coverage of Such a Broad Swath of Violent Crime Will Potentially Result in More Double Prosecutions

The fact that § 249(a)(1) is drafted broadly to include all violent crimes in which the perpetrator acts "because of" someone's race, color, religion, or national origin means that it covers a broad swath of crime. And that makes the potential for problems even greater, further increasing the likelihood of double prosecutions.

[3] *See also* George Warren, *Fairfield Couple Convicted Twice for Tahoe Beach Beating*, ABC News10, Mar. 11, 2010, http://bit.ly/2gWXyrf.

"Hate crime" is a misnomer. Hatred is not an element of the offense. For example, a robber who chooses white victims because in his mind they are more likely to have property worth stealing violates § 249(a)(1). Moreover, any violent crime in which racial epithets are uttered can potentially be prosecuted under § 249(a)(1) if federal authorities are so motivated.[4]

Because some hate crimes turn out to be hoaxes or not to be hate crimes at all, hate-crime prosecution may lead to a disproportionate number of acquittals in

[4] While § 249(a)(2) is not at issue here, its breadth should be noted, too. Section 249(a)(2) is premised on the Commerce Clause, not the Thirteenth Amendment and requires an inter-state commerce nexus. It bans violent crimes occurring "because of" someone's "religion, national origin, gender, sexual orientation, gender identity, or disability." But consider: Rapists are seldom indifferent to the gender of their victims, who are always chosen "because of" their gender. A robber might well rob only from the disabled because they are less able to defend themselves. Such victims would literally be chosen "because of" their disability.

University of San Diego law professor (and U.S. Civil Rights Commissioner) Gail Heriot reports that when she inquired of DOJ officials a decade before the HCPA's passage "[t]hey repeatedly refused to disclaim the view that all rape will be covered, and resisted efforts to correct any ambiguity by re-drafting the language." *See* Gail Heriot, *Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill That May Put Double Jeopardy Protections in Jeopardy*, 10 Engage 4 (Feb. 2009). The inclusion of all rape as a "hate crime" would be in keeping with at least one previous congressional statement. For example, Senate Report 103-138, issued in the connection with the Violence Against Women Act, stated that "[p]lacing [sexual] violence in the context of the civil rights laws recognizes it for what it is—a hate crime." *See also* Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 St. John L. Rev. 315 (2001) (arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, Harv. Women's L.J. 157 (1994) (arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act).

state court that are perfectly appropriate. *See*, *e.g.*, *Police: Va. Minister Painted Racial Slurs on House Before Setting It on Fire*, CBS DC, Apr. 4, 2013, http://cbsloc.al/2gWNQp6; Stephen Jimenez, *The Book of Matt: Hidden Truths About the Murder of Matthew Shepard* (2013). The cost of allowing double prosecutions may thus be especially high.

CONCLUSION

This Court should reverse the court below because § 249(a)(1) is an invalid exercise of Congress's power.

Respectfully submitted,

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Dated: December 21, 2016

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 4,041 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. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: December 21, 2016

s/Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system. I also certify that this brief was scanned for viruses using Malwarebytes Anti-Malware Home (Free) 2.2.1.1043.

Dated: December 21, 2016

s/Ilya Shapiro
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