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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ANIMAL LEGAL DEFENSE FUND, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, and AMY MEYER,

Plaintiffs,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah; SEAN D. REYES, in his official capacity as Attorney General of Utah,

Defendants.

BRIEF OF AMICUS CURIAE GOVERNMENT ACCOUNTABILITY PROJECT IN SUPPORT OF PLAINTIFFS

Case No. 2: 13-cv-00679-RJS

Judge: Robert J. Shelby

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STATEMENT OF INTEREST

The Government Accountability Project (GAP) is an independent, nonpartisan, and nonprofit organization that promotes corporate and government accountability by protecting whistleblowers and advancing occupational free speech. GAP advocates for the effective implementation of whistleblower protections throughout industry, international institutions and the federal government, focusing on issues involving national security, food safety, and public health.

GAP defines a "whistleblower" as a person who discloses information that he or she reasonably believes is evidence of illegality, gross waste or fraud, mismanagement, abuse of power, general wrongdoing, or a substantial and specific danger to public health and safety. Whistleblowers use free speech rights to challenge actions or inactions that betray the public trust. Typically, whistleblowers speak out to parties that can influence and rectify the situation. These parties commonly include the media, organizational managers, hotlines, or legislative and Congressional members or staff.

GAP defends employee whistleblowers and offers legal assistance where disclosures affect the public interest. For over 38 years, GAP has represented major whistleblowers who have exposed gross injustices under every presidential administration since the group's inception. GAP is at the forefront of advocating for whistleblower rights and protections, having seen retaliation against such individuals ranging from professional demotions to criminal prosecutions.

In this case, GAP supports Plaintiffs' Motion for Summary Judgment and opposes Defendants' Motion for Summary Judgment. Utah Code § 76-6-112 will have a chilling effect on whistleblowers throughout Utah's agricultural and food production

industry, thwarting the will of Congress to protect whistleblowers and endangering the health and safety of workers and consumers. GAP has a strong interest in being heard on this issue and in preventing that outcome.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Government Accountability Project submits the following identification of corporate parents, subsidiaries and affiliates: NONE.

SUMMARY OF THE ARGUMENT

Contrary to Defendants' claim that the law passed does not discourage whistleblowing, Defs. Br. 21-22, Utah Code § 76-6-112 penalizes disfavored speech and quiets whistleblowers. While commonly referred to as an "ag-gag law," this law's reputation as "anti-whistleblower" is equally well deserved. GAP believes that this law will have a chilling effect on whistleblowing, erase many of the valuable benefits that whistleblowers provide to the public and to law enforcement, and undercut the effectiveness of certain federal whistleblower protection laws.

It silences employee and citizen whistleblowers[1] who seek to expose illegal practices of the agricultural industry and protects agricultural bad actors from being held accountable for wrongdoing. For the state to outlaw their endeavors in the name of "property rights" and "biosecurity" is disingenuous. Especially in the food industry, employment-based undercover investigations serve as critical and unparalleled sources of information to the public. Food is unique in that we all have a stake in the game – everybody eats. Food truth-tellers have historically exposed criminal conduct and wrongdoing in the agricultural industry. To lose the benefit of these investigations would

[1] Citizen whistleblowers are civic-minded members of the public who observe and report wrongdoing. *See* Plaintiffs ' Rule 26(a)(2) Disclosure of Report of Expert Thomas Devine, ECF #83, Attachment A, p. 2-3, *see also*, Joint Hearing on: "Is Government Adequately Protecting Taxpayers from Medicaid Fraud?" Before the H. Subcommittee on Health Care, District of Columbia, Census and the National Archives and the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending of the House Committee on Oversight and Government Reform, 111th Cong. (2012) (statement of Claire Sylvia), oversight.house.gov/wp-content/uploads/2012/04/4-25-12-Sylvia-Testimony.pdf (discussing critical role of citizen whistleblowers in combatting fraud).

blind consumers and prevent them from making informed decisions about the food they and their families eat.

Utah Code § 76-6-112 prohibits, among other things, recording any images or sounds from an agricultural operation without the owner's consent. *See* Utah Code § 76-6-112(2)(a),(c). By criminalizing unauthorized audiovisual recording, Utah Code § 76-6-112 bans an entire medium of expressive communication and targets a particular viewpoint on a matter of public concern. It will chill whistleblowers from documenting and reporting workplace violations and punish, as criminals, those who do. It cannot withstand strict scrutiny under the First Amendment. Moreover, given its self-authenticating nature, audio and visual evidence is a uniquely persuasive means of conveying a message, and it can vindicate a whistleblower who is otherwise disbelieved or ignored. There are no sufficient alternative means for this type of communication.

Finally, the law conflicts with several federal whistleblower protection laws which protect a whistleblower's right to capture audio and video evidence in the agricultural industry through recording.

BACKGROUND

I. Whistleblowers Serve a Vital Function in Our Representative Democracy

Whistleblowing has a long tradition in this country of fostering transparency and accountability in government and industry, resulting in legislative and regulatory change that benefits workers, consumers, and the public. Because employees often stand in the best position to see wrongdoing in the workplace, they play a unique and vital role in helping the government detect workplace fraud, abuses, and violations of law that would otherwise go undetected. Where, as in the agricultural industry, employees have been

reluctant or unable to disclose abuses, citizen whistleblowers fill a necessary gap in informing the public about wrongdoing.

More than 150 years ago, during the Civil War, Congress recognized that the Government needed help in ferreting out corruption by government contractors. In 1863, the False Claims Act was enacted, which included a *qui tam* provision that empowered – essentially deputized – insiders to curb contractor corruption on the Government's behalf. 31 U.S.C. §§ 3729-3733. Often regarded as the government's most effective tool for combating contracting fraud, the Act was an early acknowledgement that whistleblowing can promote good governance, efficiency, transparency, and accountability. It survives, with strengthened whistleblower protections, to this day.

In recognition of the important role of whistleblowers, Congress has increasingly included whistleblower provisions in major federal legislation. In 1986, Congress re-visited the False Claims Act to include a provision that prohibited retaliation against employee whistleblowers, which was extended in 2009 to include agents and contractors. 31 U.S.C. § 3730(h). In 1989, the Whistleblower Protection Act was enacted to protect federal employees from adverse employment actions based on their disclosure of misconduct or corruption in the workplace. 5 U.S.C. § 2302. In 2002, following a cascade of high-profile corporate fraud scandals that culminated in the collapse of Enron, Congress passed the Sarbanes-Oxley Act, which imposed new or enhanced reporting and accountability standards for public companies, and included provisions that prohibit retaliation against whistleblowers who report securities fraud. 18

U.S.C. § 1514A. To date, on the federal level alone, there are 58 federal laws[2] protecting those who speak out about abuse.[3]

Recently, these protections were extended to many employees in the agricultural industry. In 2011, after a string of high-profile cases of food-borne illnesses sickening hundreds, the Food Safety Modernization Act (FSMA) was signed into law to give the Government more power to combat contamination in the nation's food supply. To assist in that mission, FSMA contains strong protections for employees who disclose violations of the Food, Drug & Cosmetics Act by companies engaged in "the manufacture, processing, packing, transporting, distribution, reception, holding or importation of food." 21 U.S.C. § 399d. Employees have been slow to take advantage of this new law. In the first year of FSMA's enactment, only 11 complaints were filed under the Act.[4] This number rose to only 71 complaints in FY2015.[5]

Several factors may explain an employee's hesitance to report wrongdoing. In the agricultural industry, powerful corporations exert tremendous pressure to keep their

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[2] *See* Plaintiffs' Rule 26(a)(2) Disclosure of Report of Expert Thomas Devine, ECF #83, Attachment A, p. 2.

[3] Moreover, a worker's affiliation with ALDF, PETA or any other group in no way diminishes the apparent conflict between Utah Code § 76-6-112(2) and existing whistleblower protection laws. In determining whether an employee is covered under a whistleblower law, the only relevant questions are whether the worker was an "employee" of a covered employer, and whether they engaged in protected activity. Similarly, the Department of Labor has explicitly stated that an employee's motive is irrelevant in determining whether that employee is protected by these whistleblower provisions. *See Collins v. Village of Lynchburg, Ohio*, ARB No. 07-079, ALJ No. 2006-SDW-03 (ARB Sept. 29, 2006).

[4] Whistleblower Investigation Data, U.S. Dept. of Labor, Occupational Health and Safety Administration, http://www.whistleblowers.gov/wb_data_FY05-15.pdf.

[5] *Id.*

employees quiet, consequently allowing systemic wrongdoing to continue unabated. In the absence of employee disclosures, the work of Plaintiffs has shone a light on that secretive world and exposed wrongdoing. Like employee whistleblowing, citizen whistleblowing is well-recognized and protected by U.S. and international law. For example, the Dodd-Frank whistleblower provisions for Securities and Exchange Commission disclosures, 15 U.S.C. §78u-6, are available to any witness, not just employees. Similarly, any witness can file a lawsuit under the False Claims Act, 31 U.S.C. §3729, to challenge fraud in government contracts.[6]

Those who report misconduct and workplace violations in this area should be encouraged to come forward and should not be punished when they do. These and other protections are needed now more than ever. Armed with only a small mobile device and an internet connection, in the last decade journalists, activists, and whistleblowers have exposed illegal practices in agriculture production facilities by recording and publicizing those practices, stirring a robust public debate about the conditions under which our nation ‘s food is produced.

Whistleblowers provide key voices in that debate, closing the enforcement loop between regulators and Congress. As Justice Brandeis famously wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[7] In passing this law,

[6] *See* Plaintiffs’ Rule 26(a)(2) Disclosure of Report of Expert Thomas Devine, ECF #83, Attachment A, p. 2.

[7] Louis D. Brandeis, Other People’s Money 92 (Frederick A. Stokes Co. 1914).

however, Utah has chosen to dim the lights, muffle the debate, and punish those who expose wrongdoing.

II. Utah's Enactment of an "Ag-Gag" Law: A Trend to Criminalize Whistleblowing

In recent years, GAP has observed a disturbing increase in criminal prosecutions of whistleblowers, often initiated by complaints filed by their employers with law enforcement officers.[8] By providing employers in the agricultural industry a basis for seeking prosecutions of their employees, Utah 's Ag-Gag law effectively adds another tool to the list of threats supervisors in agricultural operations can use to silence any potential whistleblowers among their rank and file. Such harassment and abuse of the legal system must not strand and has already been criticized by the courts.[9]

This new law will silence those who wish to publicize abusive, unsafe, and unsanitary practices in an industry that has a critical role in public health. More specifically, it will discourage whistleblowers from coming forward out of fear of prosecution. In this way, it conflicts with federal law and policy that encourages whistleblowing as a much needed gap-filler in government oversight and values profits at the expense of the public's health.

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[8] *See, e.g*., Natalie Singer, *Was Inspector Source of Leak at Boeing?*, Seattle Times (Mar. 26, 2008) (describing Boeing's involvement in prosecution of whistleblower who disclosed records concerning quality control violations); Kevin Sack, *Whistle-Blowing Nurse is Acquitted in Texas*, N. Y. Times (Feb. 11, 2010) (describing felony trial of whistleblower who disclosed evidence of doctor 's fraud and malpractice to state medical licensing board).

[9] *See ALDF v. Otter*, 118 F. Supp.3d 1195 (D. Idaho Aug. 3, 2015) (striking down law, appeal pending); *ALDF v. Herbert*, No. 13-00679, Dkt. No. 53 (D. Utah Aug. 8, 2014)(denying motion to dismiss); *W. Watersheds Project v. Michael*, No. 15-0169, Dkt. No. 40 (D. Wyo. Dec. 28, 2015)(same).

ARGUMENT

I. Utah Code § 76-6-112 Targets a Means of Expression and a Message, Will Chill Whistleblowing, and Violates the First Amendment

Utah Code § 76-6-112 prohibits three categories of nonconsensual recording: (1) recording by "leaving a recording device on the agricultural operation," (2) applying "for employment at an agricultural operation with the intent to record," and then recording the premises "while employed," and (3) recording an agricultural operation while "committing criminal trespass." Utah Code Ann. § 76-6-112 (2)(a), (b) and (d). While GAP is confident that Plaintiffs and amici will press many other procedural and substantive arguments, GAP wishes to be heard here on the law's recording provisions which will have a particularly negative impact on whistleblowing.

A. Banning Audio and Visual Recording Strikes at the Heart of Speech that is protected by the First Amendment

The sweep of these provisions is breathtaking and contrary to Defendants' claims, extends far beyond simply criminalizing wiretapping, trespass and fraud. Moreover, the narrow reading Defendants give to employee whistleblowing grossly underestimates the scope of employee disclosures. ("Nothing in the Act prevents an earnest employee, one who did not seek employment with intent to surreptitiously record the operation or conceal his or her qualifications and background, from documenting animal abuse or health and safety violations inside and agricultural facility through audio and video recordings.") Despite what Defendants argue, the law is certain to "prevent" employees from documenting violations.

To convict a defendant under Utah Code § 76-6-112 (2)(a) or (c), the State need not prove that the defendant entered a production facility under false pretenses or

trespass. The State is also relieved of proving an intent to injure or harm. Therefore, any employee who has permission to be on the property who makes a recording of the "image of, or sound from, the agricultural operation" without authorization, could be prosecuted and convicted. In effect, the law bans *all* video and audio recording of agricultural operations taken without management's consent or knowledge. This provision strikes at the heart of the First Amendment.

Whistleblowers' ability to collect and preserve concrete, smoking-gun evidence of wrongdoing makes them an especially effective and beneficial aide to law enforcement. To this end, the courts and agencies charged with administering the various whistleblower laws have interpreted these laws to protect not only the reporting of violations, but also the collection of evidence of those violations. *See, e.g., United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998) (interpreting the False Claims Act 's anti-retaliation provision); *Haney v. N. Am. Car Corp*., 81-SDW-1, slip op. at 4 (Sec 'y June 30, 1982) (interpreting Safe Drinking Water Act whistleblower provision to protect employee 's tape recording of evidence of violation); *Mosbaugh v. Georgia Power Co*., 91-ERA-1 and 11, slip op. at 7-8 (Sec 'y Nov. 20, 1995) (employee 's secret tape recording of evidence protected under Energy Reorganization Act whistleblower provision). Photographs and audiovisual recordings, given their self-authenticating nature, are a uniquely powerful form of evidence. *See ACLU v. Alvarez*, 679 F.3d 585, 607 (7th Cir. 2012) (characterizing audiovisual recordings as an irreplaceable form of speech with no adequate substitute).

(1) *Utah Code § 76-6-112 regulates protected speech*

The recording of sound and images is not done for its own sake; it is the first step in a process that results in the communication of a message to others. In this way, the act of audiovisual recording is "necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Alvarez*, 679 F.3d at 597.

Moreover, "regulation of a medium [of expression] inevitably affects communication itself." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (invalidating an ordinance banning residential signs). The Supreme Court has held that conduct that *facilitates* speech, such as monetary contributions to political candidates, is protected by the First Amendment. *See*, *e.g.*, *Citizens United v. FCC*, 558 U.S. 310, 336 (2010) ("laws enacted to control or suppress speech may operate at different parts in the speech process."). As the Seventh Circuit has aptly stated,"[c]riminalizing all nonconsensual audio recording necessarily limits the information that might later be published or broadcast — whether to the general public or to a single family member or friend — and thus burdens First Amendment rights." *Alvarez*, 679 F.3d at 597; *see also Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (finding a violation of a defendant's First Amendment rights for a prosecution based on the recording of police officers).

(2) *Utah Code § 76-6-112 is not content-neutral*

Any law that suppresses, disadvantages, or imposes differential burdens on speech because of its content is subject to strict scrutiny. *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). "[E]ven a regulation neutral on its face may be content

based if its manifest purpose is to regulate speech because of the message it conveys." *United States v. Eichman*, 496 U.S. 310, 315 (1990).

Here, Utah Code § 76-6-112 applies only to one type of content: recordings showing activities inside agricultural operations. It does not ban recordings of any other subjects at any other places. And because the law gives agricultural operation owners veto power, effectively turning them into state-backed censors, the necessary effect of the law is to burden speech that is negative or critical. Therefore, the manifest purpose of this provision is to regulate speech because of its content and the message it conveys, and to tip the scales to one side of the public debate. Consequently, the Court must view Utah Code § 76-6-112(2) through a strict scrutiny lens.

For these reasons, Utah Code § 76-6-112 must be justified by a compelling State interest and must be narrowly tailored to advance that interest. It cannot survive that level of review.

(3) *Utah Code § 76-6-112 is not narrowly tailored to further a compelling state interest, and the speech it prohibits is of core significance*

Regardless of whether the State has an interest in protecting the property and privacy of agricultural operation owners, as Defendants claim, Utah Code § 76-6-112 is not narrowly tailored to further that interest. There is no requirement that, for criminal liability, the person who records the activity first gain access by false pretenses or even trespass in all instances. Indeed, there is no requirement that the person making the audio or visual recording have any intent to interfere with the property owner's interests. The law does not penalize only those recordings that are intentionally false, and, in any

event, Utah has civil laws, such as defamation (Utah Code § 76-9-404), that are much better suited to remedying the harms from those violations.

Neither does the law penalize workers for "undermin[ing] biosecurity" at plants, *see* Defs. Br. at 16, or in any meaningful way deter anyone other than those wishing to disclose wrongdoing from entering the facilities. There is no requirement, for example, that all workers applying to agricultural operations be trained previously in biosecurity protocol.

Instead, the law completely prohibits the use of an entire medium that is potent and has played an irreplaceable role in helping whistleblowers expose workplace fraud, abuses, and violations of law. The effect of these provisions, which effectively make it a crime to document and report a crime, on whistleblowing will be immense. Indeed, this is surely why the agricultural industry sought the law's implementation.

B. There is No Adequate Alternative for Audio and Visual Recording

Audiovisual recording is a uniquely powerful means of communication. *See Alvarez*, 679 F.3d at 607.

As effective as Upton Sinclair's *The Jungle* was in the era of print media, video and audio recordings have an even greater impact in the modern era. Recordings made by employees without the knowledge or consent of their employers, those who are targeted by this law, are especially reliable, since the recorded behavior is untainted by the employer's knowledge that the company's conduct is being memorialized.

Video evidence has provided some of the strongest proof of violations that affect public health and consumer safety. For instance, in 2008, the Humane Society of the United States (HSUS) released video recorded by employees working in the

Westland/Hallmark Meat Company that showed workers introducing sick and diseased cattle ("downer cows") into the nation's meat supply. The video led to the largest recall of ground beef in history and a $155 million settlement under the False Claims Act.[10]

Around that same time, Dr. Dean Wyatt, a Public Health Veterinarian with the USDA Food Safety and Inspection Service, repeatedly reported to his superiors that animals were being mistreated at a processing plant in Oklahoma. He was ignored and eventually transferred to Vermont. Once there, he witnessed similar violations at a different plant. After his reports were again ignored by the agency, HSUS conducted an investigation and released a video documenting the abuse. Armed with video that vindicated his disclosures, Dr. Wyatt was asked to present testimony to Congress concerning systemic disregard for the law within the industry and the agency tasked with overseeing it.[11] Supported by this video, Dr. Wyatt's compelling testimony led to changes in the agency's approach to enforcing the laws governing treatment of animals in slaughter facilities.

In addition to these investigations, videos shot by employees of henhouses have increased awareness of battery cages and have led to laws barring inhumane practices.[12] And this is not just an animal welfare issue. When laws prevent recording,

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[10] Associated Press, *California: Deal Reached in Suite Over Animal Abuse,* N. Y. Times, Nov. 27, 2013, www.nytimes.com/2013/11/28/us/california-deal-reached-in-suit-over-animal-abuse.html?ref=westlandhallmarkmeatcompany.

[11] Cody Carlson, *A Call for USDA Vigilance in Treatment of Food Animals*, The Atlantic, Aug. 31, 2012, www.theatlantic.com/health/archive/2012/08/a-call-for-usda-vigilance-in-humane-treatment-of-food-animals/261836/.

[12] Stuart Pfeiffer, *California 's egg-farm law prompts a push for national standards*, L.A.Times, May 27, 2012, articles.latimes.com/2012/may/27/business/la-fi-egg-farms-20120527.

they stop environmental whistleblowing, public health whistleblowing and workers' rights whistleblowing.[13] Without an employee's 'right to tell,' consumers are necessarily deprived of their 'right to know.' Unrelated to agriculture, but related to public health, video evidence of mistreatment at nursing homes has led to a law that encourages the use of cameras in long term care facilities.[14]

Utah Code § 76-6-112 undercuts the viability of this important variety of speech, threatening to undo the significant contributions made by whistleblowers discussed above and prevent future debate and oversight of this industry 's conduct by the public and the government. It is unconstitutional, and the Court should enjoin its enforcement.

II. Utah Code § 76-6-112 Undermines the Effectiveness of Federal Whistleblower Protection Laws

The whistleblower protections in the federal False Claims Act, 31 U.S.C. § 3730(h), the Clean Water Act, 33 U.S.C. § 1367, and the Food Safety and Modernization Act, 21 U.S.C. § 402, protect an employee's right to gather evidence, including audio and video evidence of their employer's wrongdoing. Utah Code § 76-6-112 makes it unlawful to collect such evidence.

The False Claims Act's anti-retaliation provision, 31 U.S.C. § 3730(h), has been construed to protect the gathering of evidence of an employer's fraud. *See*, *e.g*., *United*

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[13] *See, e.g*., Chris D'Angelo, *Undercover Video Shows 'Hideous' Conditions At Maine Egg Facility*, Huffington Post, June 9, 2016, http://www.huffingtonpost.com/entry/humane-society-video-maine-egg-facility_us_5758af84e4b0e39a28ac8ae2

[14] Debra Cassens Weiss, *"Granny cam" law aimed at curbing nursing-home abuse takes effect in Oklahoma*, ABA Journal, Nov. 20, 2013, www.abajournal.com/news/article/granny_cam_law_aimed_at_curbing_nursing-home_abuse_takes_effect_in_oklahoma.

States ex. rel. Yesudian v. Howard Univ., 153 F.3d 731, 740 (D.C. Cir. 1998). Similarly, the Department of Labor, which administers the anti-retaliation provisions of the Food Safety Modernization Act and the Clean Water Act, has held that collecting evidence of wrongdoing is protected activity for which the employer may not retaliate. *See*, *e.g*., *Mosbaugh v. Georgia Power Co*., 91-ERA-1 and 11, slip op. at 7-8 (Sec 'y Nov. 20, 1995) (secret tape recording of evidence protected); *Haney v. North American Car Corp*., 81-SDW-1, slip op. at 4 (Sec 'y June 30, 1982) (tape recording of evidence protected). These laws would be thwarted if, though protected from termination or other adverse employment actions, whistleblowers would nonetheless be subject to criminal prosecution for the very same protected conduct.

CONCLUSION

When whistleblowers are afraid to come forward, those who are of a mind to violate the law can do so without fear of exposure. Incentives are perverted, oversight breaks down, and the public's health is at greater risk. GAP respectfully requests that this Court should grant Plaintiff's Motion for Summary Judgment and grant them the relief that they seek.

Respectfully submitted this 15th day of June, 2016.

/s/_____
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/s/ Sarah L. Nash
Sarah L. Nash*
Government Accountability Project
Food Integrity Campaign
**Pro Hac Vice* Application Pending

Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of June 2016, I electronically filed this Brief with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to all counsel of record.

/s/
Lawrence Sleight