

No. 13-4429

In the United States Court of Appeals for the Third Circuit

TARA KING, et al.,

Plaintiffs/Appellants

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey,
in his official capacity, et al.,

Defendants/Appellees

and

GARDEN STATE EQUALITY,

Intervenor-Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

**BRIEF OF AMICUS CURIAE
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE**

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	v
RULE 29(C)(5) STATEMENT	v
CONSENT TO FILE AS <i>AMICUS CURIAE</i>	v
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	1
I. Both Beneficial and Harmful Medical Treatments Have Been Delivered in the Name of Religion.	2
II. The Government Has the Right and Obligation to Regulate Harmful Practices, Irrespective of Whether Those Practices Are Religiously Motivated.	6
III. Religious Groups May Disagree about the Wisdom of SOCE, But the Scientific Community Reflects No Such Divergence of Opinion.	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)	14
CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK	14
CERTIFICATE OF BAR MEMBERSHIP	15
CERTIFICATIONS OF FILING AND SERVICE	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Anspach v. City of Philadelphia,</i> 503 F.3d 256 (3d Cir. 2007)	9
<i>Cent. Rabbinical Cong. of the USA & Canada, v. N.Y.C. Dep't of Health & Mental Hygiene,</i> No. 12-cv-7590, 2013 U.S. Dist. LEXIS 4293 (S.D.N.Y. Jan. 10, 2013).....	9
<i>Church of Lukumi Babalu Aye v. Hialeah,</i> 508 U.S. 520 (1993).....	12
<i>Dent v. West Virginia,</i> 129 U.S. 114 (1889).....	7, 8
<i>Edwards v. Aguillard,</i> 482 U.S. 578 (1987).....	6
<i>In re D.L.E.,</i> 645 P.2d 271 (Colo. 1982).....	10
<i>In re Eric B.,</i> 189 Cal. App. 3d 996, 235 Cal. Rptr. 22 (Cal. Ct. App. 1987)	10
<i>In re Hamilton,</i> 657 S.W.2d 425 (Tenn. Ct. App. 1983).....	10
<i>In re Sampson,</i> 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970), <i>aff'd</i> 37 A.D.2d 668 (N.Y. App. Div. 1971).....	10
<i>Jehovah's Witnesses of Wash. v. King Cnty. Hosp.,</i> 278 F. Supp. 488 (W.D. Wash. 1967), <i>aff'd mem.</i> 390 U.S. 598 (1968) (per curiam)	10
<i>Muhlenberg Hosp. v. Patterson,</i> 128 N.J. Super. 498, 320 A.2d 518 (1974).....	10
<i>People v. Vogelgesang,</i> 221 N.Y. 290 (1917).....	7

<i>State v. Perricone</i> , 37 N.J. 463, 181 A.2d 751 (1962)	10
<i>Truitt v. Board of Public Works</i> , 221 A.2d 370 (Md. 1966)	2
<i>United States v. Article or Device "Hubbard Electrometer,"</i> 333 F. Supp. 357 (D.D.C. 1971).....	4, 7
<i>Workman v. Mingo Cnty. Bd. of Educ.</i> , 419 F. App'x 348 (4th Cir. 2011)	9
STATUTES	
24 R.C.N.Y. § 181.23.....	9
N.J. ADMIN. CODE § 13:35-2A.17 (2014).....	8
N.J. STAT. ANN. § 45:9-6 (2013)	7
OTHER AUTHORITIES	
A.M.A. PRINCIPLES OF MED. ETHICS §5 (2001)	8
A.P.A. ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT §2.04 (2010)	8
AM. PSYCHIATRIC ASS'N, OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS, WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 61 (2009 ed.)	12
AM. PSYCHOLOGICAL ASS'N, REPORT ON THE AMERICAN PSYCHOLOGICAL TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 77 (2009)	12, 13
Seth M. Asser, M.D. & Rita Swan, Ph.D., <i>Child Fatalities From Religion-motivated Medical Neglect</i> , 101 No. 4 Pediatrics 625 (Apr. 1998).....	4
CODE OF ETHICS OF NAT'L ASS'N OF SOC. WORKERS §4.01(c).....	8
Hamilton, <i>Patterns of Hospital Ownership and Control</i> (1960)	2
James Randi, <i>The Faith Healers</i> 207 (Prometheus Books 1987).....	3

Jerry A. Coyne, Ph.D., <i>More children killed by religiously-based medical neglect, Why Evolution Is True</i>	5
Joy Buck, <i>Reweaving a Tapestry of Care: Religion, Nursing, and the Meaning of Hospice, 1945-1978</i>	2
Megan Romer, <i>How and why did Bob Marley die?</i> , About.com	4
National Gay and Lesbian Task Force, <i>National Religious Leadership Roundtable Rejects Reparative Therapies</i> (Aug. 3, 2011)	11
Pope Brock, <i>Charlatan: America's Most Dangerous Huckster, The Man Who Pursued Him, And the Age of Flimflam</i> (Crown Publishers 2008)	3
Stacey A. Tovino, <i>Hospital Chaplaincy under the HIPAA Privacy Rule: Health Care or “Just Visiting the Sick”?</i> , 2 Ind. Health L. Rev. 49 (2005)	2
United Church of Christ, <i>Resolution “Calling on UCC Congregations to Covenant as Open and Affirming”</i> (1985)	11

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Americans United for Separation of Church and State certifies that it is a not-for-profit corporation, and that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

RULE 29(C)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person – other than the *amicus curiae*, its members, or its counsel – contributed money intended to fund the preparation or submission of this brief.

CONSENT TO FILE AS *AMICUS CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that seeks to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters, including several thousand within this Circuit.

ARGUMENT

Religious groups and individuals have played a vital role in the delivery of healthcare in this country. Much good has come of that. But mischief, too, has resulted. History reveals countless examples of harmful or ineffective treatments being delivered by charlatans for financial gain or by sincere practitioners professing divine inspiration.

The State not only can, but must, fulfill its duty to protect the public by regulating such harmful “healthcare,” whether delivered in the name of religion or otherwise. Because Sexual Orientation Change Efforts therapy (“SOCE”) lacks a scientific basis and is harmful to children, New Jersey has legitimately declined to allow Appellants to use their state-granted professional license to provide the treatment to minors.

I. Both Beneficial and Harmful Medical Treatments Have Been Delivered in the Name of Religion.

Religious institutions have played an indispensable role in the development of our nation's healthcare system. In colonial times, ministers often would study medicine as part of their theological training, to enable them to provide medical as well as pastoral care to people wherever they served. See Stacey A. Tovino, *Hospital Chaplaincy under the HIPAA Privacy Rule: Health Care or "Just Visiting the Sick"?*, 2 Ind. Health L. Rev. 49, 61 (2005). The modern hospice originated from Christian centers where travelers, as well as the poor, ill and dying, could find comfort. See Joy Buck, *Reweaving a Tapestry of Care: Religion, Nursing, and the Meaning of Hospice, 1945-1978*, 15 Nursing History Rev. 113, 114-15 (2007). By 1930, there were over 600 Catholic hospitals. Tovino, *supra*, at 63-64. In 1956, church-affiliated hospitals accounted for more than one out of six hospitals, and admitted over one-fourth of all hospital patients. *Truitt v. Board of Public Works*, 221 A.2d 370, 403 (Md. 1966), citing Hamilton, *Patterns of Hospital Ownership and Control*, 90 (1960). The trend has continued; today, religiously affiliated hospitals provide care across the country, and maintaining the health and safety of children has long been a part of their mission.

Not surprisingly, medical questions often implicate matters of faith. Hospital chaplains and prayer rooms offer comfort to patients and loved ones. Patients and family members consult religious figures and sources in addressing,

for example, whether to be circumcised, to use contraception, and to withhold or withdraw treatment near the end of life.

Much harm can result, however, when religious tenets replace medical science as the basis for making healthcare decisions. With the passage of time, we can allow ourselves to be amused, for example, at the story of Dr. John R. Brinkley, the self-described “scientist-fundamentalist” who after the Scopes trial in 1925 achieved fame and fortune by promising to restore male virility by injecting goat glands into the scrotum. Pope Brock, *Charlatan: America’s Most Dangerous Huckster, The Man Who Pursued Him, And the Age of Flimflam* (Crown Publishers 2008).

Then there was the dental huckster dubbed “The Psychic Dentist”:

The Reverend Willard Fuller, of Palatka, Florida, says he can insert dental fillings without drilling or even opening his client’s mouth, turn ordinary silver fillings and crowns into gold, straighten crooked teeth, tighten dentures, cure periodontal disease, and grow new teeth in his clients – all just by calling upon Jesus to do it. He says:

Sometimes you can watch a cavity fill up right in front of your eyes. You can actually see silver, gold or porcelain coming up until the whole cavity is full. It’s amazing!

James Randi, *The Faith Healers* 207 (Prometheus Books 1987).

While Brinkley and Fuller may have been chasing their patients’ wallets, not their patients’ health, others have acted with more sincere religious motivations but with equally ineffective outcomes. The Church of Scientology, for example, has long maintained that “many illnesses may be cured through E meter auditing by its

trained ministers through an appeal to the spirit or soul of a man,” even though “there is absolutely no scientific or medical basis” for the claim. *United States v. Article or Device “Hubbard Electrometer,”* 333 F. Supp. 357, 359 (D.D.C. 1971).

Some of these religiously inspired approaches to medical conditions can have tragic results. For example, Rastafarians reject the possible medical benefit of amputation based upon Leviticus 21:5: “They shall not make baldness upon their head, neither shall they shave off the corner of their beard, nor make any cuttings in their flesh.” Indeed, it is reported that Rastafarian reggae legend Bob Marley rejected a recommendation to amputate a toe containing a malignant melanoma, a condition from which he eventually died. Megan Romer, *How and why did Bob Marley die?*, About.com, <http://worldmusic.about.com/od/genres/f/BobMarleyDeath.htm>.

Adults, of course, are not the only ones who can be placed at risk when religion replaces science as a basis for healthcare decisions. A 1998 study identified 172 children who died between 1975 and 1995 when their parents withheld medical care in favor of religious rituals. Seth M. Asser, M.D. & Rita Swan, Ph.D., *Child Fatalities From Religion-motivated Medical Neglect*, 101 No. 4 Pediatrics 625 (Apr. 1998). The authors found that 140 fatalities were from conditions for which survival rates with medical care would have exceeded 90%. *Id.* at 626. A subsequent, separate investigation by a television station in Oregon

reported that at least twelve children had died in Idaho between 2011-2013 from medical neglect attributable to The Followers of Christ and The Church of the Firstborn. Jerry A. Coyne, Ph.D., *More children killed by religiously-based medical neglect, Why Evolution Is True, available at* <http://whyevolutionisttrue.wordpress.com/2013/11/16/more-children-killed-by-religiously-based-medical-neglect>.

Individual examples are heartbreaking. When a two-year-old child aspirated on a banana, the parents enlisted other church members in prayer for an hour while the child still showed signs of life. Asser & Swan, *supra*, at 626. In another case, a father had a medical degree and had completed a year of a residency before joining a church opposed to medical care; when his five-month-old son experienced difficulty breathing after several days of running a fever, the father claimed to have “rebuked the spirit of death” when the child “perked right back up and started breathing.” *Id.* The child died the next day from bacterial meningitis. *Id.*

So while religion has played a vital role in ensuring the provision of medical care to the infirm, and continues to provide a source of guidance to people confronting difficult healthcare decisions, it also has been the cause of heedless physical injury and suffering that medical science reliably can avoid or address.

II. The Government Has the Right and Obligation to Regulate Harmful Practices, Irrespective of Whether Those Practices Are Religiously Motivated.

The law draws a clear distinction between science and religion. Thus, a Louisiana statute that required the teaching of “creation science” alongside evolution violated the Establishment Clause, because “creation science” is a religious belief while evolution is a scientific theory. *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). Accordingly, a Sunday school teacher may teach Genesis to explain the origins of life, but a state-licensed public-school science teacher may not equate creationism with evolution.

Religion lays no more claim to the practice of medicine than it does to natural science, as articulated by then-Judge Cardozo, almost a hundred years ago, in upholding the conviction of a spiritualist for the illegal practice of medicine:

[T]hings were done by this defendant which no good faith could justify. He combined faith with patent medicine. ‘If he invoked the power of the spirit, he did not forget to prescribe his drugs. ‘It is beyond all question or dispute,’ said Voltaire, ‘that magic words and ceremonies are quite capable of most effectually destroying a whole flock of sheep, if the words be accompanied by a sufficient quantity of arsenic.’ (Morley’s Critical Miscellanies, III, p. 17).’ The law, in its protection of believers, has other cures in mind. The tenets to which it accords freedom, alike of practice and of profession, are not merely the tenets, but the *religious* tenets, of a church. The profession and practice of the religion must be itself the cure. The sufferer’s mind must be brought into submission to the infinite mind, and in this must be the healing. The operation of the power of spirit must be, not indirect and remote, but direct and immediate. If that were not so, a body of men who claimed divine inspiration might prescribe drugs and perform surgical operations under cover of the law. While the

healer inculcates the faith of the church as a method of healing, he is immune. When he goes beyond that, puts his spiritual agencies aside and takes up agencies of the flesh, his immunity ceases. He is then competing with physicians on their own ground, using the same instrumentalities, and arrogating to himself the right to pursue the same methods without the same training.

People v. Vogelgesang, 221 N.Y. 290, 292-93 (1917) (emphasis in original).

Similarly, after finding that the medical benefits of E-meter auditing lack any scientific basis, Judge Gerhard Gesell ordered that the device be used only for “bona fide religious counseling” and that “any person using it for auditing or counseling of any kind is forbidden by law to represent that there is any medical or scientific basis for believing or asserting that the device is useful in the diagnosis, treatment or prevention of any disease.” “*Hubbard Electrometer*,” 333 F. Supp. at 364.

Just as a court can instruct a cleric not to hold himself out as a doctor, and can order a Scientologist not to portray her religious device as a medical one, a state can direct a state-licensed practitioner to forgo treatments that lack any basis in scientific fact. Indeed, that is the very *quid pro quo* of obtaining a state license in the first place: the license certifies a requisite level of scientific knowledge in a practitioner’s area of expertise. “[I]t has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely.” *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *see also* N.J. STAT. ANN. § 45:9-6 (2013) (stating the

educational, citizenship, and character requirements for a licensee to practice medicine or surgery in New Jersey). “Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.” *Dent*, 129 U.S. at 122-23.

The obligation that mental-health professionals maintain a requisite level of scientific knowledge, and inform their practice accordingly, likewise appears in ethical rules. The American Medical Association requires physicians, including psychiatrists, “to study, apply, and advance scientific knowledge, [and] maintain a commitment to medical education.” A.M.A. PRINCIPLES OF MED. ETHICS §5 (2001). Psychologists must base their work “upon established scientific and professional knowledge of the discipline.” A.P.A. ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT §2.04 (2010). And social workers must base their “practice on recognized knowledge, including empirically based knowledge, relevant to social work and social work ethics.” CODE OF ETHICS OF NAT’L ASS’N OF SOC. WORKERS §4.01(c).

The State’s regulatory authority necessarily extends to medical procedures that have religious implications. For example, New Jersey prescribes requirements for a licensed certified midwife to perform a circumcision. *See, e.g.*, N.J. ADMIN.

CODE § 13:35-2A.17 (2014). New York City requires those providing a religiously motivated, post-circumcision procedure on a minor to obtain the informed consent of the minor’s parents. 24 R.C.N.Y. § 181.23; *Cent. Rabbinical Cong. of the USA & Canada, v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 12-cv-7590, 2013 U.S. Dist. LEXIS 4293 (S.D.N.Y. Jan. 10, 2013). And in *Anspach v. City of Philadelphia*, 503 F.3d 256 (3d Cir. 2007), this Court rejected a parent’s free-exercise challenge against a city health clinic’s provision of emergency contraception to a teenage girl, because the clinic’s statements were based on the FDA’s conclusion that scientific studies had shown that emergency contraception does not abort or otherwise affect existing pregnancies. The Court stated that “[d]efendants were entitled to rely upon the FDA’s conclusion that scientific studies demonstrated that emergency contraception does not have an adverse effect on an ‘established pregnancy.’” *Id.* at 273. In these and other circumstances, healthcare providers are entitled – indeed, required – to rely on scientific expertise, even if some might find that approach objectionable on religious grounds.

Indeed, the state can even *mandate* the provision medical treatment to a child – a course of action far more intrusive than requiring treatment to be foregone – and it may do so even when the provision of that treatment violates the child’s parents’ religious beliefs. Thus, courts have ordered the delivery of blood transfusions against parents’ religious wishes. *See, e.g., Workman v. Mingo Cnty.*

Bd. of Educ., 419 F. App'x 348 (4th Cir. 2011); *Jehovah's Witnesses of Wash. v. King Cnty. Hosp.*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd mem.*, 390 U.S. 598 (1968) (*per curiam*); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962). They have directed the provision of other life-saving procedures. *See, e.g., Muhlenberg Hosp. v. Patterson*, 128 N.J. Super. 498, 320 A.2d 518 (1974) (ordering transfusion for surgery to avoid irreparable brain damage); *In re Eric B.*, 189 Cal. App. 3d 996, 235 Cal. Rptr. 22 (Cal. Ct. App. 1987) (ordering post-chemotherapy monitoring of infant); *In re Hamilton*, 657 S.W.2d 425, 427 (Tenn. Ct. App. 1983) (ordering treatment for child's cancer); *In re D.L.E.*, 645 P.2d 271, 272 (Colo. 1982) (ordering treatment for child's epilepsy). And they even have intervened to improve the quality of children's lives. *See, e.g., In re Sampson*, 317 N.Y.S.2d 641 (N.Y. Fam. Ct. 1970), *aff'd*, 37 A.D.2d 668, 669 (N.Y. App. Div. 1971) (ordering surgery to correct grotesque facial deformity).

The New Jersey statute is a far more modest measure. It prohibits, rather than requires, treatment. And it does so without forcing anyone to *violate* their religious beliefs. No parent has come forward to claim that SOCE is religiously obligatory. And even Appellants – who stand an additional step removed from the minors who might otherwise be subjected to SOCE – make no such claim; rather, the provision of SOCE “aligns with,” but is not mandated by, their religious beliefs. Aplt. App., vol. II at 123.

III. Religious Groups May Disagree about the Wisdom of SOCE, But the Scientific Community Reflects No Such Divergence of Opinion.

Appellants are of course free to believe that homosexuality is sinful. That belief, however, is far from universal across religions, or even across Christian denominations. For instance, the United Church of Christ has urged: “We seek to address the needs and advocate the concerns of lesbian, gay and bisexual people in our church and in society by actively encouraging churches, instrumentalities and secular governmental bodies to adopt and implement policies of non-discrimination....” United Church of Christ, *Resolution “Calling on UCC Congregations to Covenant as Open and Affirming”* (1985), <http://www.ucc.org/men/open-and-affirming.html>.

Religious opinion likewise diverges on the efficacy of SOCE. The National Religious Leadership Roundtable, convened by the National Gay and Lesbian Task Force and comprised of multiple religious denominations, specifically addressed the harm caused by SOCE when it stated that “[t]he reparative ministries and therapies that aim to devalue and seek to change the God-given orientations and identities of lesbian, gay, bisexual and transgender (LGBT) people – and often use a platform of religion as their foundation – are wreaking havoc in the lives of LGBT people and their families.” National Gay and Lesbian Task Force, *National Religious Leadership Roundtable Rejects Reparative Therapies* (Aug. 3, 2011),

<http://thetaskforceblog.org/2011/08/03/national-religious-leadership-roundtable-rejects-reparative-therapies/>.¹

The state may not pick sides in this religious debate, so it may not regulate SOCE because of the religious motivations underlying the treatment. Cf. *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). It may, however, regulate the treatment for secular reasons, which is precisely what it has done. While religious groups may disagree among themselves about the sinfulness of homosexuality and the propriety of anti-homosexuality treatment, the scientific community speaks with one voice on the topic: SOCE harms its subjects. AM.

PSYCHIATRIC ASS’N, OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS, WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 61 (2009 ed.). The American Psychiatric Association notes that “[s]uch so-called ‘treatment’ ignores established scientific evidence, demeans the dignity of the patient, succumbs to individual and social prejudice and stigma, and has often been significantly harmful to patients, families, others, and their relationships.” *Id.* Because of their vulnerability, developmental immaturity, and lack of personal autonomy, SOCE is even more damaging to children and adolescents than it is to adults. AM. PSYCHOLOGICAL ASS’N, REPORT ON THE AMERICAN PSYCHOLOGICAL

¹ As of the issuance of this statement in 2011, The National Religious Leadership Roundtable encompassed 57 members representing a broad spectrum of religious as well as gay-rights organizations. <http://www.welcomingresources.org/nrlr.htm>.

TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 77 (2009). Thus, for minor children struggling with self-acceptance, professional organizations recommend therapist acceptance, as well as the implementation and facilitation of coping skills, “social support and identity exploration and development, without imposing a specific sexual orientation identity outcome.” *Id.* at v. The New Jersey statute legitimately reflects this scientific consensus.

CONCLUSION

The decision below should be affirmed.

Dated: March 6, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,973 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. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman (14 point font).

Dated: March 6, 2014
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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

I hereby certify that the electronic version of this brief is identical to the text version in the paper copies filed with the court. The electronic document was scanned using Sophos Anti-Virus and no viruses were detected.

Dated: March 6, 2014
New York, New York

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to LAR 46.1 that my name appears on the foregoing brief, and I am presently a member in good standing of the Bar of this Court.

Dated: March 6, 2014
New York, New York

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CERTIFICATIONS OF FILING AND SERVICE

I hereby certify that on this date, seven (7) hard copies of the Brief of Amicus Curiae Americans United for Separation of Church and State were sent to the Clerk's Office. Pursuant to Local Appellate Rules 31.1(d) and 113.4(a), I caused the Brief of Amicus Curiae Americans United for Separation of Church and State to be served on all counsel of record via the Court's appellate electronic filing system (*i.e.*, CM/ECF).

Dated: March 6, 2014
New York, New York

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