No. 16-10150

IN THE

# *United States Court of Appeals for the Ninth Circuit*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,
*v.*

RILEY BRIONES, JR.,
*Defendant-Appellant*.

On Appeal from the United States District Court
for the District of Arizona
No. 2:96-cv-00464-DLR-4
Hon. Douglas L. Rayes

## BRIEF OF *AMICI CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ET AL. IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *Amici Curiae* state that no subsidiaries or any corporation and no publicly held corporation owns 10% or more of their stock.

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## INTEREST OF *AMICI*[1]

The **National Association of Criminal Defense Lawyers** (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands, and up to 40,000 attorneys including affiliates' members. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper and efficient administration of justice and files numerous *amicus* briefs each year in federal and state courts addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. Based on its criminal law expertise, NACDL seeks to assist the Court in deciding the serious issues presented in the case regarding the constitutionality of Briones' conviction and sentence.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *Amici* and their counsel contributed money that was intended to fund the preparing or submitting of the brief. *Amici* files this brief with the consent of both parties under Ninth Circuit Rule 29-2(a).

The **ACLU** is a nationwide, nonprofit, nonpartisan organization with more than 1.75 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding nearly 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including cases implicating the constitutional rights of juvenile offenders, such as *Roper v. Simmons*, 543 U.S. 551 (2005) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), as well as cases involving the application of new sentencing rules, such as *Dorsey v. United States*, 132 S.Ct. 2321 (2013).

The **Fair Punishment Project** (FPP) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School, whose mission is to address the ways in which our laws and criminal justice system contribute to excessive punishment for offenders. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess. To that end, FPP conducts research and advocacy and works with stakeholders to seek meaningful,

consensus-driven criminal justice reform. As part of its advocacy mission, FPP has submitted briefs as *amicus curiae* to courts across the nation, providing its perspective on emerging issues in criminal law and procedure.

**Juvenile Law Center** (JLC), founded in 1975, is the oldest public interest law firm for children in the United States. JLC advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, JLC works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Roderick and Solange MacArthur Justice Center** is a non-profit, public interest law firm with offices in Chicago, Illinois (based at the Northwestern Pritzker School of Law's Bluhm Legal Clinic); Oxford, Mississippi (based at the University of Mississippi School of Law); St. Louis, Missouri; New Orleans, Louisiana and

Washington, D.C. It was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation and has led myriad battles against injustices in the criminal system, including litigation of cases about juvenile justice, the death penalty, unfair parole revocations, police misconduct, abusive prison conditions, and the incarceration of the poor.

Each of the NACDL affiliates within this Circuit has joined this brief:

**The Alaska Association of Criminal Defense Lawyers** (AKACDL) is an Alaska non-profit professional organization of criminal defense lawyers and other professionals dedicated to the goal of fighting for fundamental rights of all of Alaska's Citizens.

**Arizona Attorneys for Criminal Justice** (AACJ) was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused.

**California Attorneys for Criminal Justice** (CACJ) is a statewide organization of criminal defense lawyers, and of persons from affiliated professions, in the State of California. CACJ is one of the two largest statewide organizations of criminal defense lawyers affiliated

with the National Association of Criminal Defense Lawyers. CACJ has as part of its bylaws "the defense of the rights of persons as guaranteed by the United States Constitution." CACJ has appeared as an *amicus curiae* in this Court on several occasions on matters of importance to its membership. CACJ members have been involved in the litigation of matters directly connected with the subject matter of this case before a number of Federal and State courts.

The **Hawaii Association of Criminal Defense Lawyers** is dedicated to advancing the interests of the criminal defense bar and the equitable administration of justice in the state.

The **Idaho Association of Criminal Defense Lawyers (IDACDL)** protects individual rights and improves criminal law by promoting study and research in the field of criminal law, the proper administration of justice, the integrity and independence of the judicial system, and the expertise of the defense lawyer.

**The Montana Association of Criminal Defense Lawyers** (MTACDL) was established in 1997 to provide training and other resources to private practitioners, full time public defenders, court appointed attorneys, and tribal court advocates.

**Nevada Attorneys for Criminal Justice** (NACJ) is a nonprofit voluntary professional bar association that works on behalf of Nevada's criminal defense lawyers to ensure equal justice and due process for citizens accused of a crime.

The members of the **Oregon Criminal Defense Lawyer's Association** (OCDLA) are lawyers, investigators and other professionals committed to representing adults and juveniles accused of crimes in state and federal courts. OCDLA members represent clients in trials, appeals and post-conviction proceedings.

The **Washington Association of Criminal Defense Lawyers** (WACDL) is a statewide, nonprofit organization formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has over 800 members—private criminal defense lawyers, public defenders, and related professionals—committed to preserving fairness and promoting a rational and humane criminal justice system.

## INTRODUCTION

The Eighth Amendment prohibits the sentence of life without the possibility of parole for all but the rarest of juvenile offenders. That is, "*Miller* [*v. Alabama*, 567 U.S. 460 (2012)] drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption." *Montgomery v. Louisiana*, 136 S.Ct. 718, 734 (2016). Thus, *Miller* provided a categorical rule: only those who are irreparably corrupt may be lawfully sentenced to life without the possibility of parole. In a decision that may affect scores of inmates serving life without the possibility of parole for juvenile offenses,[2] the majority affirmed a sentence imposed without assessing Briones' categorical eligibility for such a punishment.

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[2] The most recently available information indicates that 61 state inmates are serving such a sentence within the geographic scope of the court: 34 in Arizona, 13 in Washington, 5 in Oregon, 4 in Idaho, 4 in Nevada, 1 in Montana. Juvenile Sentencing Project, *Juvenile Life Without Parole Sentences in the United States* (Nov. 20, 2017) available at https://juvenilelwop.org/map/. Additionally, approximately 27 persons were serving federal life sentences for juvenile offenses when *Montgomery* was decided. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 1, *Montgomery*, 135 S.Ct. 1546 (No. 14-280). In addition to the number of inmates potentially affected by the Court's decision, the seriousness of the sentence imposed—the harshest possible penalty for a juvenile—weighs in favor of review.

Properly making that assessment should have included, at a minimum, an explicit finding of categorical eligibility. Holding otherwise risks rendering *Miller*'s primary protection meaningless. *See Hall v. Florida*, 134 S.Ct. 1986, 1999 (2014). Moreover, because only those juveniles who are irreparably corrupt are eligible for life without the possibility of parole, it is the state's burden to prove as much to a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000). The panel's contrary decision allows Briones' improper sentence to stand.

Briones' *conviction* is also unconstitutional. For juveniles, the statute authorizing his sentence provides only for mandatory life without the possibility of parole. Because Congress has not authorized a valid punishment for the charged crime, his conviction is also unconstitutional. *See United States v. Evans*, 333 U.S. 483, 486 (1948). In light of each of these substantial infirmities in the proceedings, *Amici* urge the Court to grant rehearing en banc.

## ARGUMENT

### I. *MILLER* PROVIDES CATEGORICAL PROTECTION, NOT MERELY A PROCEDURAL REQUIREMENT TO CONSIDER YOUTH.

Because juveniles cannot be sentenced to death, *see Roper v. Simmons*, 543 U.S. 551, 578 (2005), a life without parole sentence is the "most severe penalty permitted by law" for juveniles: "[It] means denial of hope; . . . it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham v. Florida*, 560 U.S. 48, 69-70 (2010) (internal punctuation omitted). As Judge O'Scannlain explained in dissent, life without the possibility of parole is accordingly limited to "those 'rarest of juvenile offenders . . . whose crimes reflect permanent incorrigibility.'" Dissent at 25. This limitation poses a categorical question: is the juvenile offender eligible for life without the possibility of parole? The District Court failed to "make any evident ruling on that question" and instead considered the "'hallmark features' of youth identified by the Supreme Court in *Miller*" solely as *mitigating* factors, thereby fundamentally misunderstanding the "importance of *Montgomery*'s clarification of *Miller*." Dissent at 25.

### A. The District Court Erroneously Considered Juvenile Status As Mitigating Factor Rather Than A Categorical Protection.

Before the Supreme Court issued its decision in *Montgomery*, there was confusion about *Miller*. Some courts interpreted *Miller* as providing both a categorical exclusion from punishment and procedural protections designed to enforce it. Other courts, by contrast, believed that *Miller*'s emphasis on the problems with mandatory life without the possibility of parole sentences may have suggested a procedural rule only. *See Montgomery*, 136 S.Ct. at 725 (noting split of authority).

"But," as the Supreme Court of Georgia has put it, "then came *Montgomery*." *Veal v. State*, 784 S.E.2d 403 (Ga. 2016). Although *Montgomery* acknowledges that *Miller* has an important procedural component, the critical question for both cases is whether a juvenile "'belongs to the protected class.'" *Id.* at 411 (quoting *Montgomery*, 136 S.Ct. at 734-35). To make that determination, the sentencer must take into account "the family and home environment," the "circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him," and juveniles' diminished ability to protect

their own interests in the criminal justice system. *Miller*, 567 U.S. at 477-78.

The process has a purpose: to ensure accurate assessment of who is eligible for the sentence. In this sense, the law as established by *Miller* is analogous to that governing one of the death penalty's categorical exclusions, intellectual disability. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Where a person under sentence of death makes a colorable claim of intellectual disability, that person is entitled to an evidentiary hearing, *Brumfield v. Cain*, 135 S.Ct. 2269, 2273 (2015), and factfinders must consider current medical definitions in assessing such a claim. *See Moore v. Texas*, 134 S.Ct. 1986, 1990 (2014). These requirements provide process, but it is a process aimed at a categorical protection: the intellectually disabled are not eligible for execution.

Clearly, a sentencer would not have satisfied these procedural requirements simply by considering the features of the defendant's intellectual disability in mitigation before handing a sentence down. Likewise, in the present case, the District Court did not satisfy *Miller*'s requirements by considering youth as a mitigating factor. The District Court failed to address the constitutional question that *Miller* and

*Montgomery* require a sentencer to adjudicate: whether a defendant is a member of the exceptionally narrow class of irreparably corrupt juveniles for whom life without the possibility of parole is permissible under the Eighth Amendment.

The District Court's failure to perform the required analysis creates a serious risk that *Miller* "could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 134 S.Ct. at 1999 (describing risk of under-enforcement of *Atkins*). Addressing categorical eligibility is required by the Court's holdings in *Miller* and *Montgomery* that life without the possibility of parole sentences for juveniles must be exceedingly rare. *Montgomery*, 136 S.Ct. at 726 ("lifetime in prison is a disproportionate sentence for all but the rarest of children . . . ." (citing *Miller*, 567 U.S. at 479-80)).

The District Court failed to address the critical question of whether Briones falls into the exceptionally narrow category of juveniles eligible for a sentence of life without the possibility of parole. In affirming the District Court's sentence, the panel has endorsed a rule that would create an "unacceptable risk" that juveniles ineligible for that sentence would be sentenced to the harshest penalty under law.

### B. The District Court Further Misapplied *Miller* By Overlooking The Central Role Of Rehabilitation In Juvenile Sentencing.

The panel affirmed Briones' sentence based on the following statement by the District Court:

> [I]n mitigation I do consider the history of the abusive father, the defendant's youth, immaturity, his adolescent brain at the time, and the fact that it was impacted by regular and constant abuse of alcohol and other drugs, and he's been a model inmate up to now. However, some decisions have lifelong consequences.

Majority at 9.

As just discussed, this statement shows that the District Court entirely misconstrued *Miller*'s categorical protection: Youth is far more than a "mitigating" factor. The District Court also failed to reckon with the powerful evidence of Briones' actual rehabilitation. In doing so, the District Court failed to apply the Eighth Amendment's prohibition of nonparolable life sentences for all juvenile offenders save those who have "exhibit[ed] such irretrievable depravity that rehabilitation is **impossible**." *Montgomery*, 136 S.Ct. at 733 (citing *Miller*, 567 U.S. at 479–80) (emphasis added). And in invoking the "lifelong consequences" of Briones' decision, the District Court again failed to adhere to the

procedural protections in *Miller*. The court engaged in a purely retrospective sentencing analysis and erroneously minimized the evidence of both capacity for rehabilitation and Briones' actual rehabilitation. *Montgomery*, 136 S.Ct. at 736 (noting similar behavior is "one kind of evidence that prisoners might use to demonstrate rehabilitation.").

But the District Court's central failing was not simply in how it weighed the evidence. It was its failure to address whether Briones is eligible for the sentence it imposed. Nowhere in the record below does the District Court address the critical question the Eighth Amendment requires it to decide: Whether Briones was or is one of "those children whose crimes reflect transient immaturity [or one] . . . whose crimes reflect irreparable corruption." *Montgomery*, 136 S.Ct. at 734. Because the District Court failed to address this critical question, the Court should grant the petition.

## II. CONGRESS HAS NOT PROVIDED A LEGAL PUNISHMENT FOR THE CRIME OF CONVICTION.

Briones' conviction, in addition to his sentence, should be reversed because he is being punished for a conviction for which Congress has authorized no valid punishment. It is the exclusive province of the

Congress to provide for criminal sentences for the prohibited conduct. *Evans*, 333 U.S. at 486. "[A] criminal statute is not operative without articulating a punishment for the proscribed conduct." *United States v. Under Seal*, 819 F.3d 715, 723 (4th Cir. 2016). For that reason, the penalty provision of a criminal statute is among its "defining characteristic[s]," and it is "indelibly linked" to the crime punished. *Id.* at 722. Without a valid sentencing provision for the statute of conviction, subjecting Briones to punishment was an *ultra vires* violation of Briones' constitutional rights.

### A. No Legal, Authorized Punishment Exists For Juveniles Charged Under 18 U.S.C. §1111.

Separation of powers principles provide that the Congress prescribes punishments for federal crimes. "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions." *Evans*, 333 U.S. at 486. A criminal statute with no legal punishment is unconstitutional. *See Under Seal*, 819 F.3d at 725.

Briones was charged with an offense that had only two available punishments: death and life without the possibility of parole. 18 U.S.C.

§1111(b).[3] In 2005, *Roper* foreclosed death as a viable sentence for juveniles, leaving a mandatory life sentence without the possibility of parole as the only permissible punishment for juveniles convicted under §1111. In 2012, *Miller* foreclosed mandatory life without the possibility of parole sentences for juveniles, leaving in place *no* authorized punishment for juveniles convicted under §1111.

### B. Briones Was Convicted Under A Statute That Is Unconstitutional As Applied To Juveniles.

Because Briones' statute of conviction had no authorized punishment, his conviction, as well as his sentence, is unconstitutional. In the six years since *Miller* was decided, Congress has "provided for no other penalty" for juveniles convicted under §1111. *See Under Seal*, 819 F.3d at 726.[4] Precisely the same situation—Congressional failure to act

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[3] Briones was indicted under 18 U.S.C. §1153, which confers federal jurisdiction to prosecute certain crimes occurring in Indian country. The substantive offense and related punishment are provided in 18 U.S.C. §1111. That statute provides for "life," but because the federal government has abolished parole, a sentence of "life" is the same as life without possibility of parole. *See United States v. Pete*, 819 F.3d 1121, 1126, 1132 (9th Cir. 2016).

[4] This legislative inaction is particularly notable in light of the federal government's position, prior to *Montgomery*, that *Miller* was retroactive. *See, e.g.*, Judgment, *Wright v. United States*, No. 13-1638

with the result that a criminal statute carries only unconstitutional punishments when applied to juveniles—led the Fourth Circuit to conclude that juveniles may simply not be tried or convicted under the statute at issue. *Under Seal*, 819 F.3d at 722 (addressing 18 U.S.C. §1959(a), murder in aid of racketeering, which, like §1111, provides for only death and mandatory life sentences). The same constitutional infirmity is present here.

Because Briones' statute of conviction suffers the same structural defect when applied to juveniles as the statute at issue in *Under Seal*, Briones' conviction should be held unconstitutional. And because this constitutional infirmity flows directly from the structure of the statute, without regard to any particular factual applications, this Court can and should fully and fairly adjudicate the issue on appeal. *See Parks Sch. Of Bus., Inc. v. Symington*, 51 F.3d 1480, 1488 (9th Cir. 1995); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (permitting "consideration of the issue [if it] would not prejudice [the opposing party's] ability to present relevant facts that could affect [the]

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at 3 (8th Cir. Feb. 5, 2014) (Colloton, J., dissenting) (noting federal government's position).

decision."). Briones' was convicted of a crime with no valid punishment for juveniles, and this Court should accordingly grant the petition and hold that the District Court lacked the authority to impose the challenged sentence.

## III. SIXTH AMENDMENT PROTECTIONS EXTEND TO WHETHER A DEFENDANT IS IRREPARABLY CORRUPT.

Even if this Court concludes that life without the possibility of parole is an authorized sentence for Briones, it should reverse the sentence because its imposition violated the Sixth Amendment's guarantee to defendants that a jury must determine beyond a reasonable doubt any factual finding, other than the fact of a prior conviction, which would increase their potential sentence. *See Ring v. Arizona*, 536 U.S. 584, 609 (2002); *Apprendi*, 530 U.S. at 490; *Cunningham v. California*, 549 U.S. 270 (2007); *Alleyne v. United States*, 133 S.Ct. 2151 (2013); *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016). *Miller* and *Montgomery* make clear that the Eighth Amendment limits life without parole eligibility to juveniles who are irreparably corrupt. *See supra* §I. Because juveniles are not eligible for that sentence absent such a finding, a jury must therefore make this determination beyond a reasonable doubt.

This Sixth Amendment's guarantee of a jury finding turns on the question of whether or not the fact-finding in question exposes the defendant to a harsher punishment. *See Apprendi*, 530 U.S. at 476; *see also Alleyne*, 133 S.Ct. at 2162 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact . . . must be submitted to the jury."). In Briones' case, the mandate that he will spend the rest of his life—and ultimately die—in prison is the most aggravated constitutionally permissible sentence that he could have received as a juvenile offender (assuming *arguendo* such a sentence is permissible and authorized). Because the fact-finding in Briones' sentencing proceeding in no way complied with these demands of the Sixth Amendment, the Court should grant the petition and reverse.

### A. A Finding Of Irreparable Corruption Increases A Juvenile Defendant's Potential Sentence And Is Similar To Other Factual Findings That Receive Sixth Amendment Protections.

It is clear that a finding of irreparable corruption increases a juvenile defendant's potential sentence. As with aggravating factors in the death penalty context—which must be found by a jury beyond a reasonable doubt—without such a finding, a juvenile defendant is otherwise categorically ineligible for a sentence of life without the

possibility of parole. *Montgomery*, 136 S.Ct. at 734; *Ring,* 536 U.S. at 609. Given the foundational presumption that "all but the rarest juvenile offender" shall be ineligible for the sentence, there can be no question that a finding of irreparable corruption increases a defendant's potential sentence.

The finding that a defendant is irreparably corrupt is similar to other factual findings that receive Sixth Amendment protections. In *Hurst v. Florida*, the Supreme Court reviewed a Florida statute adopting "aggravating circumstances" that, when present, operated to make a defendant eligible for the death penalty. 136 S.Ct. at 620. One such circumstance was that a murder was especially heinous. Fla. Stat. § 921.141(5)(h) (2012). The Supreme Court held that only a jury could find that such circumstances existed, given that the existence of those circumstances increased the potential sentencing exposure. 136 S.Ct. at 621-22.

Significantly, the Sixth Amendment jury fact-finding guarantee is not limited to aggravating factors enumerated by sentencing law or other statute. It applies to any factual criteria—including criteria developed by decisional law—that a court may consider dispositive to a

sentence that is aggravated beyond the default. *Cunningham*, 549 U.S. at 278-81. In *Cunningham*, the Court considered a California rule permitting judges, when deciding whether to depart from the "middle term" sentence, to consider a "nonexhaustive list of aggravating circumstances," including any "criteria related to the decision being made." *Id.* at 278-79. Absent a finding in aggravation, departure from the middle term was not permitted. Because the departure relied on a finding of fact, the Court held that the Sixth Amendment entitles a defendant to have a jury find that fact beyond a reasonable doubt. *Id.* at 293-94. It was of no moment that the "fact" in question was a category developed at the discretion of the judge.

A juvenile is ineligible for a sentence of life without parole absent a finding of irreparable corruption. Because, as in *Hurst* and *Cunningham*, that finding operates to increase a defendant's sentencing exposure and because it is a factual finding, a sentence of life without the possibility of parole for a juvenile offense cannot be constitutionally imposed without a jury finding it beyond a reasonable doubt. As in *Cunningham*, it is of no moment that the required finding was

announced by a court—in this case the Supreme Court—rather than the legislature.

### B. Briones Did Not Receive The Required Sixth Amendment Protections.

To the extent the District Court *did* address whether Briones was irreparably corrupt, it is indisputable that there was no jury finding of irreparable corruption beyond a reasonable doubt. "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring). Because a finding of irreparable corruption is necessary for a juvenile offender to be eligible for a sentence of life without parole, the process below violated Briones' Sixth Amendment rights.

## CONCLUSION

*Amici* urge the Court to grant rehearing en banc.

Respectfully submitted,

*/s/John R. Mills*

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July 18, 2018

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing *Amicus* Brief in Support of Petition for Rehearing En Banc complies with the length limits permitted by Circuit Rule 29-2(c)(2). The brief is 4,143 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

PHILLIPS BLACK INC.

*/s/John R. Mills*
John R. Mills
*Counsel for* Amici Curiae

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 18, 2018.

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*/s/John R. Mills*
John R. Mills
*Counsel for Amici Curiae*

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