No. 17-2991

In the United States Court of Appeals for the Seventh Circuit

City of Chicago,
Plaintiff-Appellee,

v.

Jefferson B. Sessions III, Attorney General of the United States,
Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Illinois, No. 17-cv-5720 (Leinenweber, J.)

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT

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CIRCUIT RULE 26.1DISCLOSURE STATEMENT

Appellate Court No: 17-2991

Short Caption: Chicago v. Sessions

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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The Immigration Reform Law Institute has no parent corporation.

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Attorney's Signature: /s/ Mark S. Venezia Date: December 5, 2017

Attorney's Printed Name: Mark S. Venezia

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes x

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Attorney's Signature: /s/ Christopher J. Hajec Date: December 5, 2017

Attorney's Printed Name: Christopher J. Hajec

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and legal permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir. filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010); and *In re Q- T- -- M- T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

IRLI submits this *amicus curiae* brief to assist this Court in understanding how the court below erred by ignoring plaintiff-appellant's noncompliance with applicable law, including the Supremacy Clause of the U.S. Constitution, and issuing an injunction at odds with fundamental principles of federalism.

The parties have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The Department of Justice places three conditions on a jurisdiction's eligibility to receive funds under the Edward Byrne Memorial Justice Assistance Grant Program ("JAG"). These conditions are that the jurisdiction: (1) honor formal written requests for advance notice of scheduled release dates and times for particular aliens in the jurisdiction's correctional facilities ("the notice condition"); (2) provide federal agents acting under federal law with access to the jurisdiction's correctional facilities to meet with aliens and inquire into their right to be or remain in the country ("the access condition"); and (3) submit a certification of compliance with 8 U.S.C. § 1373 ("the compliance condition"). SA 3-4.

Application requirements for JAG grants are specified by federal statute, and include:

> (1) A certification, made in a form acceptable to the Attorney General and executed by the chief executive officer of the applicant (or by another officer of the applicant, if qualified under regulations promulgated by the Attorney General), that—
> . . .
> (D) the applicant will comply with all provisions of this subpart [34 U.S.C. §§ 10151 et seq.] and all other applicable Federal laws.

34 U.S.C. § 10153.

The court below ("the District Court") held that the Attorney General lacked statutory authority to impose the notice and access conditions, but did have such

authority to impose the compliance condition because "applicable laws" for purposes of § 10153 certification include 8 U.S.C. § 1373. SA 25.

The District Court erred in part. Its correct holding on the compliance condition implies, contrary to its other holding, that the Attorney General also had authority to impose the notice and access conditions.

As the District Court held, § 10153 gives the Attorney General authority to require the City of Chicago ("the City") to certify that it has complied with all applicable federal laws. Manifestly, that is a level of authority above and beyond, and thus including, the authority to require that the City, in fact, comply with all applicable federal laws.

Federal law applicable to the City here includes the Supremacy Clause of the U.S. Constitution and the Immigration and Nationality Act ("INA"), both of which the City deliberately violates by its policies of forbidding communication with federal officers about release dates and forbidding access to its jails by federal officers. Under the Supremacy Clause, neither the City itself nor its officers may undermine or impede federal immigration enforcement in either of these ways. Thus, by requiring the City to reverse its policies, and require its officers to provide notice and access, the Attorney General acted within his statutory authority to condition JAG funds on the City's compliance with applicable federal law.

In any event, even if statutory authority were lacking here, the District Court erred by granting an injunction protecting and giving effect to the City's unconstitutional policies.

ARGUMENT

As a matter of policy, the City obstructs the enforcement of federal immigration law by federal officers. The City's most egregious obstruction is codified in its Code of Ordinances as follows:

> **Civil immigration enforcement actions, Federal responsibility.**
> (b) (1) Unless an agency or agent is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall:
> (A) Permit ICE agents access to a person being detained by, or in the custody of, the agency or agent;
> (B) Permit ICE agents use of agency facilities for investigative interviews or other investigative purpose; or
> (C) While on duty, expend their time responding to ICE inquiries or communicating with ICE regarding a person's custody status or release date.

Chicago, Illinois Code of Ordinances § 2-173-042 ("the Ordinance").

The Ordinance violates the Supremacy Clause in three ways: First, it stands, and is meant to stand, as an obstacle to the accomplishment of federal purposes in numerous parts of the INA. Second, it commands that local officials impede federal officers in the pursuance of their official business—namely, the enforcement of federal immigration law. Third, it violates the INA directly, by violating the anti-harboring provisions of 8 U.S.C. § 1324.

A. The City's Ordinance Stands As An Obstacle To The Purposes Of Congress.

The Supremacy Clause provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under this clause, Congress has the power to preempt state and local laws. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)); *see Hillsborough Cty. v. Automated Med. Labs., Inc.* 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.").

Preemption may be either express or implied, and implied preemption includes both field preemption and conflict preemption. *Lozano v. City of Hazleton*, 724 F.3d 297, 302 (3rd Cir. 2013) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). Conflict preemption can occur in one of two ways: where "compliance with both federal and state regulations is a physical impossibility," or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lozano*, 724 F.3d at 303 (citing *Arizona*, 567 U.S. at 399) (internal quotation marks and citations omitted). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and

its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912), *quoted in Hines v. Davidowitz*, 312 U.S. 52, 67 n.20 (1941). The judgment of courts about what constitutes an unconstitutional impediment to federal law is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373.

Underlying the doctrine of obstacle preemption is the necessity of cooperation between state and federal sovereignties for our federal system to function properly. As the Second Circuit has explained:

> A system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. Without the Constitution, each sovereign could, to a degree, hold the other hostage by selectively withholding voluntary cooperation as to a particular program(s). The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes.

City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (internal citations omitted) (holding 8 U.S.C. § 1373 constitutional).

By design, the Ordinance frustrates the INA in one of its central purposes—the federal-state cooperation Congress intended to foster in immigration enforcement. As the Supreme Court has recognized, "consultation between federal

and state officials is an important feature of the immigration system." *Arizona v. United States*, 567 U.S. 387, 411 (2012). For example, in passing the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"), of which 8 U.S.C. § 1373 is a part, Congress intended unimpeded communication among federal, state, and local governments in sharing immigration status information, as well as unobstructed cooperation in ascertaining the whereabouts of illegal aliens. The Senate Judiciary Committee Report accompanying IIRAIRA makes this general intent clear:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and Local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.

S. Rep. No. 104-249, at 19-20 (1996) (emphasis added), *quoted in City of New York*, 179 F.3d at 32-33. Thus, in drafting § 1373, Congress intended a cooperative effort among local, state, and federal law enforcement to enforce immigration law.

A review of additional federal immigration provisions further underscores this intent. Shortly before enacting IIRAIRA, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Entitled "Communication between State and local government agencies and Immigration and Naturalization Service," Section 434 of this law, now 8 U.S.C. §

1644, is nearly identical to § 1373. This provision of PRWORA forbids any prohibitions or restrictions on the ability of state or local governments to send to or receive from the federal government information about the immigration status, lawful or unlawful, of an alien in the United States. Going further than the Senate Judiciary Committee Report accompanying IIRAIRA, in the Conference Report accompanying PRWORA, Congress made clear its intent in passing Section 434: to bar *any* restriction on local police in their communications with ICE. The scope includes the *whereabouts* of illegal aliens, which obviously includes notice of their release from detention.

> The conference agreement provides that no State or local government entity shall prohibit, or in any way restrict, any entity or official from sending to or receiving from the INS information regarding the immigration status of an alien or *the presence, whereabouts, or activities of illegal aliens*. It does not require, in and of itself, any government agency or law enforcement official to communicate with the INS.
>
> The conferees intend to give State and local officials the authority to communicate with the INS regarding *the presence, whereabouts, or activities of illegal aliens. This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.* The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that *illegal aliens do not have the right to remain in the United States undetected and unapprehended*.

H.R. Rep. No. 104-725 (1996) (Conf. Rep.) at 383 (1996) (emphases added), *quoted in City of New York*, 179 F.3d at 32.

Another federal statute also has the purpose of fostering cooperation in immigration enforcement. In 8 U.S.C. § 1357(g), Congress made clear that no agreement is needed for state and local officers or employees "to communicate with [federal immigration authorities] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States." § 1357(g)(10)(A). Likewise, Congress has refused to require any formal agreement for state and local officers or employees to "cooperate with [federal immigration authorities] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." § 1357(g)(10)(B).

Because the Ordinance, as a refusal to cooperate, is preempted by all of these laws, it violates the Supremacy Clause, which is indisputably a federal law that applies to the City.

And it is not as though the City were within its rights, under the Tenth Amendment, to deny its cooperation. The seminal cases delimiting such rights are *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Court took up a statute that required states to enact legislation to take possession and dispose of nuclear waste produced in their state. In *Printz*, the Court considered the Brady Act, which required state employees to do background checks of firearm purchasers. The Court ruled that

both of these two kinds of federal imperatives constituted commandeering in violation of the Tenth Amendment. *New York*, 505 U.S. at 158; *Printz*, 521 U.S. at 935.

Relevantly here, however, the Supreme Court has carved out a safe harbor for federal law controlling state activity when such law regulates information flow in or affecting a domain of federal authority. In this realm, the Court has ruled favorably for federal law both mandating state actions and prohibiting state actions. *See also City of New York*, 179 F.3d at 33-35 (distinguishing *New York* and *Printz* and rejecting a Tenth Amendment challenge to § 1373).

In *Reno v. Condon*, 528 U.S. 141 (2000), the Court considered a suit by the State of South Carolina enjoining enforcement of the Driver's Privacy Protection Act of 1994 ("the DPPA"), 18 U.S.C. §§ 2721-25. The DPPA forbade state department of motor vehicles personnel from disclosing the personal information of drivers for most purposes, though in some circumstances it mandated such disclosure. 18 U.S.C. § 2721. In a unanimous decision, the Court held that the DPPA was consistent with the federalism required by the Tenth Amendment, despite the heavy resource expenditure states needed to make to enforce the Act, and even states' need to pass laws to comply with it. *Condon*, 528 U.S. at 150-151.

The Court distinguished the federal legislation in *Condon* from that in *Printz* and *New York*. The statute in *Condon* regulated state activities, and the legislation required and man hours employed were a byproduct. *Condon*, 528 U.S. at 150-151. By contrast, the statute in *Printz* directly required state employers to fulfill a federal law enforcement function, and the statute in *New York* directly commanded state legislative initiatives and expenditures to dispose of property (waste). As the Court held:

> [T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 151.

In affirming the validity of the DPPA, the Court noted that the statute *requires* the disclosure of certain information:

> The DPPA's prohibition of nonconsensual disclosures is also subject to a number of statutory exceptions. For example, the DPPA requires disclosure of personal information for use in connection with matters of motor vehicle or driver safety and theft, to carry out the purposes of [federal statutes].

Id. at 145 (internal quotation marks and ellipses omitted). The Court explained: "'[t]hat a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that

activity is a commonplace that presents no constitutional defect.'" *Id.* at 150-51 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)). *Cf. Arizona v. United States*, 567 U.S. 387, 412-13 (holding that an Arizona law making verification of immigration status by local officials mandatory was not preempted by federal immigration law because 8 U.S.C. § 1644 (a provision with wording almost identical to that of § 1373), the constitutionality of which the Court did not question, encouraged the sharing of such information).

Indeed, finding the Ordinance protected under the Tenth Amendment would mark something of a revolution in Tenth Amendment jurisprudence. For example, the Crime Control Act of 1990 compels states to report missing children and prohibits them from allowing their state law enforcement agencies to delay or delete missing child reports:

> **State requirements**
>
> Each State reporting under the provisions of this title shall—
>
> (1) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the observance of any waiting period before accepting a missing child or unidentified person report;
>
> (2) ensure that no law enforcement agency within the State establishes or maintains any policy that requires the removal of a missing person entry from its State law enforcement system or the National Crime Information Center computer database based solely on the age of the person;
>
> (3) provide that each such report and all necessary and available information, which, with respect to each missing child report, shall include—(A) the name, date of birth, sex, race, height, weight, and eye and hair color of the child; (B) a recent photograph of the child, if available; (C) the date and location of the last known contact with the

> child; and (D) the category under which the child is reported missing; is entered within 2 hours of receipt into the State law enforcement system and the National Crime Information Center computer networks and made available to the Missing Children Information Clearinghouse within the State or other agency designated within the State to receive such reports ….

42 U.S.C. § 5780.

If the Ordinance is protected by the Tenth Amendment, so too would be local ordinances mandating the withholding of federally-required information about missing children, or any other state or local refusal to adhere to federal information-sharing requirements.

In short, by requiring non-cooperation in immigration enforcement, the Ordinance stands as an obstacle to the congressional purpose of fostering such cooperation, and thus violates the Supremacy Clause.

B. The City's Ordinance Intentionally Impedes Federal Officers In The Performance Of Their Duties.

Under the Ordinance, if a federal immigration officers asks when an alien in City custody will be released, City officials may not tell him. If a federal immigration officer seeks access to a City jail to interview an alien and, if appropriate, take custody in a controlled environment, City officials may not let him in. By thus shutting its jails to federal officers and refusing to provide information very germane to the federal enforcement mission, the Ordinance

patently interferes with federal officers in their enforcement of federal immigration law, and was designed to do just that.

Such interference violates the Supremacy Clause at a very basic level; the supremacy of federal law would be meaningless if states could block its enforcement within their territories. Especially egregious is the denial of access to jails, as if the federal government were a hostile foreign power. One wonders if officials of the City would attempt to prevent federal entry into its jails by force, or to arrest federal officers who attempted entry. Such a shocking course would, of course, violate the Supremacy Clause, as the Supreme Court decided well over a century ago in a case in which state marshals arrested a federal officer in the performance of his federal duties:

> "If, when thus acting, and within the scope of their authority, [federal] officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. *The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government.* And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, *and the exercise of acknowledged federal power arrested*. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with

> authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; *obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.*"

In re Neagle, 135 U.S. 1, 61-62 (1890) (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1879)) (emphases added). *See generally* Seth P. Waxman and Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 Yale L.J. 2195, 2236-37 (2003) (discussing *Neagle*).

But if, under the Supremacy Clause, the City may not use force or legal process to block federal officers performing their federal law enforcement duties from its jails, it has no legitimate authority, under that clause, to "deny" them access to its jails by law. In this very basic way, the Ordinance violates the Supremacy Clause.

C. The City's Ordinance Violates 8 U.S.C. § 1324.

The City also is in clear violation of the anti-harboring provisions of the INA's Title II, Chapter 8, § 274, codified at 8 U.S.C. § 1324, which reads in pertinent part:

> **Bringing in and harboring certain aliens**
> (a) Criminal penalties.
> (1) (A) Any person who—
> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or

> shield from detection, such alien in any place, including any building or any means of transportation …
> (v)
> (I) engages in any conspiracy to commit any of the preceding acts, or
> (II) aids or abets the commission of any of the preceding acts,
> shall be punished as provided in subparagraph (B).
> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—
> (ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, United States Code, imprisoned not more than 5 years, or both ….

The INA defines "person" when used in Title II as "an individual or an organization." 8 U.S.C. § 1101(b)(3). "The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects." 8 U.S.C. § 1101(a)(28). Thus, § 1324 applies to municipal corporations, which, under the INA's sweeping definition, are organizations, and thus persons.

The DOJ's JAG requirement is notice *after* the detention facility has received the said request from ICE. Even if the City argues that receiving the request does not give it the requisite knowledge of the alien's unlawful presence, its noncompliance is in "reckless disregard" of the likelihood of the alien's unlawful presence, and constitutes an attempt to "shield [the alien] from detection" in a "building," and thus violates 8 U.S.C. § 1324(a)(1)(a)(iii). The Ordinance

prevents both an interview and an arrest. The City is not merely shielding (likely illegal) aliens, but it is systematically doing so.

Even if City officers or the City itself may escape criminal prosecution via sovereign immunity, this does not alter the conclusion that they are continuously violating the statute. *See, e.g.*, *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998) (recognizing that sovereign immunity is "immunity from trial and the attendant burdens of litigation") (internal quotation marks omitted). And, as shown above, that statute is an "applicable law" under 34 U.S.C. § 10153.

CONCLUSION

For the foregoing reasons, the District Court's judgment granting an injunction should be reversed.

DATED: December 5, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 29 because it contains 4,154 words. This brief also complies with the typeface and type-style requirements of Circuit Rule 32(b) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ Mark S. Venezia
Mark S. Venezia

CERTIFICATE OF SERVICE

I certify that on December 5, 2017, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I further certify that I will cause 15 paper copies of this brief to be received by the Clerk within seven days of the Notice of Docket Activity generated upon acceptance of the brief, in compliance with 7th Circuit Rule 31(b) and ECF Procedure (h)(2).

Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Mark S. Venezia
Mark S. Venezia