STATE OF WISCONSIN
IN SUPREME COURT

YASMEEN DANIEL, Individually, and as Special Administrator of the Estate of Zina Daniel Haughton,

Plaintiff-Appellant,

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, as Subrogee for Jalisco's LLC,

Intervening Plaintiff,

v.

ARMSLIST, LLC, an Oklahoma Limited Liability Company, BRIAN MANCINI and JONATHAN GIBBON,

Defendants-Respondents-Petitioners,

BROC ELMORE, ABC INSURANCE CO., the fictitious name for an unknown insurance company, DEF INSURANCE CO., the fictitious name for an unknown insurance company, and ESTATE OF RADCLIFFE HAUGHTON, by his Special Administrator, Jennifer Valenti,

Defendants,

PROGRESSIVE UNIVERSAL INSURANCE COMPANY,

Intervening Defendant.

APPEAL NO. 2017-AP-344
Milwaukee County Case No. 15-CV-8710

BRIEF OF *AMICUS CURIAE*
FLOOR64, INC., D/B/A THE COPIA INSTITUTE

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INTRODUCTION

Tragic events like the one at the heart of this case can often challenge the proper adjudication of litigation brought against Internet platforms. Justice would seem to call for a remedy, and if it appears that some twenty-year old federal statute is all that stands between a worthy plaintiff and a remedy, it can be tempting for courts to ignore it in order to find a way to grant that relief.

The problem is, as in cases like this one, there is more at stake than just the plaintiff's interest. This case may look like a domestic violence case, a gun policy case, or even a negligence case, but it is actually a speech case. Laws that protect speech, such as the one at issue in this appeal, are on the books for good reason. They are ignored at our peril, because doing so imperils all the important expression they are designed to protect.

Yet that is what the Court of Appeals has done. In its efforts to provide the plaintiff a remedy, the court ignored the prohibitions imposed by this key federal statute, 47 U.S.C. §230 ("Section 230"), which purposefully limited the court's ability to extract that remedy from an Internet platform like defendant-respondent-petitioner Armslist LLC. And in so ignoring these limitations, the court has placed at risk all the online activity and innovation that statute was intended to foster.

The plain text of Section 230 pointedly prohibits a cause of action from proceeding against an Internet platform for liability arising from content created by a user. The user may potentially be liable for it – the statute in no way prevents such a finding – but Section 230 makes clear that the platform itself cannot be held liable for the content this third party created.

The statute so limits liability for platforms because long ago Congress realized the only way the Internet could thrive as a place for vibrant speech and innovative services would be if Internet platforms, of which Armslist is one of countless, could be immune from suits arising from the user expression they enabled. By denying Armslist this immunity, however, the Court of Appeals opened the door to other platforms being denied the immunity as well and, as a result, undermined all that Congress had sought to foster with this law.

Thus, there are two interrelated reasons why this Court should reverse the Court of Appeals' decision.

One relates to the basic mechanics of Section 230. The Court of Appeals simply erred in construing the statute as one of narrow applicability that did not reach the claims brought against Armslist. It further erred by misconstruing the statute's pre-emption provision, which purposefully bars states from imposing their own law in ways that deny Internet platforms the protection that the statute is designed to afford them. This Court should reverse in order that Wisconsin jurisprudence be consistent with the plain language and the substantial body of established precedent.

The other reason is that if this decision were to stand as is – in conflict with that established precedent, the plain language of the statute, as well as Congress's clear intent – the consequences will be far-reaching and destructive. For it is not just platforms in Wisconsin that are affected by the Court of Appeals' decision; in deciding that Section 230 could not reach Armslist, the Court of Appeals effectively denied Section 230's protection to every Internet platform everywhere. And in doing so, it jeopardized all the online speech and services that depend on Section 230 in order to exist. It is a decision whose impact will be felt far beyond Wisconsin's borders, and with far greater deleterious effect

on far more sorts of valuable innovation and expression than the Court of Appeals likely anticipated. This Court should therefore reverse this decision in order not to invite this chilling result.

ARGUMENT

I. The Court of Appeals Erred in Refusing to Apply Section 230 to Armslist.

A. Congress Intended Section 230 to Apply to All Internet Platforms, Including Those Like Armslist.

In reading Section 230 more narrowly than the text supports, the Court of Appeals ignored the Congressional intent behind the statute. Section 230 was not a solution to a hypothetical problem. In 1995 a New York state court had found Prodigy, an early online communications service, liable for $200 million in damages arising from a user's speech. *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Damage awards like these can wipe technologies off the map. If platforms had to fear the crippling effect that even just one award, arising from just one user, could have on their developing online services, it would force them to monitor all the expression they facilitate to ensure none could tempt such trouble. Br. *amicus curiae* for Chris Cox and NetChoice at 15, *Homeaway.com v. City of Santa Monica*, No. 18-55367 (9th Cir. filed Apr. 25, 2018) ("Cox Brief"), *available at* https://tdrt.io/gPJ ("The inevitable consequence of attaching platform liability to user-generated content is to force intermediaries to monitor everything posted on their sites.").[1]

[1] The Court does not need to guess how Congress intended Section 230 to work: last year former member of Congress Chris Cox, the statute's

Given the sheer amount of expression they handle, however, such monitoring would be an impossible task. *Id.* at 2 ("While the volume of users [in 1995] was only in the millions, not the billions as today, it was evident [...] even then that no group of human beings would ever be able to keep pace with the growth of user-generated content on the Web."). Platforms would thus be forced to either over-censor broad swaths of legitimate expression pre-emptively, or cease to be platforms at all. *Id.* at 26 ("[Platforms], facing massive exposure to potential liability if they do not monitor user content and take responsibility for third parties' legal compliance, would encounter significant obstacles to capital formation."). Congress passed Section 230 to relieve platforms of this monitoring burden and the speech-inhibiting decisions it would force them to make. *Id.* at 12 ("All of the unique benefits the Internet provides are dependent upon platforms being able to facilitate communication among vast numbers of people without being required to review those communications individually.").

The problem with the user speech in *Stratton Oakmont* was that it was found to be defamatory. Yet even though Section 230 was in large part passed in response to this case, it was not limited to providing platforms immunity only for liability arising from user speech alleged to be defamatory, or only to the sorts of platforms that might tend to facilitate speech tempting that sort of liability. Congress instead chose broader language, because if all Section 230 spared platforms from was defamation liability they would still need to monitor content for all other possible sources of liability, and little would have been accomplished.

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co-author, submitted an *amicus* brief in a similar case where a lower court had denied Section 230 applicability to certain types of platforms. In it, he explained that Congress intended Section 230 to apply broadly, because it was only by being broad that it could have any effect achieving Congress's goal of fostering the growth of the Internet while most effectively limiting its downsides. Cox Brief 11-12.

Furthermore, as much as Congress wanted to protect platforms' ability to promote discourse, *id.* at 12, it also wanted to advance e-commerce. *Id.* at 16; 23-24. *See also Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003), *cert. denied* 541 U.S. 1085 (2004). This legislative goal required treating all platforms equally, even those that tended to host speech in furtherance of commercial transactions. Cox Brief 10. *See also Gentry v. eBay, Inc.*, 121 Cal.Rptr.2d 703, 716 (Cal. Ct. App. 2002) (finding a platform hosting transactional user speech eligible for Section 230 protection).[2] Thus Congress chose to apply immunity to any "provider … of an interactive computer service." 47 U.S.C. § 230(c)(1). An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet." 47 U.S.C. § 230(f)(2). As long as the platform meets that broad definition, which Armslist does, Section 230 immunity should apply, regardless of the type of interactive computer service it offers.

Congress is certainly capable of narrowing Section 230 should it desire a different result. It recently added a new exemption to its coverage explicitly allowing platform liability for user speech connected with human trafficking. Pub. L. 115–164, § 2, Apr. 11, 2018, 132 Stat. 1255, *codified at* 47 U.S.C. §230(e)(5). Congress could similarly narrow Section 230 further by creating an exemption for online gun sales. But when Section 230 is limited, platforms find themselves faced with the perverse incentive to limit online

[2] Armslist is one such platform. Although the type of speech it enables is fairly narrow – allowing sellers to announce their wares for sale – these offers are still speech, and speech that the Court of Appeals would have platform Armslist potentially be liable for as a result of having intermediated it.

speech and services that are otherwise legitimate and valuable. *See*, *e.g.*, Mike Masnick, *SESTA's First Victim: Craigslist Shuts Down Personals Section*, TECHDIRT.COM, Mar. 23, 2018, https://tdrt.io/gIw. *See* discussion II.B.

This Court should therefore reverse the Court of Appeals' decision to ensure that Wisconsin jurisprudence does not run afoul of the legislative goals and language Congress had carefully enshrined in the statute.

B. Congress Pre-empted States From Interfering With the Application of Section 230 to Internet Platforms, Including Those Like Armslist.

In 1996 when Section 230 was codified, Congress could not know what the Internet would grow to become. But it did know that without platform immunity all of its potential stood to go unrealized. *See* 47 U.S.C. § 230(a-b) (articulating that potential and the policy goal of fostering it). To ensure the Internet would have the space to continue to develop, Congress drew Section 230 broadly and in accordance with a general policy principle: encourage the most good online expression, and the least bad. It achieved this policy goal with a regulatory approach that both protected against liability for carrying speech, 47 U.S.C. §230(c)(1), and against liability for removing it. 47 U.S.C. §230(c)(2). By removing the threat of sanction, platforms would be able to facilitate the most beneficial speech and allocate their resources most efficiently to minimize the most undesirable.

But imposing liability on platforms distorts this balance and undermines both objectives. It co-opts resources that could be better spent optimizing speech intermediation faculties and pressures sites to reject more content. It even pressures sites to delete content that may be perfectly lawful, because, as discussed above, it may be prohibitively

expensive, if not also impractical or even impossible, to weed out the acceptable from the problematic.

Because the Internet inherently transcends state boundaries, without this immunity platforms could be exposed to regulators in each one they reach. Cox Brief 27 ("A website […] is immediately and uninterruptedly exposed to billions of Internet users in every U.S. jurisdiction and around the planet. This makes Internet commerce uniquely vulnerable to regulatory burdens in thousands of jurisdictions."). Congress worried that state and local authorities would be tempted to impose liability on platforms, and in doing so interfere with the operation of the Internet by separately creating, on a local level, the very monitoring obligations Section 230 was intended to avoid. *Id.* at 25 ("While one monitoring requirement in one city may seem a tractable compliance burden, myriad similar-but-not-identical regulations could easily damage or shut down Internet platforms."). Indeed it was hardly an idle concern, given that *Stratton Oakmont* itself was a case where a state court, interpreting state law, had done just that.

The pre-emption provision of Section 230 was supposed to forestall this result. 47 U.S.C. §230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). It was particularly needed because not every jurisdiction will agree on what the best policy should be for imposing liability on certain kinds of expression. Yet if one jurisdiction can effectively chill certain types of speech facilitation with the threat of potential liability, it will chill it for every jurisdiction everywhere, regardless of whether these other places agree with the policy choice or not.

So while here it might seem desirable for Wisconsin to take the regulatory lead with regard to platform liability for online gun sales, if the Court of Appeals' decision were to

stand, it would not just be online gun sales that would be affected, nor would it just be Wisconsin affecting what can appear online. After all, if Wisconsin can disregard the pre-emption provision to impose liability on platforms, then so can any other state. Indeed, such a precedent could easily prompt other states to threaten platforms with liability to force them to curtail whatever speech and services they facilitate that these jurisdictions found objectionable, regardless of whether all other state and local jurisdictions would also share that concern. The problem is, though, if any jurisdiction can cause platforms to reduce speech and services to mitigate their potential liability exposure in one jurisdiction, that reduction is likely to be felt in every other one, including Wisconsin, where the public and policymakers might have preferred for this speech and these services to have remained available.

In nevertheless finding itself unbound by Section 230's pre-emption provision, the Court of Appeals evidently misunderstood its critical purpose. The purpose was not to pre-empt any particular policy "domain" normally left to the states. *Daniel v. Armslist, LLC,* 2018 WI App. 32, ¶33, 382 Wis. 2d 241, 913 N.W.2d 211. Instead, Congress used its commerce powers to pre-empt the "field" of Internet platform regulation itself. "To ensure the quintessentially interstate commerce of the Internet would be governed by a uniform national policy[,]" sparing platforms the need to monitor the expression they facilitate, Congress deliberately foreclosed the ability of state and local authorities to interfere with that policy. Cox Brief 10. Congress did so because without this provision, the statute would be useless. Cox Brief 13 ("Were every state and municipality free to adopt its own policy concerning when an Internet platform must assume duties in connection with content created by third-party users, not only would compliance become oppressive, but the federal policy itself could quickly be undone.").

When it comes to online speech, the only policy that is supposed to be favored is the one Congress originally chose, "to promote the continued development of the Internet and other interactive computer services and other interactive media," 47 U.S.C. §230(b)(1), and all that these services offer. *See* 47 U.S.C. §230(a) (enumerating the many benefits of these services). The only way to give that policy the effect Congress intended is to ensure local regulatory efforts cannot distort the careful balance Congress codified to achieve it. This Court therefore should reverse the Court of Appeals' decision, which threatens that fundamental equilibrium.

II. If the Decision Stands, It Will Chill Online Speech and Innovation.

A. This Is a Case About Holding Platforms Liable for User Speech, Which Section 230 Forbids.

There are many facets to this case: it is a case about a tragic instance of domestic violence, a case highlighting the issues surrounding gun policy, as well as a standard negligence case. But despite these other attributes, the core legal question raised by this appeal is whether an Internet platform can be held liable for the consequences of speech a user expressed through its services. In this case, the speech in question is the speech offering the sale of the gun. All questions of liability flow from this speech because had it not been made, then the gun would not have been sold to the shooter.

Crucially, however, this case is not about holding a speaker liable for the consequences of his or her speech, which Section 230 permits. Rather, this case is about a plaintiff attempting to hold a platform liable for the consequences of its *user's* speech, which Section 230 expressly forbids. 47 U.S.C. §230(c)(1) ("No provider or user

of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

As Armlist's brief notes, there is plenty of case law affirming this prohibition. Br. 13-19. There can often be negative consequences to user speech, but courts have been clear, and nearly uniform, in determining that Section 230 prevents holding the intermediating platforms liable for them, even in cases where the types of speech a platform attracts may be more likely to have negative consequences. *See id.* at 18-19.

When courts have found potential liability for Internet platforms, those cases have had key differences from this one. One such difference is when there is a question as to who created the potentially wrongful expression, the platform or the user. *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157, 1166-67 (9th Cir. 2008). Here, however, there is no allegation that the Armslist platform created the content offering the sale of the gun; it was the seller who did. Furthermore, unlike in *Roommates* where the court found the platform had helped give the content its wrongful quality, it appears that under Wisconsin law the speech offering the gun sale by an unlicensed dealer was not even illegal. *Daniel* at ¶9.

Other cases where courts have allowed claims to proceed against platforms have been those where they found a platform's potential culpability had nothing to do with its facilitation of user speech. For instance, in *Barnes v. Yahoo*, the Ninth Circuit affirmed that Section 230 would have applied to Yahoo's intermediation of the user speech in question. 570 F.3d 1096, 1105-06 (9th Cir. 2009). Instead, it only found the possibility of promissory estoppel liability for the separate action of having promised to delete the content and then not. *Id.* at 1109. Meanwhile in *Doe 14 v.*

Internet Brands, the theory of liability against it was based on a duty to warn, which was found to be separate from any of its speech intermediation activities. 824 F.3d 846, 851 (9th Cir. 2016).

In this case, however, the entire theory of liability is predicated on dissatisfaction with how Armslist handled its user's speech. *Daniel* at ¶17. Neither *Barnes* nor *Internet Brands* supports such a finding of liability. Nor does twenty-plus years of jurisprudence interpreting Section 230. Thus this Court should reverse the Court of Appeals error.

B. Online Speech and Innovation Depend on Internet Platforms Being Able to Depend on Robust Section 230 Protection.

In order to achieve Congress's objective of fostering online speech and services, it is important not to erode the critical protection Section 230 affords the Internet platforms that facilitate this speech and these services. There is plenty of evidence that when platforms do face potential liability for user speech, the result is chilling to all online expression.

A notable illustration of this dynamic is the censoring effect that results from claims alleging violations of intellectual property rights. While, as discussed above, Section 230's liability protection is purposefully exhaustive in the types of user-created liability it insulates platforms from, the statute does contain a specific limitation: when it comes to liability for potential violations of intellectual property rights, Section 230's immunity does not apply to those claims. 47 U.S.C. §230(e)(2). As a result, when allegations are made that user content is infringing, platforms find themselves having to censor that content pre-emptively, without any adjudication as to whether it is truly infringing or not. *See*, *e.g.*, 17 U.S.C. §512(c)(1)(C) (conditioning a separate and more limited form of platform

liability protection on the "removal" of allegedly infringing content upon being notified of its presence on the platform, not its ultimate adjudication).

When there is no protection from liability for user expression, the choice for a platform is stark: censor, or potentially be obliterated by the enormous costs of even litigating liability over user content. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Zeran v. AOL*, 129 F.3d 327, 331 (4th Cir. 1997).

If platforms had to fear liability for their users' content, the resulting Internet would inevitably include far less speech, if not also far fewer platforms altogether. Because it is not just the Armslists of the world that can find themselves at these cross-roads. Platforms of all types depend on the immunity Section 230 provides. Internet platforms such as social media websites, blogging platforms, video-sharing services, and web-hosting companies—platforms that are the essential architecture of today's Internet—depend on it. These platforms are often the primary way in which the majority of people engage with one another online. They are the "vehicle[s] for the speech of others," Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501, 514 (2015), and host a wide range of diverse ideas that can be presented and received all over the world. Internet platforms enable anyone, even those with minimal resources and technical expertise, to become "a pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

But platforms can only afford to facilitate this expressive activity when they can be protected from liability arising from all the expression they enable. Thus, any

efforts to weaken Section 230 weaken the ability for others to express themselves online. Reversal by this Court is therefore warranted in order not to invite this chilling effect.

C. Amicus Copia Institute Exemplifies the Sort of Speaker, Speech, and Speech-intermediating Platform That Will be Hurt by the Erosion of Section 230's Protection if the Decision Stands.

Amicus Copia Institute depends on Section 230. The business of the Copia Institute is to examine the law and policy surrounding innovation, which it does in large part through its online publication Techdirt.com. Section 230 makes it possible for it to engage in these activities in several ways.

First, it is because of Section 230 that the Copia Institute can foster robust discourse on these subjects on the Techdirt site. Each article invites readers to post comments, and the resulting discussion is often enriching. In fact, every weekend Techdirt publishes a post synthesizing the most insightful and most humorous comments from the week before.[3] So insightful is this discourse that Techdirt has even added to its staff someone who had regularly contributed to the discussion in the comment section. Techdirt is committed to fostering this community of contributors to the discourse it stimulates and regularly celebrates its success.[4]

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[3] These posts are collected at https://www.techdirt.com/search.php?q=funniest&search=Search&edition=&tid=Techdirt&aid=&searchin=stories.

[4] Mike Masnick, Techdirt 2018: The Stats, TECHDIRT.COM, Mar. 23, 2018, https://tdrt.io/h8h (noting the top commenters with the most valuable contributions from 2018).

But none of this discourse would be possible without Section 230 shielding Techdirt from liability for what these commenters say. If Techdirt had to worry about the potential liability that could arise from each and every comment, it would not be able to enable its readers to comment freely. Far less discussion and discovery would result, including on controversial topics where productive discourse depends on attracting substantive insights. Without the protection Section 230 affords, people who object to certain ideas would be able to use the threat of liability to pressure Techdirt to delete those they found distasteful, no matter how legitimate and important that user contribution might have been. The threat of litigation by parties unhappy with expression found on Techdirt pages is a very real one.[5] It is only Section 230 that makes it possible for online media sites – be they large, corporate publications or smaller, independent media sites like Techdirt – to resist the censorial demands that would seek to squelch this online discussion.

As a small business, the Copia Institute also depends on Section 230 to generate revenue. In addition to the comment section, where any reader can contribute, the company also provides private forums where subscribers who pay for additional content and features can interact. Furthermore, like many other online publications, Techdirt posts contain ads. As is often the case for online media outlets, ads are provided by third-party services. Section 230 is what makes this sort of funding model possible. Without it, sites like Techdirt would have to spend their limited resources vetting each and every ad appearing on any of

[5] See Mike Masnick, Case Dismissed: Judge Throws Out Shiva Ayyadurai's Defamation Lawsuit Against Techdirt, Techdirt.com, Sep.6, 2017, available at https://tdrt.io/goU (chronicling the dismissal of an unmeritorious lawsuit brought against Techdirt by someone objecting to critical, and truthful, coverage, including by third-party speakers in the comments).

their pages. Techdirt is more than twenty years old and thus has more than 70,000 posts. Not only have these thousands of posts collected thousands of comments, but there are also thousands of ads appearing on these pages. It would be an impossible task to muster the enormous amount of attention and expertise required to vet them all. But without Section 230 shielding sites like Techdirt from this burden, they would need to. Running third-party ads would no longer be a viable way of generating revenue, and sites that depend on them to be financially stable, as well as the services that provide them, would disappear.

The Copia Institute also relies upon Section 230 as a speaker. Not only does it depend on social media to share its Techdirt posts and other work among the widest audience possible, but it also uses payment providers, email providers, and other services to organize, advocate, and influence policy around the issues of its expertise, as well as sustain itself financially to pursue these efforts. These various services that the Copia Institute uses, services whose business is to in some way facilitate content supplied by others, all depend on Section 230 to fulfill this mission. Without the benefit of this statute they would either cease to provide these services, or they would offer them only at the prohibitive cost necessary to underwrite the massive amount of extra manpower they would need to deploy in order to monitor the myriad and voluminous third-party user activity they facilitate – if not also subsidize the direct cost of having to defend themselves, even potentially successfully, for what lawsuits that might arise from any of it.

The Copia Institute is obviously different from Armslist in several ways: it is a different sort of entity, with different business purpose, making use of Section 230 in different ways, and with regard to different subject matter. But all of these Internet platforms – Armslist, Techdirt, and the services the Copia Institute uses – are part of an online

ecosystem that depends on a robust and functional Section 230 being available to them all. The plain text of the statute, as well as two decades of jurisprudence, has made clear that all are equally entitled to its protection, including with respect to the sort of potential negligence liability as present in this case. It is that reliability, ubiquity, and durability of this statutory protection that has made it possible for all these platforms, and all the speakers and services they enable, to enrich the world. Whittling away at its coverage now in order to reach any particular platform – such as Armslist – would mean ripping it away from them all.

CONCLUSION

The Court of Appeals' erroneous interpretation of Section 230 and its refusal to apply the statute to the Internet platform Armslist will chill speech and innovation. Therefore, this Court should reverse.

Dated this 17th day of January, 2019.

Respectfully submitted,

GIMBEL, REILLY, GUERIN & BROWN LLP

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a non-party brief produced with a proportional serif font. The length of this brief, including footnotes, is 4,610 words.

KATHRYN A. KEPPEL

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

KATHRYN A. KEPPEL

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2019, I caused three copies of this amicus brief to be served upon each of the following persons via U.S. Mail, First Class:

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