

No. 18-20274

**In the United States Court of Appeals
for the Fifth Circuit**

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,
PLAINTIFF-APPELLANT,

v.

O.W., BY NEXT FRIEND HANNAH W.
DEFENDANT-APPELLEE,

HANNAH W., AS PARENT/GUARDIANS/NEXT FRIENDS OF O.W., AN INDIVIDUAL
WITH A DISABILITY; DANIEL W., AS PARENTS/GUARDIANS/NEXT FRIENDS OF O.W.,
AN INDIVIDUAL WITH A DISABILITY; O.W.,
PLAINTIFFS-APPELLEES,

v.

SPRING BRANCH INDEPENDENT SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, NO. 4:16-CV-2643*

**BRIEF OF DISABILITY RIGHTS TEXAS AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

This *amicus curiae* brief is submitted in support of Appellees. All parties have consented to the filing of this brief. The undersigned counsel of record certifies that the following *amicus curiae* and its counsel have an interest in this brief:

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Date: December 17, 2018

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4 C.F.R. § 300.1114

4 C.F.R. § 300.1314

Brian Rosenthal, Denied: How Texas Keeps Tens of Thousands of Children out of Special Education, Houston Chronicle (Sept. 10, 2016), <https://www.houstonchronicle.com/denied/1/>5, 7

Brian Rosenthal, Denied: Schools Push Students Out of Special Education to Meet State Limit, Houston Chronicle (Oct. 22, 2016), <https://www.houstonchronicle.com/denied/2/>5

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Brian Rosenthal, Denied: Texas Schools Shut Non-English Speakers Out of Special Ed, Houston Chronicle (Dec. 10, 2016), <https://www.houstonchronicle.com/denied/4/>5

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Fast Facts, National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Dec. 13, 2018) 7

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SBISD 2018 PBMAS Report,
https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear=8&_program=pbm.master.sas&_debug=0&prgopt=maskpdf18.sas&search=distname&namenum=spring+branch&submit=Continue12, 13

Susan Carroll & Brian Rosenthal, Denied: Unable to Get Special Education in Texas, One Family Moved, Houston Chronicle (Dec. 24, 2016), <https://www.houstonchronicle.com/denied/5/>5

Texas Education Agency PBMAS Manuals (2004-2016), <https://tea.texas.gov/pbm/PBMASManuals.aspx>6

Texas Education Agency Performance-Based Monitoring Analysis System Overview, https://tea.texas.gov/Student_Testing_and_Accountability/PBMAS6, 7

Texas Senate Bill Analysis, Senate Research Center (June 8, 2017), <http://www.capitol.state.tx.us/tlodocs/85R/analysis/pdf/SB00160F.pdf#navpanes=0> (last visited Dec. 13, 2018)10

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Disability Rights Texas is a nonprofit organization mandated to protect the legal rights of people with disabilities by the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001 *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 1081 *et seq.*, and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794e. Disability Rights Texas is the designated “protection and advocacy” system for the State of Texas. In accordance with its federal mandate, Disability Rights Texas has the authority to, among other things, pursue administrative, legal and other appropriate remedies to protect the rights of persons with disabilities. 42 U.S.C. § 6042(2); 42 U.S.C. § 10805(a)(1). Texas has delayed in starting or failed to conduct special education evaluations for thousands of children, and therefore delayed them from obtaining or otherwise denied them of the educational support and services they need to succeed and to which they are legally entitled under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* Thus, *amicus curiae* is concerned with the implications that this Court’s decision will have for all Texas students with disabilities. Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

RULE 29(a)(4)(E) STATEMENT

Amicus curiae certifies that: (A) no party’s counsel authored this brief in whole or part; (B) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person, other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE CASE

Amicus curiae incorporates the Counter-Statement of the Case in the Brief for Appellees. As this Court’s decision may affect the legal rights of other children with disabilities who are met with unreasonable delays in receiving special education evaluations or who have otherwise not received required educational support and services to which they are entitled, *amicus curiae* submits this brief to further detail the systemic failure of Texas school districts, including Appellant Spring Branch Independent School District (“SBISD”), to meet their obligations under the Individuals with Disabilities Education Act (“IDEA”).

SUMMARY OF ARGUMENT

IDEA creates an affirmative, ongoing obligation on school districts to identify, locate, and evaluate all children suspected of having disabilities and who, by reason thereof, are in need of special education services. Commonly known as “Child Find,” this provision of the IDEA requires every school district to identify

and evaluate any child residing within its boundaries that the school district reasonably suspects may have a disability and need for special education services. Accompanying this duty is an obligation to conduct the evaluation within a reasonable time after becoming aware of behavior that likely indicates a disability.

School districts throughout Texas have intentionally disregarded their Child Find duties. Beginning in 2004, the rate at which Texas public schools identified children with disabilities began to drop and it soon had one of the lowest in the country. This drop was a direct result of the Texas Education Agency's ("TEA") implementation of an arbitrary school district assessment metric that required school districts to restrict their identification of special education students to be no more than 8.5% of the school's total student population or face increased scrutiny or sanctions. SBISD's identification rates initially failed to meet the 8.5% cap, but they began to fall in 2008 and plummeted to 7.2% in 2014 and 7.1% in 2015.

As a result of the TEA's cap, Texas school districts have avoided their Child Find obligations by delaying and denying IDEA evaluations, while keeping thousands of children with disabilities from receiving the educational services and support required by federal law. The United States Department of Education recently found evidence demonstrating a pattern of practices in school districts throughout Texas in which evaluations were delayed or denied for children who

were suspected of having a disability. Unfortunately, O.W. is one of the many children caught in the injustice of the 8.5% cap and ensuing Child Find violations.

ARGUMENT

I. Child Find Is A Duty Of Paramount Importance Placed On School Districts In Order To Identify Children With Disabilities.

The IDEA requires that children with a disability be provided with “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). In order to help achieve this objective, the IDEA imposes an affirmative, ongoing “Child Find” duty on every public school district to identify, locate, and evaluate all children suspected of having disabilities and needing special education services residing within the district. 20 U.S.C. § 1412(a)(3) and (10)(A)(ii); 4 C.F.R. §§ 300.111, 300.131; 19 TEX. ADMIN. CODE § 89.1096(a)(2); *see also Dallas Indep. Sch. Dist. v. Woody*, 865 F.3d 303, 312-13 (5th Cir. 2017). The Child Find duty arises when the school district has reason to suspect a disability, coupled with reason to suspect that special education services may be needed to address that disability. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 950 (W.D. Tex. 2008). Once the suspicion develops, the school district must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability. *Id.* Congress, in enacting the IDEA, acknowledged

that the proper identification of each child eligible for services is of “paramount importance.” *See Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 245, 129 S. Ct. 2484, 2495 (2009).

II. Texas’ Child Find Crisis.

Since at least 2004, the TEA has deliberately restricted access to special education resources in order to save dollars at the expense of children with disabilities. An alarming investigative series published by the Houston Chronicle in late 2016 revealed that starting in 2004, the TEA “quietly devised a system that has kept thousands of disabled kids . . . out of special education” in school districts across the state. Brian Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children out of Special Education*, Houston Chronicle (Sept. 10, 2016) [hereinafter “*Denied, Part 1*”], *available at*: <https://www.houstonchronicle.com/denied/1/> (last visited Dec. 13, 2018).¹ It was at this time, that the TEA established the

¹ *See also* Brian Rosenthal, *Denied: Schools Push Students Out of Special Education to Meet State Limit*, Houston Chronicle (Oct. 22, 2016), *available at*: <https://www.houstonchronicle.com/denied/2/> (last visited Dec. 13, 2018); Brian Rosenthal, *Denied: Mentally Ill Lose Out as Special Ed Declines*, Houston Chronicle (Nov. 9, 2016), *available at*: <https://www.houstonchronicle.com/denied/3/> (last visited Dec 13, 2018); Brian Rosenthal, *Denied: Texas Schools Shut Non-English Speakers Out of Special Ed*, Houston Chronicle (Dec. 10, 2016), *available at*: <https://www.houstonchronicle.com/denied/4/> (last visited Dec. 13, 2018); Susan Carroll & Brian Rosenthal, *Denied: Unable to Get Special Education in Texas, One Family Moved*, Houston Chronicle (Dec. 24, 2016), *available at*: <https://www.houstonchronicle.com/denied/5/> (last visited Dec. 13, 2018); Brian Rosenthal & St. John Barsed-Smith, *Denied: Houston Schools Systematically Block Disabled Kids from Special Ed*, Houston Chronicle (Dec. 27, 2016) [hereinafter “*Denied, Part 6*”] <http://www.houstonchronicle.com/denied/6/> (last visited Dec. 13, 2018); Brian Rosenthal, *Denied: Special Ed Cap Drives Families Out of Public Schools*, Houston Chronicle (Dec. 29, 2016), *available at*: <https://www.houstonchronicle.com/denied/7/> (last visited Dec. 13, 2018).

“Performance-Based Monitoring Analysis System” (“PBMAS”) to annually report on the performance of school districts and charter schools in selected program areas, including special education. *See* Texas Education Agency Performance-Based Monitoring Analysis System Overview, *available at*: https://tea.texas.gov/Student_Testing_and_Accountability/PBMAS/ (last visited Dec. 13, 2018). One of the PBMAS’s performance indicators included a measure of each school district’s special education identification rate (sometimes referred to as its special education representation rate).² The TEA inexplicably decided that in order to meet PBMAS performance standards, a school district’s special education identification rate should be 8.5% or lower. *See* Texas Education Agency PBMAS Manuals (2004-2016) *available at*: <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last visited Dec. 13, 2018). Thus, despite its obligation to identify, locate, and evaluate *all* children suspected of having disabilities and needing special education services residing within the state, the TEA set forth a specific limit to the number of children that could be enrolled in each district’s special education program.³

² The PBMAS manuals include the method for calculating the rates and the corresponding performance level standards. *See* Texas Education Agency PBMAS Manuals (2004-2016), *available at*: <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last visited Dec. 13, 2018). For example, the 2014 PBMAS manual provides that each district’s rate is compared to the 8.5% PBMAS standard and assigned a performance level. *See* 2014 PBMAS Manual at p. 74, *available at*: <https://tea.texas.gov/pbm/PBMASManuals.aspx> (last visited Dec. 13, 2018). A performance level of 0 means the district met the 8.5% standard. *Id.* at pp. 8, 74.

³ At the time of the adoption of the 8.5% cap, the national average of children receiving special education services was over 13%, which makes the cap even more perplexing and disturbing.

School districts that failed to meet the identified standards (which, until the 2017-2018 school year included the 8.5% special education identification cap) risked scrutiny from the TEA, including sanctions, interventions, and on-site reviews. *See* Texas Education Agency Performance-Based Monitoring Analysis System Overview, *available at*: https://tea.texas.gov/Student_Testing_and_Accountability/PBMAS/ (last visited Dec. 13, 2018).

Indeed, “[m]any schools [] interpreted the . . . monitoring system as a strict ban on serving more than 8.5% of students in special education.” *See* Denied, Part 1. In turn, many school districts violated the IDEA in order to lower their rates. By way of example, some: (i) ignored requests for evaluations; (ii) discouraged formal requests for evaluations; (iii) falsely informed families that they must pay for evaluations; (iv) falsely told families that there was a waitlist; (v) falsely told parents that their children could only be tested once every two years; (vi) directed students who needed special education to private schools; and (vii) randomly removed children from special education. *See* Denied, Part 1; Denied Part 6.

A. The Federal Government Investigates The TEA’s 8.5% Cap.

The Houston Chronicle’s exposé prompted the federal government to immediately investigate the TEA. On October 3, 2016, just weeks after the initial *Denied* article was published, the U.S. Department of Education informed the TEA

See Fast Facts, National Center for Education Statistics, *available at*: <https://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Dec. 13, 2018).

that “[t]he report raises serious concerns about the State’s compliance with . . . child find requirements . . .” *See* Letter from Sue Swenson, U.S. Dept. of Ed., to Mike Morath, TEA Commissioner (Oct. 3, 2016), *available at*: <https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/files/letter-to-mike-morath-10-03-2016.pdf> (last visited Dec. 13, 2018). The Office of Special Education Programs (“OSEP”) of the U.S. Department of Education thoroughly investigated the matter by: (i) conducting listening sessions with parents throughout the state; (ii) receiving and reviewing hundreds of public comments; (iii) reviewing state and district-wide documents and policies; (iv) visiting twelve school districts and interviewing their teachers, administrators and staff; and (v) interviewing TEA representatives. *See* Office of Special Education Programs, Letter from Ruth E. Ryder, Acting Director, OSEP, to Mike Morath, TEA Commissioner (Jan. 11, 2018), *available at*: <https://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=51539620527> (last visited Dec. 13, 2018).

OSEP’s investigation confirmed the Houston Chronicle’s report—namely, that the TEA’s use of the 8.5% indicator resulted in a significant decline in Texas’ overall special education identification. *See* Office of Special Education Programs, Texas Part B Monitoring Visit Letter Enclosure, *available at*: <https://www2.ed.gov/fund/data/report/idea/partbdmsrpts/dms-tx-b-2017-enclosure.pdf> (last visited Dec. 13, 2018). The investigation revealed many situations where

school districts “engaged in practices that violated the IDEA child find requirements.” *Id.* For example, one school district, after failing to meet the 8.5% limit, vowed to reduce the percentage of children receiving special education. *Id.* at p. 3. Another school district’s superintendent admitted to “lean[ing] on administrators” if the number of children in special education was too high. *Id.* at p. 4. After another school district exceeded the 8.5% identification rate, it promised that it would “decrease the percentage of enrolled students receiving [special education] . . . services in order to meet the state average.” *Id.* OSEP also found many instances in which school districts delayed or failed to conduct evaluations for children who were suspected of having a disability because, as is the case with O.W., they received accommodations under Section 504 of the Rehabilitation Act of 1973 or other specialized services. *Id.* at pp. 1, 12.

Such examples are reflective of the type of unreasonable delay and denial of benefits Texas’ most vulnerable children suffered as a result of the failure of school districts, such as SBISD, to comply with their Child Find duty. OSEP noted that under federal law each state must have policies and procedures to ensure that *all* children with disabilities are identified, located, and evaluated. *Id.* at p. 4. OSEP stressed that “[t]he IDEA does not limit or restrict the number of children who can be identified as ‘children with disabilities’ provided that the child meets the IDEA’s definition of a ‘child with a disability.’” *Id.* However, the TEA’s cap

did just that. OSEP concluded that the TEA: (i) failed to ensure that all children in the state were identified, located, and evaluated; (ii) failed to ensure that a free appropriate public education was made available to all children with disabilities; and (iii) failed to fulfill its general supervisory and monitoring responsibilities to ensure that districts properly met their Child Find and free appropriate public education obligations under IDEA. *Id.* at p. 13

B. The State Legislature Intervenes And Bans The 8.5% Cap.

While the federal government was in the midst of investigating the TEA, the Texas state legislature introduced a bill that prohibited policies that assess a school district's performance based on its special education enrollment. *See* Texas Senate Bill 160 Bill Analysis, Senate Research Center (June 8, 2017), *available at*: <http://www.capitol.state.tx.us/tlodocs/85R/analysis/pdf/SB00160F.pdf#navpanes=0> (last visited Dec. 13, 2018). The bill analysis recognized that parents, advocates, and school districts saw the 8.5% indicator for what it was: a cap on a school district's special education enrollment. *Id.* It also noted that while over a million new students enrolled in Texas schools after the TEA's adoption of the PBMAS 8.5% standard, the state's special education average dropped from approximately 12% to 8.5%—the lowest of any state. *Id.* As a result, more than 250,000 children may have been denied services as a result of the policy. *Id.* The bill passed and became effective on May 22, 2017. TEX. EDUC. CODE § 29.0011.

C. Repercussions From The 8.5% Cap Continue To Exist.

The effects of Texas school districts' repudiation of their Child Find obligations in order to meet the state's 8.5% cap are still resonant and widespread. O.W.'s case is an unfortunate example of this. O.W. enrolled in SBISD in the fall of 2014, prior to the Houston Chronicle's exposé, the U.S. Department of Education's investigation, and the state legislature's prohibition of the 8.5% standard. In other words, O.W. became an SBISD student during the time in which the TEA was scrutinizing, and school districts were scrambling to cut, special education identification rates.

Following the adoption of the PBMAS in 2004, 96% of school districts in Texas reduced their special education identification rates. *See Denied*, Part 1. SBISD was not an exception. In 2004, SBISD identified 10.9% of its students as eligible for special education. *See SBISD 2004-2005 PBMAS Report, available at: https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear=8&program=pbm.master.sas&_debug=0&prgopt=mskpdf.sas&search=distname&namenum=spring+branch&submit=Continue* (last visited Dec. 13, 2018). Although SBISD's identification rate was already significantly lower than the national special education identification rate average of 13.7%, it failed to meet the stringent 8.5% PBMAS threshold. *Id.* Over the next few years, SBISD continued to receive negative performance levels from the TEA. *See SBISD PBMAS District Reports*

for 2005-2007, *available at*: <https://rptsvr1.tea.texas.gov/pbm/distrpts.html> (last visited Dec. 13, 2018). However, starting in 2008, SBISD's special education identification/representation rate began a downward spiral, and in 2011 it reached the TEA's goal and identified only 8.3% of its students as eligible for special education. *See* SBISD 2011 PBMAS Report, *available at*: https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear=8&_program=pbm.master.sas&_debug=0&prgopt=maskpdf11.sas&search=distname&namenum=spring+branch&submit=Continue (last visited Dec. 13, 2018). SBISD's special education identification rate continued to fall, and in 2014—the year in which O.W. was enrolled as a student in the SBISD—it had cut its identification rate down to 7.2%. *See* SBISD 2014 PBMAS Report, *available at*: https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear=8&_program=pbm.master.sas&_debug=0&prgopt=maskpdf14.sas&search=distname&namenum=spring+branch&submit=Continue (last visited Dec. 13, 2018).⁴ The ramifications of the 8.5% cap can still be felt as SBISD's special education identification rate remains, as of the date of the latest PBMAS report, in the 7% range. *See* SBISD 2018 PBMAS Report, *available at*: https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear

⁴ A year later, it went down to 7.1%. *See* SBISD 2015 PBMAS Report, *available at*: https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&myear=8&_program=pbm.master.sas&_debug=0&prgopt=maskpdf15.sas&search=distname&namenum=spring+branch&submit=Continue (last visited Dec. 13, 2018).

[=8&_program=pbm.master.sas&_debug=0&prgopt=maskpdf18.sas&search=distname&namenum=spring+branch&submit=Continue](#) (last visited Dec. 13, 2018).

III. SBISD’S Reliance on *Woody* is Misplaced.

SBISD relies on *Dallas Indep. Sch. Dist. v. Woody* to excuse its delay in referring O.W. for an IDEA evaluation. See SBISD Brief, at pp. 22-23. However, *Woody* involved a particularly unique set of facts. See *Dallas Indep. Sch. Dist. v. Woody*, 178 F. Supp. 3d 443, 468 (N.D. Tex. 2016) (“*Woody I*”), *aff’d in part, rev’d in part*, 865 F.3d 303 (5th Cir. 2017) (“*Woody II*”). There, pursuant to a settlement of a due process claim, a California school district reimbursed tuition costs to a student with disabilities attending a specialized, private school in Texas during her junior year of high school while her mother remained in California. *Woody I*, 178 F. Supp. 3d at 452-53; *Woody II*, 865 F. 3d at 307. The student’s mother later moved to Texas and sought reimbursement from the Dallas Independent School District (“DISD”) for her daughter’s senior year at the Dallas private school. *Id.* DISD offered to evaluate the student three months after receiving notice, which was found to be reasonable given the unique situation, the mother’s partial responsibility in the delay, and a request that all communications between the schools be through her attorney. See *Woody I*, 178 F. Supp. 3d at 468; *Woody II*, 865 F. 3d at 320.

SBISD claims that in *Woody* this Court “recognized the practical reality that it takes time to assess a student’s functioning and needs, and make arrangements for the members of the ARDC to meet.” SBISD brief at p. 22. This simplified and wrong takeaway ignores *Woody*’s unique factual situation. There, DISD had to get records from a California school district and “figure out exactly what DISD’s obligations were to . . . a student whose situation did not fit within the comprehensive IDEA framework.” *Woody I*, 178 F. Supp. 3d at 468.

SBISD cannot align itself with the incomparable facts in *Woody* to excuse its unreasonable delay in evaluating O.W. Unlike the student in *Woody*, O.W. was enrolled as a student and attended a SBISD public elementary school. O.W.’s parents provided information relevant to O.W.’s disabilities and behaviors from the time of his enrollment, providing SBISD with direct knowledge of O.W.’s difficulties from the outset in addition to the disruptive, aggressive, and impulsive behavior he exhibited from the very first days of school. Rather than help O.W. get the help he needed to succeed, SBISD stuck its head in the sand and ignored its Child Find obligation by delaying its referral for an IDEA evaluation for more than three months after it knew, or should have suspected, that he was a child with a disability who was in need of special education services.

The reason for this delay is clear. In 2014, SBISD’s special education identification rate was 7.2%. In 2015, it reached its rock bottom: 7.1%. When

O.W. was enrolled as a SBISD student, school districts across Texas were delaying and/or denying children of their rights under the IDEA in order to meet the state's 8.5% cap. Unfortunately, O.W. got caught in the cap's unjust effects and the district's Child Find violations.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellees' Brief, this Court should affirm the District Court's determination that SBISD unreasonably delayed in starting O.W.'s special education evaluation.

Respectfully submitted,

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Date: December 17, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. 32(g)(1), the undersigned counsel certifies that:

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/s/ Cristina I. Torres

Cristina I. Torres

Date: December 17, 2018

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I hereby certify that this brief has been served through the Court's ECF system on all counsel of record on December 17, 2018.

I further certify that 1) required privacy redactions have been made, 5th Cir. R. 25.2.13; 2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and 3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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