No. 13-30738

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TIM SOSEBEE, MARK WRITESMAN, DALE PATILLO,
Plaintiffs–Appellants,

v.

STEADFAST INSURANCE COMPANY, et al.,
Defendants–Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana in Civil Action No. 09-CV-4138
The Honorable Eldon E. Fallon

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS–APPELLEES AND AFFIRMANCE

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November 26, 2013

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Sosebee, et al., v. Steadfast Ins. Co., et al., Case No. 13-30738

Pursuant to Pursuant to Fifth Circuit Rule 29.2, which requires "a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the *amicus* brief," undersigned counsel of record certifies that, in addition to those persons listed in the parties' Rule 28.2.1 statements, the following listed persons have an interest in this *amicus* brief. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. American Institute of Marine Underwriters, 14 Wall Street, Suite 820, New York, NY, 10005.
2. Members of the American Institute of Marine Underwriters, identified at http://www.aimu.org/members2.html.
3. Attorneys for *amicus curiae*: Joseph Grasso (counsel of record), Wiggin and Dana LLP, Two Liberty Place, 50 S. 16th Street, Suite 2925, Philadelphia, PA, 19102; Kim Rinehart and Tadhg Dooley, Wiggin and Dana, P.O. Box 1832, New Haven, CT 06508.

Pursuant to Fed. R. App. P. 26.1, undersigned counsel of record certifies that *amicus curiae* has no parent corporation; and that no publicly held corporation owns ten percent or more of the stock of *amicus curiae*.

Dated: November 26, 2013 /s/ Joseph G. Grasso

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and Fifth Circuit Rule 28.3(b), *amicus curiae* waives oral argument in this case. Both parties to the appeal have requested oral argument, however, and a*micus curiae* will, of course, make counsel available should the Court decide that oral argument from *amicus curiae* would assist the Court in its review.

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QUESTION PRESENTED

Whether the District Court correctly held that Section III(B) of the Energy Package Policy, Number B11252008Q2N1073, which incorporates the standard SP-23 (Revised 1/56) Protection and Indemnity Form promulgated by amicus American Institute of Marine Underwriters, provides "occurrence based" coverage.

INTEREST OF AMICUS CURIAE

The American Institute of Marine Underwriters ("AIMU") is a non-profit trade association representing the ocean marine insurance industry in the United States as an advocate, promoter, source of information, and center for education. *See generally* www.aimu.org.[1] AIMU represents forty-three marine insurance companies in the United States. Those companies underwrite over 90% of the ocean marine risks insured in the United States. In 2012, AIMU's members underwrote marine insurance policies with total premiums of approximately $2.5 billion. The insured value of the goods and vessels insured under these policies total hundreds of billions of dollars.

One of the services AIMU provides to its members is promulgation of policy forms for voluntary use by its members. The Protection & Indemnity ("P&I")

[1] Pursuant to Fed. R. App. P. 29(c)(5), AIMU represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than AIMU, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

policy at issue in this case includes the Form SP-23 (Revised 1/56), one of three P&I forms created by AIMU that are in wide use in the United States.[2] The SP-23 form provides indemnity to assured parties for liability arising from certain enumerated "events" or "happenings" that occur during the policy term. In other words, it provides occurrence-based indemnity coverage.

In this appeal, Plaintiffs–Appellants ("Appellants") challenge the District Court's holding that Section III of the 2008 Energy Package Policy, which incorporates the SP-23 form, provides occurrence-based coverage. As the creator, repository, and distributor of the SP-23 form and the representative of U.S. marine underwriters implementing it, AIMU has a strong interest in the outcome of this appeal. Should this Court accept Appellants' unprecedented interpretation of the SP-23 form and reverse the judgment of the District Court, it would have a profound impact on AIMU, its members, and their assureds, all of whom have always intended and understood the SP-23 form to provide occurrence-based indemnity coverage. AIMU thus has an interest in ensuring that this Court, like the District Court, correctly construes the SP-23 form at the center of this dispute.

All parties have consented to the filing of this brief.

[2] All of the forms promulgated by AIMU are available on its website, www.aimu.org.

ARGUMENT

AIMU created the SP-23 form to provide indemnity coverage for liability arising from certain enumerated "events" or "happenings" that occur during the policy period. The language used in the SP-23 form denotes occurrence-based coverage, a classification underscored by the very nature of marine protection and indemnity insurance, itself. As far as AIMU is aware, no court has ever construed the SP-23 form or any similar P&I form as providing anything other than occurrence-based coverage. In particular, no court has ever construed the form to provide claims-made coverage, such that coverage would apply to any claim made during the policy period, regardless of when the occurrence giving rise to the claim took place. The District Court thus correctly determined that the SP-23 form at issue in this case, with a policy period of May 18, 2008–May 18, 2009, does not provide coverage for injuries resulting from a collision on May 1, 2008. A contrary holding would upset the expectations of AIMU, its member underwriters, and their assureds, and cause significant confusion regarding the scope of coverage provided by current P&I policies. The judgment should be affirmed.

I. THE SP-23 FORM PROVIDES OCCURRENCE-BASED INDEMNITY COVERAGE.

AIMU created and promulgated the SP-23 form to provide indemnity coverage on an occurrence basis and it has always been understood by AIMU's members and their assureds to provide occurrence-based coverage. This intent and

understanding is evinced by language, nature, and history of the form, and is consistent with the construction of the form by every court to have considered it.

A. The Language of the SP-23 Form Denotes Occurrence-Based Coverage.

It is evident from the language used in the SP-23 form that the policy provides occurrence-based indemnity coverage. As the District Court noted, "[t]he plain terms of the policy state that it covers 'loss . . . [a]t and from the 18th day of May 2008 to the 18th day of May 2009,' for which the Assured becomes liable 'on account of the liabilities, risks, events and/or happenings' as described in the policy." *Sosebee v. Steadfast Ins. Co.*, CIV. A 09-4138, 2013 WL 2555460, at *7 (E.D. La. June 10, 2013). In the marine insurance context, "loss" refers to injury or damage "arising from certain perils of the sea, or sea risks to which the [insured interest] may be exposed during a particular voyage or for a specified period of time." *Mercantile Mut. Ins. Co. of N.Y. v. Folsom*, 85 U.S. 237, 246 (1873). As this Court has observed, "[t]he SP-23 form lists fourteen specific types of loss or damages as perils or risks insured against." *See, e.g., St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co.*, 666 F.2d 932, 941 (5th Cir. 1982).

Thus, when the SP-23 form used in the policy at issue in this case refers to "loss . . . [a]t and from the 18th day of May 2008 to the 18th day of May 2009," R. 2686, it demonstrates an intent to provide indemnity for liability incurred as a result of injury or damage that *occurs* during this policy period, provided that such

injury or damage arose from one of the categories of "liabilities, risks, events and/or happenings" set forth in the policy. *Id.*

Other language in the form also confirms that the SP-23 form provides occurrence-based indemnity coverage. For example, it sets a limit on liability for "any one accident or occurrence," not any one "claim." *See* R. 2692 ("Liability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured."); *see also, e.g., Gabarick v. Laurin Maritime (America), Inc.*, 650 F.3d 545, 554 (5th Cir. 2011) (finding no ambiguity in SP-23 form's limitation of liability for "any one accident or occurrence"); *Axis Ins. Co. v. Buffalo Marine Servs.*, CIV. A. H-12-0178, 2013 WL 5231619, at *12 (S.D. Tex. Sept. 12, 2013) (holding that "policy limits" under a P&I policy incorporating the SP-23 form "exist on a per 'occurrence' basis").

The notice provision contained in the SP-23 form is also consistent with occurrence-based, and not claims-made, coverage. Contrary to the Appellants' assertion, notice provisions "are generally contained in *both* claims-made and occurrence policies." *Int'l Ins. co. v. RSR Corp.*, 148 F. App'x 226, 231 (5th Cir. 2005) (emphasis added). However, notice provisions serve a different purpose in an occurrence policy than in a claims-made policy. "In the case of a 'claims-made policy . . . notice itself constitutes the event that triggers coverage." *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir.

1999). This Court has thus referred to such notice as "claims-triggering notice." *Resolution Trust Corp. v. Ayo*, 31 F.3d 285, 292 (5th Cir. 1994). "In the case of an 'occurrence' policy," by contrast, "any notice requirement is subsidiary to the event that triggers coverage." *Matador Petroleum*, 174 F.3d at 658. Its purpose is not to trigger coverage, but rather "to aid the insurer in administration of its coverage of claims," *FDIC v. Booth*, 82 F.3d 670, 678 (5th Cir. 1996), and to enable the insurer to "timely intercede and protect its own interest," *Ayo*, 31 F.3d at 292. This Court has referred to such notice as "prejudice-preventing notice." *Id.*

The notice provision in the SP-23 form is prejudice-preventing, and therefore consistent with occurrence-based, not claims-made, coverage. *See Ayo*, 31 F.3d at 292–93. It requires the assured to give notice of "any *occurrence* which *may* result in loss, damage and/or expense for which this Assurer is *or may* become liable." R. 2690. The clause does not require notice of a "claim" and provides no indication that coverage is triggered by notice of a claim. *Id.* Moreover, the use of conditional language makes clear that notice of an occurrence is required even if no claim is ever made. This is so the insurer may "timely intercede and protect its own interest." *Ayo*, 31 F.3d at 292.

In short, the most natural reading of the SP-23 form comports with its intended meaning—that it provides occurrence-based indemnity coverage. If the SP-23 form was intended to provide claims-made coverage, it would contain very

different language. Not only would its notice provision be different, *see* p. 6, *supra*, but it would likely contain explicit claims-made language. Because claims-made coverage is the exception in most insurance contexts (save for professional malpractice, *see FDIC v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994)), claims-made policies tend to contain clear language identifying the nature of coverage. *See, e.g.*, *Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 920 (Tex. Ct. App. 1988) (collecting cases across jurisdictions). Indeed, in *Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, this Court found that a contractual indemnity provision was occurrence-based because it did *not* contain the sort of express claims-made language typically found in claims-made policies. 390 F.3d 336, 344 (5th Cir. 2004) ("The provisions do not state, as the insurance policy did in *Yancey*, that they are strictly claims-based. Therefore, we find the parties intended an occurrence-based provision . . . .").[3]

B. The Nature of Marine P&I Insurance is Consistent with Occurrence-Based Coverage.

The occurrence-based nature of the SP-23 and other marine P&I forms

[3] As the Court observed in *Millennium Petrochemicals*, the insurance policy in *Yancey* contained the following clear language: "THIS IS A 'CLAIMS MADE' POLICY READ CAREFULLY . . . COVERAGE: To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as money damages *because of any claims first made against the insured during the policy period*, arising out of any negligent act, error or omission, occurring subsequent to the retroactive date, in the conduct of the Insured's business . . . ." *Millennium Petrochemicals*, 390 F.3d at 344 n.5.

derives not merely from policy language, but from the nature and history of marine insurance, itself. As described long ago by the Supreme Court, the fundamental nature of marine insurance is that "[u]nderwriters . . . undertake, in consideration of a certain premium, to indemnify the party insured against loss arising from certain perils of the sea, or sea risks to which the ship, merchandise, or freight of the insured may be exposed *during a particular voyage or for a specified period of time.*" *Folsom*, 85 U.S. at 246 (emphasis added); *see also* 1 Parks *The Law and Practice of Marine Insurance and Average* at 20 (1987) (same); *Export S.S. Corp. v. American Ins. Co., Newark, N.J.*, 106 F.2d 9, 10 (2d Cir. 1939) ("[I]n a time policy insuring against loss arising from legal liability, the insurer is bound to make the insured whole on losses due to liabilities that accrued against the insured during the term covered by the policy. Conversely, the insurer has no obligation as to losses from liabilities accruing before or after the term." *Export S.S. Corp. v. American Ins. Co., Newark, N.J.*, 106 F.2d 9, 10 (2d Cir. 1939.

Thus, in the absence of express language to the contrary, a marine insurance policy—whether a P&I policy or a Hull or Cargo policy—only indemnifies against losses stemming from risks that are realized during the policy period, whether that is a period of time, as in this case, or for the duration of a particular voyage. *See, e.g.*, *Folsom*, 85 U.S. at 246; *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1200 (5th Cir. 1993) (stating that "proof that the loss occurred within

the policy period is a *precondition* to coverage" under marine insurance policy); *see generally* 1 Parks, *The Law and Practice of Marine Insurance and Average* at 22 (noting that the insured's "interest must be exposed to a risk of loss from a peril insured against *during the currency of the marine adventure for which the contract was written*" and that "the risk of loss must act upon the subject-matter insured *after the policy takes effect*") (emphases added).[4] As discussed above, the SP-23 form contains no contrary language.

The occurrence-based nature of the SP-23 is also consistent with its nature as an indemnity policy. *See generally* 2 Parks, *The Law and Practice of Marine Insurance and Average*, at 1004 ("[A] P&I policy is, strictly speaking, an *indemnity* policy and not a liability policy, although the indemnity is basically against liabilities."). As this Court observed in *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, "[f]or indemnification purposes, a loss occurs during the policy premium term when an event which gives rise to potential liability and litigation, such as the alleged collision in this case, happens during that term." 540 F.2d 1257, 1263 (5th Cir. 1976). For this reason, the Court read an ambiguous clause in a marine P&I policy to extended "coverage . . . only to losses occurring during the

[4] Though the foregoing observations concern marine policies generally, "[t]here is no valid reason why cases involving cargo, hull, and other types of liability policies should not be equally persuasive in cases involving P&I policies," specifically. 2 Parks, *The Law and Practice of Marine Insurance and Average*, at 1008.

policy period." *Id.* at 1262–63.[5] Similarly, the SP-23 form provides indemnification for liability arising from a "loss"—that is, an accident or injury arising from one of the enumerated perils—that occurs during the policy period. R. 2686.

In sum, the nature of the SP-23 form, as a marine indemnity insurance policy is consistent with occurrence-based, not claims-made, coverage.

C. Courts Have Long Understood the SP-23 Form to Provide Occurrence-Based Coverage.

In light of the plain language of the SP-23 form and the widespread understanding that it provides occurrence-based indemnity coverage, it is unsurprising that few courts have directly addressed a contention that the policy is "claims-made." However, in those instances where the question has directly or indirectly arisen, courts have uniformly found that the SP-23 and similar marine P&I forms provide occurrence-based coverage.

To the best of AIMU's knowledge, beside the matter on appeal, only one other case has presented a direct challenge to the occurrence-based nature of the SP-23 form. In *Dean v. Heck Towing, Inc.*, the District Court for the Eastern District of Louisiana quoted nearly identical policy language to that contained in the SP-23 form in this case and held that "the plain meaning of the insurance

[5] The clause at issue was ambiguous because it did not contain the words "loss," "damage," "injury," or "liability," as did the other coverage clauses. *Id.* at 1260.

policy clearly evinces the intent to enter into an 'occurrence' insurance policy," as opposed to a claims-made policy. No. 87-3683, 1988 WL 101527, at *1 (E.D. La. Sept. 26, 1988).

In other cases, courts construed policies in such a manner as necessarily to imply occurrence-based coverage, even though the assured parties made no explicit argument that the policies were not occurrence-based or that they were claims-made. For example, in the *Exmoor* case, the Second Circuit observed that "in a time policy insuring against loss arising from legal liability, the insurer is bound to make the insured whole on losses due to liabilities that accrued against the insured during the term covered by the policy. Conversely, the insurer has no obligation as to losses from liabilities accruing before or after the term." *Export S.S. Corp.*, 106 F.2d at 10. Applying this principle, the court apportioned responsibility for indemnification between two policies because part of the damage occurred when one policy was in effect and the remainder when the other policy was in effect. *Id.* at 12. It was not relevant to the court which (if either) policy was in effect at the time the resulting claim was made. More recently, in *La Reunion Française Societé Anonyme d'Assurances et des Réassurances v. J.E. Brenneman Co., Inc.*, the court held that a policy incorporating the SP-23 form "d[id] not cover any personal injury claims resulting from [a] pier collapse, because the injuries did not occur until after the expiration of the policies." No. 01-5612, 2007 WL 1931306, at

*12, 16 (D.N.J. June 28, 2007).

Still other cases (a great many of them) discuss the SP-23 using language that evinces the courts' understanding that it provides occurrence-based coverage, even though that understanding is not essential to the holding. In *In re Prudential Lines, Inc.*, for example, the Second Circuit held that an American Club P&I form, which was substantively identical to the SP-23 form,[6] "provides coverage for all losses or damages for which Prudential is held liable resulting from *injury occurring during the policy period*." 158 F.3d 65, 83 (2d Cir. 1998) (emphasis added). Similarly, in *Alleman v. Bunge Corp.*, this Court held that a longshoreman's injuries were not covered by his employer's P&I policy, which included the "Form SP23." 779 F.2d 218, 219 (5th Cir. 1985). The Court assumed that the policy was applicable because it was in effect "*[a]t the time of the accident*" but concluded that the claim fell within a policy amendment that excluded coverage for "claims for injury, illness or death to employees of the

[6] *Compare* R. 2686 ("The Assurer hereby undertakes to make good to the Assured . . . all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risk, events and/or happenings herein set forth: . . . Liability for loss of life of, or personal injury to, or illness of, any person . . . .") *with In re Prudential Lines Inc.*, 158 F.3d at 83 ("Each American Club policy covers a one-year period and provides that the Club will indemnify Prudential as 'the Assured against any loss, damage or expense which the Assured shall become liable to pay and shall pay by reason of the fact that the Assured is the owner . . . of the insured vessel and which shall result from the following liabilities, risks, events, occurrences and expenditures: . . . Liability for . . . loss of life, or personal injury to, or illness of any person . . . .'") (quoting policy, modifications in original).

assured." *Id.*; *see also, e.g., St. Paul Fire & Marine Ins. Co. v. Vest Transport. Co.*, 666 F.2d 932, 936 (5th Cir. 1982) (finding that among the "insurance policies which [the assured] had in effect *on the date of the casualty*" were a primary and excess P&I policy "incorporat[ing] . . . [the] SP-23") (emphasis added); *Gabarick v. Laurin Maritime (America) Inc.*, 635 F. Supp. 2d 499, 502, 507 (E.D. La. 2009) (noting that policy which "provided Protection and Indemnity (P&I) coverage" through the SP-23 form "was in effect *at the time of the collision*") (emphasis added), *aff'd* 650 F.3d 545 (5th Cir. 2011); *New York Cross Harbor RR Terminal Corp. v. Atlantic Mutual Ins. Cos.*, 669 F. Supp. 554, 556, 559 (E.D.N.Y. 1987) (noting that policy with "clauses that are standard to a so-called SP-23 Protection and Indemnity Policy" "was in effect in 1984 and 1985, with the incident . . . taking place in November 1984"), *rev'd on other grounds* 852 F.2d 38 (2d Cir. 1988).

In stark contrast, in the more than fifty years since the SP-23 form was first promulgated, no court has ever construed it to provide claims-made coverage. Indeed, despite a diligent search, AIMU is not aware of a single case in which *any* marine P&I policy was found to provide coverage where an incident occurred outside the relevant policy period. To the best of AIMU's knowledge, there is only one other case in which a party has even *argued* that the SP-23 provides claims-made coverage and in that case, as noted above, the district court rejected that

interpretation, holding that "the plain meaning of the insurance policy clearly evinces the intent to enter into an 'occurrence' insurance policy." *Heck Towing*, 1988 WL 101527, at *1.

II. A HOLDING THAT SP-23 PROVIDES CLAIMS-MADE COVERAGE WOULD BE DETRIMENTAL TO THE INTERESTS OF AIMU, MEMBERS, AND THEIR ASSUREDS.

The SP-23 form is "the most widely used type of P&I policy in the United States." Margaret M. Sledge, *Rights and Duties of Primary and Excess Insurance Carriers*, 15 Tul. Mar. L.J. 59, 94 n.148 (1990). As set forth above, AIMU created the SP-23 to provide occurrence-based coverage and, since 1956, when the form was first promulgated, AIMU's members have subscribed to policies based on the understanding that the SP-23 form provides occurrence-based coverage. Insurance policies incorporating the SP-23 form have been priced and administered in accordance with this generally held belief. Were this Court to decide, for the very first time, that the SP-23 form actually provides claims-made coverage, it would frustrate the expectations and understanding of AIMU and its forty-three member underwriters and cause extreme uncertainty as to the scope and nature of thousands of existing P&I policies incorporating the SP-23 form.

Such a decision would harm assureds as well. Notwithstanding the position of the Appellants in the current dispute, most shipowners would likely prefer to have occurrence-based coverage, inasmuch as it offers a much longer tail of

coverage, exposing the insurer to "indefinite future liability" for occurrences during the policy period. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993); *see also, e.g., Pac. Res. Inc. v. Oswego Shipping Corp.*, No. 79 Civ. 1606, 1984 WL 928, at *4 (S.D.N.Y. 1984) ("Thus, a shipowner/operator who operated for only one year, say in 1975, would only need one 1975 'occurrence' policy, but would require several years of 'claims made' policies, to protect itself from claims arising out of acts in 1975"). Should this Court hold that the SP-23 form provides claims-made coverage, any assured covered by a non-renewed P&I policy at the time an otherwise covered "event" or "happening" occurred would be exposed to liability without indemnity.

Accordingly, it is in the interests of both insurance companies and the assureds—and, of course, of AIMU as the representative of marine underwriters and the creator of the form—that the SP-23 form be construed consistent with its text and history, the understanding of every prior court to consider the question, and with sound public policy. The form provides occurrence-based indemnity coverage and should be construed as such.

CONCLUSION

For the foregoing reasons, *amicus curiae* AIMU respectfully urges the Court to affirm the judgment of the District Court insofar as it held that Section III(B) of the Energy Package Policy, Number B11252008Q2N1073, incorporating the SP-

23 form, provides indemnity coverage on an occurrence basis.

Respectfully submitted,

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November 26, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney for *amicus curiae* American Institute of Marine Underwriters, Joseph G. Grasso, hereby certifies that, on the 26th day of November, 2013, he served the foregoing motion and all related pleadings and attachments on all of the parties to this litigation, by CM/ECF and electronic transmission (e-mail attachment), addressed to their attorneys, as follows:

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Philadelphia, Pennsylvania, this 26th day of November, 2013.

BY: /s/ Joseph G. Grasso
Joseph G. Grasso

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 3,852 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

/s/ Joseph G. Grasso