ORAL ARGUMENT SCHEDULED FOR NOVEMBER 21, 2017

Case No. 16-5242

In the United States Court of Appeals For the District of Columbia Circuit

REGINALD L. IVY,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Appellee.

On Appeal from the U.S. District Court
for the District of Columbia
Case No. 1:15-cv-01976-RC (Contreras, J.)

REPLY BRIEF FOR COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT REGINALD L. IVY

Travis Crum
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
tcrum@mayerbrown.com

Court-Appointed Amicus Curiae Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES*

Page(s)

Cases

---

* *Authorities upon which we chiefly rely are marked with asterisks.*

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules and Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

GLOSSARY

DCIA	Debt Collection Improvement Act of 1996
DEA	Drug Enforcement Administration
FMS	Financial Management Services
IRS	Internal Revenue Service
MDHE	Missouri Department of Higher Education

INTRODUCTION

The Taxpayer Bill of Rights of 1988 "speaks volumes about Congress's explicit consideration of the remedies available to taxpayers." *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 411 (4th Cir. 2003). As part of that statute, Congress enacted Section 7433 and waived the government's sovereign immunity for actions taken "in connection with any collection of Federal tax." 26 U.S.C. § 7433(a). In this case, the wrongful offset occurred "in connection with" the "collection" of Ivy's taxes because the government used Ivy's collected taxes to pay a student loan debt that was no longer past due, thus violating 26 U.S.C. § 6402(d). Accordingly, the district court had jurisdiction to hear Ivy's case.

The government makes two principal arguments in its opposition brief.[1] *First*, the government asserts that Ivy's claim is based on the collection of a non-tax debt—not the collection of taxes. The government's argument ignores that Section 7433's waiver of sovereign

[1] *Amicus* and the government (Govt. Br. 18-19) agree that Ivy's Section 6402(d) claim has been mooted by the IRS's issuance of a check to Ivy for his $634 tax refund, plus interest. And the government does not contend that Section 7433 needs to be interpreted in light of 26 U.S.C. § 6402(g). Amicus Br. 38-42.

immunity covers "collection-*related* activities." *Kim v. United States*, 632 F.3d 713, 716 (D.C. Cir. 2011) (emphasis added). The government claims that *amicus*'s argument reads the words "Federal tax" out of the statute (Govt. Br. 24) but it is the government's interpretation that erases the phrase "in connection with" from the Internal Revenue Code.

Second, the government attempts to shift the blame. As the government sees it, the IRS had nothing to do with the wrongful offset. Rather, the Bureau of Fiscal Service ("Fiscal Service")[2] is the responsible party. And because Section 7433 waives the government's sovereign immunity only for misconduct perpetrated by IRS employees, the government contends that the district court lacked jurisdiction to hear Ivy's claim based on the wrongful offset.

This bureaucratic game of whack-a-mole is unavailing. At the outset, the government's disavowal of the IRS's involvement in the wrongful offset is refuted by its own submissions and actions in this case, which establish that the IRS was intimately involved in the decision to offset Ivy's tax refund. The government's legal argument is

[2] In the record and in the district court, Fiscal Service is often referred to as the Financial Management Service ("FMS"), a predecessor agency. *See* Treas. Order 136-01 (Oct. 7, 2012).

similarly flawed. When Congress waived sovereign immunity as to the IRS's collection-related activities, the IRS was responsible for offsetting tax refunds. Although the Department of the Treasury subsequently reallocated some of the IRS's responsibilities to Fiscal Service, the scope of Congress's waiver has not changed. So it is of no moment that this responsibility is now handled by Fiscal Service employees.

And finally, if this Court has any doubts about whether the complaint alleges sufficient facts or makes particular claims falling within Section 7433's waiver of sovereign immunity, Ivy—who was proceeding *pro se* in the district court—should be given an opportunity to amend his complaint in light of the factual developments on appeal and the IRS's demonstrated willingness to intervene in Fiscal Service's process for refunding overpayments.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION UNDER SECTION 7433 TO ENTERTAIN IVY'S REQUEST FOR COMPENSATORY DAMAGES STEMMING FROM THE IRS'S WRONGFUL OFFSET

Section 7433 waives sovereign immunity for actions taken "in connection with any collection of Federal tax." 26 U.S.C. § 7433(a). The

wrongful offset of an overpayment pursuant to Section 6402(d) falls within Section 7433's waiver of sovereign immunity.

A. The IRS's Wrongful Offset Is An Activity Taken In Connection With Any Collection Of Federal Tax

The government fails to meaningfully engage with the bulk of *amicus*'s argument that the wrongful offset of Ivy's overpayment qualifies as a "collection-related activit[y]." *Kim*, 632 F.3d at 716.

The government ignores that Section 6402(d)'s heading is "[c]ollection of debts owed to Federal agencies" and that Congress broadly applied Section 7433 to the entirety of the Internal Revenue Code—not just the Chapter entitled "Collection." Amicus Br. 30 & 36-37. The government also has no response to *amicus*'s argument that the procedural protections afforded taxpayers under Section 6402(d) are analogous to those provided in collection proceedings. Amicus Br. 32-35. And although the government agrees (Govt. Br. 21-22) with *amicus* that this Court and other Circuits have emphasized the assessment/collection distinction in interpreting Section 7433, *see Kim*, 632 F.3d at 716 (collecting cases), the government papers over this dichotomy.

To be sure, the government admits that Section 6402(d) offsets occur after the assessment of a taxpayer's liability. Govt. Br. 22-23. The government, however, retorts that overpayments cannot be considered collection activities and that "tax-refund offsets under § 6402(d) are never used to collect unpaid federal taxes." Govt. Br. 23. Instead, Section 6402(d), as construed by the government, is concerned solely with the collection and payment of non-tax debts. In support of this argument, the government points to 26 U.S.C. § 6402(a) and Treas. Reg. § 301.6402-3(a)(6)(i), which together provide that "an overpayment for one tax year is credited against the taxpayer's unpaid federal taxes for any other tax years *before* it can be refunded or offset under § 6402(d)." Govt. Br. 23.

As an initial matter, the government's apparent concession that Section 6402(a) involves a collection activity demonstrates that Section 7433's waiver of sovereign immunity is not limited to actions taken pursuant to "Chapter 64 of the Internal Revenue Code, which is aptly entitled 'Collection.'" *Kim*¸ 632 F.3d at 716. That result is unsurprising given that Section 7433 waives sovereign immunity for any misconduct under the Internal Revenue Code, as opposed to an enumerated section

or chapter. *See* Amicus Br. 37 (discussing Section 7433's use of the word "title"). But the deeper flaw with the government's position is best illustrated with a hypothetical.

Suppose that Tony and Steven are eating dinner together at a restaurant and order the same meal. When the $30 check arrives, each puts down a $20 bill. When the server brings back the $10 in change, Tony takes the $10 and reminds Steven about an outstanding $5 debt. Tony *collected* Steven's overpayment of the dinner bill and *intercepted* the refund to fulfill a non-dinner *debt*.

Or to refer back to Section 7433, Tony fulfilled Steven's debt "in connection with a[] collection." 26 U.S.C. § 7433(a). The particular purpose for which the money is redirected after the collection is irrelevant in both the hypothetical and to the statutory scheme. What matters is how the government obtained—or collected—the money. Under Section 7433, the IRS must obtain the money through the "collection of Federal tax." And here, the government obtained the $634 overpayment by collecting Ivy's taxes. *See Seven-Sky v. Holder*, 661 F.3d 1, 32 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (explaining that many individuals' taxes are collected when they submit their tax

returns), *abrogated on other grounds by National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

According to the government, "*amicus* would have th[is] Court hold that the words 'in connection with any collection *of Federal tax*' mean 'in connection with any collection.'" Govt. Br. 24 (quoting 26 U.S.C. § 7433(a)) (emphasis in Govt. Br.). As the above hypothetical demonstrates, that is incorrect.

Amicus's argument still gives meaning to the words "of Federal tax" in Section 7433. Ivy's claim is against the IRS because his overpayment "of Federal tax[es]" resulted in the IRS and Fiscal Service intercepting his $634 and transferring it to the U.S. Department of Education and the Missouri Department of Higher Education ("MDHE"). *Amicus* recognizes that Fiscal Service can intercept payments to individuals in a variety on *non*-tax contexts—and neither the IRS nor Fiscal Service would be liable under Section 7433 under such circumstances. *See United States v. Hankins*, 858 F.3d 1273, 1275 n.1 (9th Cir. 2017) ("The Bureau of Fiscal Service administers the Treasury Offset Program and reroutes payments, *such as federal tax refunds*, to collect delinquent debts owed to federal agencies and

states.") (emphasis added); *see also infra* at Section I.B.2 (discussing Fiscal Service's authority to intercept payments). *Amicus*'s interpretation of Section 7433 is thus tethered to federal taxes because it conditions the IRS's liability on its involvement in collecting the money used to offset the outstanding non-tax debt.

By contrast, the government unduly narrows Section 7433's broad waiver of sovereign immunity. As *amicus* previously explained (Amicus Br. 35-38), the government's interpretation eliminates the phrases "in connection with," "any," and "title" from Section 7433. By gesturing towards the purportedly past-due debt that Ivy's $634 was intercepted to fulfill rather than how the IRS collected the funds that were used to pay that debt, the government never attempts to grapple with Section 7433's broad language nor this Court's holding that Section 7433 covers "collection-*related* activities." *Kim*, 632 F.3d at 716 (emphasis added).

B. The Government's Attempt To Shift The Blame To Fiscal Service Is Unavailing

The government contends that jurisdiction is lacking in this case because "it was Fiscal Service, not the IRS, which offset Ivy's refund." Govt. Br. 25. That argument is belied by the record and governing statutes.

1. *The IRS's Actions In This Case Demonstrate That It Was Involved In The Wrongful Offset*

Amicus does not dispute that Fiscal Service played a part in the wrongful offset of Ivy's taxes. *Amicus*, however, takes issue with the government's minimization of the IRS's role in this case.

As the government admits: "[b]efore Ivy filed suit, the IRS's only involvement with his offset was after it had already occurred, when the IRS determined that the correct amount of Ivy's refund was $634, not $1,822." Govt. Br. 26. The government's framing of the issue stems from its theory of the case. According to the government, there was only *one* offset, which occurred in September 2012 when Ivy's tax return was fraudulently filed by an identity thief. The subsequent decision to allow the Department of Education and the MDHE to retain Ivy's actual $634 overpayment—a decision the government concedes the IRS was involved in—is characterized not as an offset, but as an adjustment. *See* Govt. Br. 14 ("[T]he only offset in this case occurred in September 2012, long before [Ivy] satisfied the defaulted debt. Although the *amount* of the offset was later adjusted to reflect the true amount of Ivy's refund, that adjustment was not a new offset."); *see also* Amicus Br. 12-14 (discussing the two tax returns and two offsets).

Contrary to the government's protestations, Ivy's claim stems not from the September 2012 offset but rather from the January 2014 offset—which occurred after the filing of his actual 2011 tax return. As Ivy alleges in his complaint:

> In the month of September of 2013, I discovered that my 2011 tax return was fraudulently filed. The recovery process was finalized on January 14, 2014. During th[at] month, the IRS made a decision to allow [the Department of Education and MDHE] to retain funds that would have been sent to me by means of my 2011 tax refund.

App.1-2. Ivy further alleges that this "wrongful offset" "was made when the account was *paid-in-full* not *past-due*" and thus contrary to 26 U.S.C. § 6402(d) and 31 C.F.R. § 285.2, which "appl[y] to *past-due* debts." App.2 (emphasis in original). Ivy has thus alleged facts concerning the IRS's conduct and identified statutes and regulations that he believes the IRS violated when it engaged in "collection-related activities." *Kim*, 632 F.3d at 716. That is sufficient under Section 7433 to confer jurisdiction on the district court.[3]

[3] The government's discussion of the differences between the IRS's former and current identity-theft procedures and the IRS's knowledge of the status of Ivy's student-loan debt (Govt. Br. 11 & 26) goes to the merits of Ivy's claim—not the district court's jurisdiction. The district

In addition, the IRS's actions while this case was pending on appeal further refute any suggestion that it lacked the authority to rectify the wrongful offset. As the government stated in a letter to this Court: "*at the direction of the IRS*, the Bureau of the Fiscal Service administratively reversed the remaining $634 of the offset and disbursed to Mr. Ivy a refund of that amount, plus interest." App.43 (emphasis added); *see also* Govt. Br. 8 (discussing circumstances in which IRS can "ask Fiscal Service to reverse an offset"). The IRS's admitted role in "administratively revers[ing]" the wrongful offset establishes that there is some measure of administrative cooperation in how the IRS and Fiscal Service handle offsets under Section 6402(d).

Or to put it differently: either the January 2014 offset or the June 2017 administrative reversal violated a statute or regulation. The government has not proffered an explanation for how it can legally justify both its January 2014 and June 2017 actions. *See* App.43 (government's letter to the court); Govt. Br. 15-16 (discussing the administrative reversal). At a minimum, these new factual

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court dismissed Ivy's complaint pursuant to Rule 12(b)(1), App.28-31, and the government has not requested affirmance on alternative grounds.

developments entitle Ivy to amend his complaint prior to its dismissal. *See infra* at Section I.C.

2. *Fiscal Service's Involvement In The Wrongful Offset Is Covered By Section 7433's Waiver Of Sovereign Immunity*

Even assuming that the IRS was not involved in the wrongful offset, the district court has jurisdiction to entertain Ivy's claim.

The government's syllogism proceeds as follows: Section 7433 waives sovereign immunity only for misconduct committed by "officer[s] or employee[s] of the Internal Revenue Service." 26 U.S.C. § 7433(a). The "Fiscal Service and the IRS are separate bureaus of the Department of the Treasury." Govt. Br. 25. Ergo the wrongful offset of Ivy's tax return by Fiscal Service does not fall within Section 7433's waiver of sovereign immunity. The government's syllogism breaks down, however, upon an examination of the historic division of responsibilities between the two agencies.

As the government acknowledges, the IRS previously handled offsets and disbursements. *See* Govt. Br. 25 & n.9 (citing Treas. Reg. § 301.6402-6(n) and *Revision of the Tax Offset Program*, 64 Fed. Reg. 48,547 (Sept. 7, 1999)). Indeed, "[r]efund offsets *under § 6402(d)* used to

be administered by the IRS but that responsibility was transferred to Fiscal Service *in 1998*." Govt. Br. 5 n.2 (emphases added).[4] And therein lies the rub.

The flaw in the government's argument is revealed by examining the timeline of congressional enactments that occurred prior to the IRS's bureaucratic reorganization in 1998. Section 6402(d)'s offsetting authority was "enacted as part of the Deficit Reduction Act of 1984." *In re Chateaugay Corp.*, 94 F.3d 772, 777 (2d Cir. 1996). Congress included Section 7433 as part of the Taxpayer Bill of Rights of 1988. Thus, when Congress passed Section 7433, offsets under Section 6402(d) were processed by "officer[s] or employee[s] of the Internal Revenue Service." 26 U.S.C. § 7433(a).[5]

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[4] The Secretary of the Treasury transferred the IRS's role in handling offsets to Fiscal Service in response to Congress's enactment of the Debt Collection Improvement Act of 1996 ("DCIA"), Pub. L. No. 104-134, Title III, § 31001, 110 Stat. 1321-358 (1996). *See Revision of the Tax Offset Program*, 64 Fed. Reg. at 48,547.

[5] Section 7433 has been amended twice since its initial enactment. In 1996, Congress increased the amount of damages that could be awarded to a prevailing plaintiff. Pub. L. No. 104-168, Title VIII, §§ 801(a) & 802(a), 110 Stat. 1465 (1996). And in 1998, Congress modified Section 7433's *mens rea* requirement and its administrative exhaustion provision. Pub. L. No. 105-206, § 3102, 112 Stat. 685 (1998). Although the IRS's reorganization process began prior to this last amendments'

In other words, if the wrongful offset had occurred during the ten-year period between Section 7433's enactment and the reorganization of the IRS's responsibilities, an employee of the IRS would have performed the Section 6402(d) offset and any actionable misconduct by that employee would have fallen under Section 7433's waiver of sovereign immunity. The government therefore seeks to escape Section 7433's waiver of sovereign immunity by pointing to a bureaucratic reorganization and the fact that Section 7433 was not updated to reflect the new division of authority between federal agencies.[6]

The government's argument runs aground on 5 U.S.C. § 907(a), which provides that:

> *A statute enacted*, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, *before the*

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enactment, the touchstone is whether IRS employees handled tax refund offsets at the time of Section 7433's initial enactment and waiver of sovereign immunity.

[6] The notion that a federal agency could escape an express waiver of sovereign immunity simply by re-naming itself—say from the Government Accounting Office to the Government Accountability Office or from the Department of Defense to the Ministry of Peace—borders on the absurd. This approach would also elevate form over substance, as the real party in interest is the United States. *See* Govt. Br. 13 n.7.

> *effective date of the reorganization, has*, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, *the same effect as if the reorganization had not been made*.

5 U.S.C. § 907(a) (emphases added).

Under Section 907(a), courts "read new agencies into the existing statutes to permit the orderly administration of the statutory scheme." *Quivira Mining Co. v. EPA*, 728 F.2d 477, 481 (10th Cir. 1984). Section 907(a) ensures that there are no statutory gaps when an agency is reorganized and that laws that apply to an old agency also apply to the reorganized agency, even if Congress fails to update the relevant statutory language. When the IRS's responsibility for offsetting overpayments and intercepting refunds was transitioned to Fiscal Service, Section 907(a) extended Section 7433's waiver of sovereign immunity for actions taken "in connection with any collection of Federal tax" from the IRS to Fiscal Service. 26 U.S.C. § 7433(a).

To be sure, waivers of sovereign immunity are strictly construed. *See* Amicus Br. 37; Govt. Br. 24. But even "[]though this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress

need not state its intent in any particular way." *FAA v. Cooper*, 566 U.S. 284, 291 (2012). "To the contrary, … the sovereign immunity canon 'is a tool for interpreting the law' and … does not 'displac[e] the other traditional tools of statutory construction.'" *Id.* (quoting *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008)) (alteration in *Cooper*). All that is "require[d] is that the scope of Congress' waiver be clearly discernible from the statutory text in light of traditional interpretative tools." *Id.*

And here, Section 7433 must be read in light of Section 907(a), which makes plain that a previously enacted statute applies to a reorganized federal agency. *Cf. Erienbaugh v. United States*, 409 U.S. 239, 244 (1972) (instructing that courts should "assume[] that when Congress passes a new statute, it acts aware of all previous statutes on the same subject"). Thus, the government cannot escape Section 7433's waiver of sovereign immunity by pointing to its own re-shuffling of bureaucratic responsibilities.

Although there is not much precedent interpreting Section 907(a), it has been invoked to uphold criminal convictions of defendants charged with assaulting federal officers of certain *enumerated* agencies

even though the name of the enumerated agency had been changed and that change had not been reflected in the criminal statute itself. For example, courts have upheld convictions for assaulting officers of the Drug Enforcement Administration ("DEA") even though the criminal statute only enumerated the Bureau of Narcotics and Dangerous Drugs, the DEA's predecessor. *See United States v. Lopez*, 586 F.2d 978, 979-80 (2d Cir. 1978); *United States v. Irick*, 497 F.2d 1369, 1371-72 (5th Cir. 1974); *United States v. Nabors*, 901 F.2d 1351, 1356-57 (6th Cir. 1990); *United States v. Hillsman*, 522 F.2d 454, 457-58 (7th Cir. 1975); *United States v. Alvarez*, 755 F.2d 830, 840-41 (11th Cir. 1985).

Some of these cases, moreover, rejected defendants' arguments under the rule of lenity. *See Irick*, 497 F.2d at 1373; *Nabors*, 901 F.2d at 1356-57; *Alvarez*, 755 F.2d at 841 n.9. The rule of lenity is a tie-breaking principle of statutory interpretation that functions similarly to the cannon that waivers of sovereign immunity are strictly construed. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). When a statute is ambiguous, lenity favors the defendant whereas a waiver of sovereign immunity is construed in the

government's favor. Put simply, if a criminal conviction can be upheld even though the plain language of the statute lists the name of an agency that no longer exists, then Section 907(a) should similarly be interpreted to extend Congress's waiver of sovereign immunity for collection-related activities taken by one agency's employees to another agency's employees that now have responsibility for those tasks.

Here, Fiscal Service acted pursuant to Section 6402(d)—a provision in the Internal Revenue Code—and Section 7433 waives sovereign immunity for misconduct that "disregards any provision of this title." 26 U.S.C. § 7433(a). Accordingly, *amicus* submits that the collection-related actions taken by Fiscal Service pursuant to its authority under the Internal Revenue Code are covered by Section 7433's waiver of sovereign immunity.[7]

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[7] And to be clear, *amicus* is *not* arguing that *every* action by Fiscal Service falls under Section 7433's waiver of sovereign immunity. That is because Fiscal Service also intercepts payments under the DCIA. *See, e.g.*, 31 U.S.C. § 3701(a)(1); *United States v. $37,000 in United States Currency*, 117 F. Supp. 3d 1064, 1065-66 (S.D. Ind. 2015) (intercepting money released from forfeiture hold and directing it to pay overdue child support). *Amicus*'s contention is that the relevant font of statutory authority should determine whether an agency's actions fall under Section 7433's ambit. If, for example, Fiscal Service improperly

C. If This Court Has Any Doubts About Jurisdiction, It Should Provide Ivy, A *Pro Se* Plaintiff, With An Opportunity To Amend His Complaint

Finally, if this Court has any doubts about jurisdiction, Ivy should be given an opportunity to amend his complaint in light of the new factual developments in this case. For example, the IRS's role in administratively reversing the offset could provide grounds for Ivy to allege cooperation between Fiscal Service and the IRS—and to further allege negligent conduct on the IRS's part for failing to double-check with Fiscal Service whether Ivy's debt had been paid in full. Alternatively, if the Court believes that Ivy should have named additional defendants—such as Fiscal Service or the Department of Education—then the proper response is to give him another bite at the apple. *See, e.g.*, *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999) ("[C]ourts freely grant pro se litigants leave to amend."); *Antonelli v. Lappin*, 134 F. App'x 700, 701 (5th Cir. 2005) (unpublished) ("[A] pro se plaintiff who has named the wrong defendant should be permitted to amend his pleadings if there is a potential ground for

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intercepted money that had not been collected by the IRS, then Section 7433 would not apply.

relief."); *Berndt v. Tennessee*, 796 F.2d 879, 882-83 (6th Cir. 1986) (allowing *pro se* plaintiff who named the wrong defendants to amend his complaint).

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

/s/ *Travis Crum*
Travis Crum
Brian D. Netter
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
tcrum@mayerbrown.com

Court-Appointed Amicus Curiae Attorneys for Appellant

September 19, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 3,901 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirement of Rule 32(a)(6) because it was been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point type for text and footnotes.

/s/ *Travis Crum*
Travis Crum

Court-Appointed Amicus Curiae
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 19, 2017, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system and will cause an original and eight copies to be delivered to the Clerk's office. I further certify that two copies will be sent via overnight delivery to the following:

Reginald L. Ivy
9846 Edgefield Drive
Moline Acres, MO 63136

/s/ *Travis Crum*
Travis Crum

Court-Appointed Amicus Curiae
Attorney for Appellant