No. 07- 40416

IN THE UNITED STATE OF APPEALS
FOR THE FIFTH CIRCUIT

MONICA CASTRO, for Herself and as
Next Friend of R.M.G., a Minor Child,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF AMICI CURIAE, THE NATIONAL COUNCIL OF LA RAZA (NCLR) AND LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), IN SUPPORT OF PLAINTIFFS-APPELLANTS, MONICA CASTRO, ET AL.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Defendant-Appellee:

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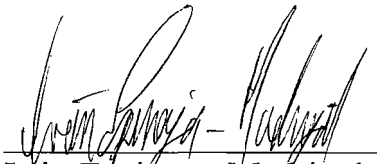

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CONSENT OF THE PARTIES

Pursuant to Federal Rule of Appellate Procedure 29(a), this brief is filed with the consent of all parties.

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This brief is respectfully submitted on behalf of the National Council of La Raza ("NCLR") and League of United Latin American Citizens ("LULAC") (collectively, "amici") with the consent of Plaintiffs-Appellants, Monica Castro and her minor child, R.M.G., and Defendant-Appellee, the United States of America ("the Government"). This brief is in support of Plaintiffs-Appellants.

STATEMENT OF INTEREST

NCLR is a private non-profit organization and the largest Latino constituency-based advocacy group in the United States. NCLR has nearly 300 member organizations in forty states. Founded in 1968, its mission is to reduce poverty and discrimination, and to improve opportunities for Latinos throughout the United States. It carries out its mission by focusing its education and advocacy work on issues related to education, economic development, electoral empowerment, healthcare, civil rights, and immigration.

LULAC is the largest and oldest Latino organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health, and civil rights of Latinos through community-based programs operating at more than 700 LULAC councils nationwide. A

private non-profit organization, LULAC involves and serves all Latino nationality groups.

Amici have an interest in the fair, predictable, and even-handed interpretation and enforcement of federal immigration laws, and in the availability to individuals of remedies for statutory and constitutional violations by the federal government. Amici respectfully submit this brief to urge the *en banc* Court to preserve the well-established legal standard for adjudicating claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq*.

Requiring aggrieved parties to point to a clearly established constitutional right that was violated by federal officers in order to bring a claim under the FTCA would constitute an unprecedented departure from the legal and statutory standards that govern the adjudication of FTCA claims. This proposed requirement would improperly broaden the scope of sovereign immunity in violation of the FTCA, which is specifically designed to waive sovereign immunity. Since the FTCA is not a judicial remedy, but rather, a congressional enactment, a change to the FTCA that would radically expand sovereign immunity can only be made by Congress.

The outcome of this case – where the Border Patrol's alleged wrongful conduct caused the detention and illegal deportation of a U.S.

citizen infant – is a matter of great public concern. Requiring aggrieved litigants to point to a clearly established constitutional right to raise FTCA claims would eviscerate the FTCA, and adversely affect Latinos and other individuals who are subject to tortious conduct by federal officials. Amici and its members are, therefore, directly affected by this Court's interpretation of the FTCA.

INTRODUCTION

This brief focuses on the erroneous reasoning advanced by the Government and reflected in the dissent to the now-vacated panel opinion. *See Castro v. United States*, 560 F.3d 381, 394-95 (5th Cir. 2009) (Smith, J., dissenting) (improperly conflating legal analysis of claims under the FTCA and *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). This brief clarifies that the well-established test used to adjudicate FTCA claims is separate and distinct from the analysis employed for claims under *Bivens*. To hold otherwise contravenes the statute and long-standing court decisions, and thwarts the intent of Congress when it formulated the standards under the FTCA.

In this case, there are no *Bivens* claims. Plaintiffs-Appellants seek relief only under the FTCA. *See* Complaint at Appellate Record 102. Nevertheless, the dissent invokes *Bivens* and improperly incorporates the

legal standard reserved for *Bivens* claims in its analysis of the FTCA claims. *See Castro*, 560 F.3d at 395 (Smith, J., dissenting) (erroneously importing and applying *Bivens* requirements in an FTCA case). According to the dissent, under the FTCA, "[b]efore subjecting the United States to suit, at a minimum we ought to require that the constitutional 'mandate' be clearly established with particularity." *Id.* This conclusion is legally wrong: there is simply no requirement that an aggrieved litigant demonstrate that a clearly established constitutional right was violated to bring an FTCA claim. In fact, the FTCA requires the opposite: the aggrieved party must identify a state tort violation by a federal official, and cannot establish liability under the FTCA by relying solely on an alleged violation of a constitutional right.

This Court should reject the Government's and dissent's effort to alter radically the legal standard that applies to FTCA claims by creating and imposing an entirely new and unprecedented requirement for FTCA cases. The legal standards for claims under the FTCA and *Bivens* are not interchangeable; these are distinct and separate legal doctrines. The imposition of *Bivens* requirements directly conflicts with the text, structure, and purpose of the FTCA. Amici urge the *en banc* Court to reject the Government's and dissent's unprecedented proposed approach to adjudicating FTCA claims.

I. The Legal Framework for Adjudicating FTCA Claims is Well-Established and Does Not Include any Requirement That Aggrieved Litigants Point to a Clearly Established Constitutional Right

As a threshold matter, the purpose of the FTCA is to waive the sovereign immunity of the government when federal officials commit a tort in violation of state law. Through the enactment of the FTCA, Congress authorized suits against the Government:

> for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). Courts have consistently interpreted the FTCA to waive sovereign immunity from tort liability. *See Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994) ("Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment."); *see also Dalehite v. United States*, 346 U.S. 15, 27-28 (1953) (FTCA was enacted to waive "the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business.").

Notably, constitutional violations, "actionable under *Bivens*, [are] not within the FTCA unless the complained of conduct is actionable under the local law of the state where it occurred." *Johnson v. Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (*citing Brown v. United States*, 653 F.2d 196, 201 (5th Cir. 1981)). "[T]he FTCA was not intended to redress breaches of federal statutory duties." *Sellfors v. United States*, 697 F.2d 1362, 1365 (11th Cir. 1983); *see also Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (the FTCA is "not satisfied by direct violations of the Federal Constitution . . . or of federal statutes or regulations standing alone") (citations omitted); *Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1977) ("even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the [FTCA] if state law recognizes no comparable private liability").

The "liability of the United States under the [FTCA] arises only when the law of the state would impose it." *Brown*, 653 F.2d at 201. Therefore, the "violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a nonfederal context." *Johnson*, 47 F.3d at 728.

The Supreme Court has recognized that Congress' enactment of the FTCA was informed by "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24. The legislative history of the FTCA demonstrates that Congress sought to make the government accountable for the tortious conduct of its officers. *See, e.g.*, S. Rep. 93-588, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 2789, 2791 (The FTCA "would apply to any case in which a Federal law enforcement agent committed the tort while acting within the scope of his employment or under color of Federal law").

II. The Government and Dissent Erroneously Conflate two Analytically Distinct Legal Doctrines to Expand Improperly the Scope of Sovereign Immunity Under the FTCA

The Government and dissent seek to expand improperly the scope of sovereign immunity in direct conflict with the FTCA, which is designed to waive sovereign immunity. *See Castro*, 560 F.3d at 394-95 (Smith, J., dissenting). Without congressional approval, this Court cannot create and impose an additional requirement on aggrieved parties that expands sovereign immunity under the FTCA. *See id.* The proposed requirement would subvert the well-established mechanism that governs the adjudication of FTCA claims, and through which the federal government intends to

provide a remedy for the wrongful actions of its officers. Reliance on the *Bivens* standard is improper because the requirement to show a violation of a clearly established constitutional right, found only in *Bivens*, serves a unique purpose and function. This standard cannot be imported into the FTCA without contradicting the language of the statute and violating the intent of Congress in enacting the FTCA.

A. The Legal Framework Expressly Designed and Reserved for *Bivens* Claims is Irrational in FTCA Cases

In *Bivens*, the Supreme Court created a cause of action for money damages against federal officials who commit constitutional violations. 403 U.S. at 389 (holding that a "violation of that command by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct"). The Court's primary concern in *Bivens* was that the broad sovereign immunity afforded to the federal government might prevent aggrieved persons from securing adequate compensation for violation of their constitutional rights by federal officials. *Id.* at 392-97. In response to this concern, the Supreme Court formulated a cause of action to allow persons to sue federal officers in their individual capacity for constitutional violations. *Id.* at 397 ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment . . . we hold that petitioner is entitled to recover money damages for any

injuries he has suffered as a result of the agents' violation of the Amendment.").

The subsequent development of legal standards under *Bivens* has been influenced heavily by the fact that individual officers must pay damages out of their own pockets when found liable under *Bivens*. For example, the qualified immunity defense is designed to protect individual government officers from excessive exposure to liability under *Bivens*. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (qualified immunity protects individual government officers from liability). In *Harlow*, the Supreme Court articulated a heightened standard for litigants to overcome qualified immunity. 457 U.S. at 818. As part of that standard, the Court expressly held that aggrieved parties must show that a clearly established statutory or constitutional right was violated:

> A government official sued in his personal capacity will be stripped of immunity and held responsible only if a reasonable official would have known that he was violating a constitutional standard that was clearly established at the time of the action.

Id. Thus, under *Harlow*, government officials are immune from suit "insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known." *Id.* This heightened standard immunizes officials who make "mistaken

judgments" in their violation of constitutional rights, and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Supreme Court's adoption of its qualified immunity standard in *Harlow* was intended to provide heightened protection for officials, who are personally liable for damages under *Bivens*, from exposure to significant damages. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974) *overruled on other grounds by Harlow*, 457 U.S. at 800 (heightened standard to overcome qualified immunity is justified because officials must be able "to perform their official functions free from the threat of suits for personal liability"). The Supreme Court limited the exposure to personal liability and damages so that *Bivens* did not become a disincentive for working in government service. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992) (affirming holding that "qualified immunity for government officials . . . was necessary to ensure that talented candidates were not deterred by the threat of damages suits from entering public service") (*citing Wood v. Strickland*, 420 U.S. 308, 319 (1975)); *see also Harlow*, 457 U.S. at 814 (discussing "the deterrence of able citizens from acceptance of public office").

The Court has also sought to strengthen the qualified immunity standard to ensure that the threat of liability under *Bivens* would not inhibit the performance of government agents' duties and responsibilities. *See Scheuer*, 416 U.S. at 239-40 ("the threat of such liability would deter [an agent's] willingness to execute his office with the decisiveness and the judgment required by the public good"). The heightened qualified immunity standard, therefore, is designed to protect only individual government officers from unwarranted exposure to liability and extensive damages under *Bivens*. By contrast, there has never been a qualified immunity defense in FTCA cases. This is because the FTCA does not impose liability on individual officials or require individual officials to pay money damages. Thus, the courts have never extended the judicially-created doctrine of qualified immunity to expand the sovereign immunity that was expressly limited by Congress in the FTCA.

B. The Imposition of Legal Standards From *Bivens* Would Eviscerate the FTCA

In this case, the Government and dissent invoke the heightened legal standard for qualified immunity that applies to *Bivens* claims, and improperly inject this standard into the analysis of the FTCA claims. There is no factual or legal basis for imposing the heightened qualified immunity standard into an FTCA case.

As explained above, FTCA and *Bivens* claims are fundamentally different: in FTCA actions, the suit is brought against the Government, not individual officials. *See, e.g.*, *Arnsberg v. United States*, 549 F. Supp. 55, 57-58 (D. Or. 1982), *rev'd on other grounds*, 757 F.2d 971 (9th Cir. 1985) (aggrieved parties may sue individual government officers under *Bivens* or sue the United States under the FTCA). While the intent and purpose of a *Bivens* action is to recover damages from individual federal officials, the intent and purpose of an FTCA claim is to permit government compensation of victims of negligence and other state law torts committed by federal employees. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997) (discussing different incentives for liability that apply to individuals and the government). The differences between the purpose and function of the two doctrines are significant.

Under the FTCA, no individual is held liable. Since FTCA claims do not create a disincentive to public service or expose individual government officials to any personal liability, the concerns and reasoning behind qualified immunity is completely irrelevant for purposes of the FTCA. *See, e.g.*, *Arnsberg*, 549 F. Supp. at 58 ("[t]he special circumstances which warrant creation of the qualified personal immunity for agents acting in good faith do not apply to the government under the [FTCA]"). In opting to

waive sovereign immunity, Congress weighed the costs and benefits of exposing the Government to liability under the FTCA. In fact, the Supreme Court has expressly found that the burden imposed on the public treasury by waiving sovereign immunity under the FTCA is justified because:

> after long consideration, Congress, believing it to be in the best interest of the nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight.

Rayonier, Inc. v. United States, 352 U.S. 315, 319-20 (1957). It would be inappropriate for this Court to re-examine and overturn the well-settled law on this issue.

Since the concerns and reasoning behind providing a qualified immunity defense for *Bivens* claims are irrelevant for purposes of the FTCA, the legal standards for an FTCA claim cannot be conflated with or otherwise connected to *Bivens*. *See, e.g.*, *Carlson v. Green*, 466 U.S. 14, 19 (1980) (finding that the *Bivens* remedy is available even if the allegations could also support a suit against the government under the FTCA because "no statute expressly declared the [FTCA] remedy to be a substitute for a *Bivens* action"); *see also* S. Rep. 93-588, 93d Cong., 2d Sess., reprinted in 1974

U.S. Code & Ad. News 2789, 2791 ("nothing in the [FTCA] or its legislative history . . . show that Congress meant to pre-empt a *Bivens* remedy"). Since the doctrines are independent, for purposes of an FTCA action – which turns on the commission of a state tort – it simply does not matter whether the aggrieved party can show that a federal official violated a constitutional right. The qualified immunity standard under *Bivens* carries absolutely no significance in the FTCA context.

Tellingly, over the many years following enactment of the FTCA and the *Bivens* decision, courts that have analyzed claims under the FTCA have never imposed the heightened *Bivens* requirement proposed by the Government and embraced by the dissent. In fact, courts have consistently rejected the Government's effort to assert *Bivens* qualified immunity defenses in FTCA cases. *See, e.g.*, *Stewart v. United States*, No. 03 Civ. 1404, 2005 WL 1903318, at *3 n.6 (D.D.C. 2005) (holding that the government's "reliance on such a defense [was] misplaced [because] [q]ualified immunity is a defense available to individuals"); *see also Arnsberg*, 549 F. Supp. at 57 ("the good faith defense available to individual government officers is not available to the government itself") (*citing Townsend v. Carmel*, 494 F. Supp. 30, 36-37 (D.D.C. 1980)). Notably, in a strikingly similar case, *Ruffalo v. United States*, in which a mother was

separated from her child for almost four years because the Government abruptly placed the father and child in a witness protection program, the Court refused to import legal principles from *Bivens* into the FTCA context:

> It is the government's contention that I should grant it qualified immunity, and hold that there is no liability because its personnel acted in good faith and the legal issues were unclear. I have recently ruled that [the individual government officers] are entitled to such immunity. I do not find qualified immunity, as a governmental defense, referred to or implied in the FTCA, and agree with the ruling in *Arsnberg* . . . that the good faith defense available to individual government officers is not available to the government itself.

590 F. Supp. 706, 710 (W.D. Mo. 1984) (internal quotation marks and citations omitted).[1] Thus, this Court's creation and imposition of a heightened standard for FTCA claims would radically alter the long-standing and well-established legal test that governs FTCA cases.

Moreover, this Court's review of the legislative intent and history of the FTCA recognizes that the Government is barred from asserting *Bivens* qualified immunity defenses. *See Sutton v. United States*, 819 F.2d 1289, 1296 (5th Cir. 1987) (discussing the FTCA's legislative history). Indeed, a report from the Senate Government Operations Committee demonstrates that

[1] Following trial, the district court entered judgment against the government and in favor of the mother and awarded damages. *See id.* at 714.

the Government cannot shield itself from suit under the FTCA by invoking *Bivens* qualified immunity defenses:

> It is not the intention of this amendment to allow any other defenses [besides those in § 2680(h)] that may be available to individual defendants by state or federal law, custom or practice to be asserted [by] the government. Congress does not oppose, however, the assertion of defenses of good faith and reasonable belief in the validity of the search and arrest on behalf of individual government defendants, so long as it is understood that the government's liability is not co-terminous with that of the individual defendants.

Sutton, 819 F.2d at 1296 (internal quotation marks and citations omitted). Since the FTCA is the product of a statutory scheme, the adoption of any component of the qualified immunity defense, including the requirement that an FTCA plaintiff demonstrate the violation of a clearly established constitutional right, would expand sovereign immunity in a way that directly contravenes congressional intent. Congress simply did not intend the FTCA to be weakened by the use of *Bivens* qualified immunity defenses.

The dissent's claim that FTCA standards, in order to be "robust," must necessarily contain the qualified immunity defense is without foundation. Unsupported by legal precedent, the FTCA statute, or its legislative history, the claim that the FTCA includes the standards of qualified immunity constitutes no more than overreaching for additional, and

unconnected, burdens of proof in order to defeat the well-founded claims of the Plaintiffs-Appellants in this case.

III. Nothing in the Discretionary Function Exception to the FTCA Provides a Basis for Imposing the *Bivens* Qualified Immunity Standard in FTCA Claims

Congress placed statutory limitations on FTCA claims by creating exceptions to the FTCA, including a "discretionary function" exception, which provides that the Government cannot be held liable for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a); *see also Sutton*, 819 F.2d at 1293 ("the government is not liable for any claim arising from the exercise of discretion in the performance of governmental functions or duty whether or not the discretion involved be abused") (*quoting Dalehite*, 346 U.S. at 33) (internal quotation marks omitted).

Notably, the Supreme Court has held that aggrieved litigants must satisfy a two-part test to determine whether the discretionary function exception bars their FTCA claims. *See Berkovitz v. United States*, 486 U.S.

531, 536-37 (1988); *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). Under *Berkovitz,* the challenged governmental action or conduct must, first, be "the product of judgment or choice." *Id.* at 536. Second, courts must determine whether the challenged judgment or choice "is of the kind that the discretionary function exception was designed to shield" because the purpose of the exception "is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and public policy through the medium of an action in tort." *Id.* at 536-37 (internal quotation marks and citations omitted).

The discretionary function exception is a limited exception created by Congress to restore sovereign immunity under narrow circumstances. It focuses on the nature of the decision made by a federal official; it does not turn on the question whether the official's actions violated a clearly established constitutional right.

Assuming the government employee is acting within the scope of his official capacity, the two-part test set forth in *Gaubert* is dispositive: it is the only analysis relevant for determining whether the discretionary function exception bars an FTCA claim. This test, as designed, articulated and applied by the Supreme Court, is simple and straightforward: the Supreme Court does not require aggrieved litigants to point to a clearly established

constitutional right that was violated by the Government to successfully bring an FTCA claim or overcome the discretionary function exception. *Gaubert*, 499 U.S. at 322-23. Simply put, under *Gaubert*, there is no room for the unprecedented requirement – urged by the Government and the dissenting opinion in this case – that aggrieved litigants point to a clearly established constitutional right. *Id.* This would be a new and unprecedented requirement that would improperly expand the scope of the discretionary function exception far beyond the reasonable limits mandated by Congress and followed by the Supreme Court.

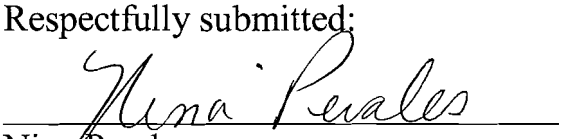
Indeed, courts, including the Fifth Circuit, have consistently used and applied the Supreme Court's two-part test to determine whether Government action falls within the discretionary function exception of § 2680(a). *See, e.g.*, *Sutton*, 819 F.2d at 1293 (interpreting the FTCA and explaining narrow scope of discretionary function exception); *see also Baldassaro v. United States*, 64 F.3d 206, 208-09 (5th Cir. 1995) (discussing the discretionary function exception in light of *Gaubert*). To force aggrieved parties to point to the violation of a clearly established constitutional right in order to bring an FTCA claim would be a dramatic departure from FTCA jurisprudence, and would place the Fifth Circuit out of line vis-à-vis the Supreme Court and other courts of appeals.

CONCLUSION

Amici respectfully urge the *en banc* Court to reject the Government's and dissent's invitation to eviscerate the FTCA by requiring aggrieved parties to point to a clearly established constitutional right that was violated to successfully raise an FTCA claim. The imposition of additional requirements on FTCA claims would violate well established Supreme Court precedent, contravene express congressional intent, and conflict with the text, structure, and purpose of the FTCA.

Dated: November 13, 2009

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)(B)

I hereby certify that the brief of *Amici Curiae* complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It is produced in 14 point Times New Roman type and contains 4,213 words, as counted by the word processing program Microsoft Word.

Dated: November 13, 2009

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