No. 16-2267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Avinesh Kumar, et al.,

Plaintiffs-Appellees,

v.

Republic of Sudan,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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INTEREST OF THE UNITED STATES

The district court construed the Foreign Sovereign Immunities Act (FSIA) to allow private parties to serve a foreign state by having process sent by mail to its embassy in the United States, if the papers are addressed to the foreign minister. That holding runs contrary to the FSIA's text, which must be understood in light of the United States' obligations under the Vienna Convention on Diplomatic Relations, as well as the statute's legislative history, which makes clear that Congress enacted the FSIA's service provision to avoid conflict with those treaty obligations. The United States has a substantial interest in preserving the inviolability of diplomatic missions pursuant to its international treaty obligations. Moreover, the government has an important interest in ensuring that foreign states are properly served before they are required to appear in U.S. courts. The United States routinely objects to attempts by foreign litigants to serve the United States through delivery of process to a United States embassy outside of diplomatic channels, and thus the government has a significant reciprocity interest in the treatment of United States missions abroad.

The United States deeply sympathizes with the extraordinary injuries suffered by the family members of the sailors killed in the bombing of the U.S.S. Cole. And the United States condemns in the strongest possible terms the terrorist acts that

caused the sailors' deaths. Nevertheless, because of the government's interest in the proper application of rules regarding service of process on foreign states, the United States submits this brief as amicus curiae in support of reversal.

BACKGROUND

1. This case arises from al Qaeda's terrorist bombing of the U.S.S. Cole in the Port of Aden in Yemen on October 12, 2000. J.A. 440. The bombing killed seventeen sailors and injured forty-two others. J.A. 441. In 2010, family members of the seventeen sailors killed in the bombing brought suit against the Republic of Sudan under 28 U.S.C. § 1605A, the terrorism exception to foreign sovereign immunity, alleging that Sudan provided material support to the al Qaeda operatives who carried out the Cole bombing. *Id.*

Although the current suit began in 2010, the litigation has a much longer, complicated procedural history. In brief, certain plaintiffs initially brought suit in 2004. J.A. 441. Sudan failed to defend and the court entered a default judgment. J.A. 442. Sudan subsequently appeared, and the court granted Sudan's motion to vacate the default judgment. *Id.* After the district court denied Sudan's motion to dismiss the suit and this Court affirmed, Sudan withdrew from the suit and, in 2007, the district court again entered a default judgment. J.A. 442-43. The district

court awarded economic but not punitive damages, and the plaintiffs appealed. J.A. 443.

While the case was on appeal, in 2008, Congress amended the terrorism exception of the FSIA to, among other things, create a federal cause of action and to provide for punitive damages. J.A. 443. In 2010, plaintiffs brought a new suit under the amended terrorism exception. J.A. 444-45. Sudan continued to refuse to participate in the litigation. J.A. 445. After a bench trial in 2014, the district court found that Sudan's provision of material support to al Qaeda led to the killing of the seventeen sailors, and, in March 2015, it entered a default judgments against Sudan and awarded damages, including punitive damages, to the plaintiffs. *Id.*

2. In April 2015, Sudan entered an appearance in the case and filed a motion to vacate the default judgments under Federal Rules of Civil Procedure 55(c) (authorizing a court to set aside a nonfinal default for good cause) or 60(b) (authorizing a court to set aside a final judgment under specified circumstances). The district court denied the motion. J.A. 446-47.

As relevant to the issue addressed in this brief, Sudan argued that the judgments were void under Rule 60(b)(4) because the district court lacked personal jurisdiction. J.A. 467; see *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005) ("An order is 'void' for purposes of Rule 60(b)(4) only if the court rendering the decision

lacked personal or subject matter jurisdiction or acted in a manner inconsistent with due process of law."). It is undisputed that the plaintiffs purported to serve Sudan by having process mailed to Sudan's embassy in Washington, D.C., addressed to the Sudanese foreign minister. J.A. 467. The plaintiffs relied on a provision of the FSIA that authorizes service:

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. § 1608(a)(3); see J.A. 467.

Sudan argued that Section 1608(a)(3) does not permit service on a foreign state through its embassy. J.A. 467. In support of that argument, Sudan argued that service on a foreign state at one of its foreign missions is prohibited by Article 22 of the Vienna Convention on Diplomatic Relations (VCDR), *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104, which provides that "the premises of the mission shall be inviolable." See J.A. 469. Sudan further relied on the United States' amicus curiae brief filed in support of Sudan's petition for rehearing in *Harrison v. Republic of Sudan*, 838 F.3d 86 (2d Cir. 2016) (No. 15-121), in which the government argued that a private party's service by mail on a foreign mission is inconsistent with the FSIA's text and history, conflicts with the United States' treaty

obligations relating to the inviolability of missions, and compromises the United States' ability to reject such service on its embassies. J.A. 469.

The district court held, however, that Section 1608(a)(3) permits a litigant to serve a foreign state by having process mailed to a state's foreign mission because "the statute does not prescribe the place of service, only the person to whom process must be served." J.A. 468 (quotation marks omitted). Relying on the Second Circuit's opinion denying panel rehearing in *Harrison*, the district court held that mission inviolability was not compromised because service was on the foreign minister, not the foreign mission, and because Sudan consented to service through its mission by accepting the package. J.A. 469. For these reasons, the district court held that the plaintiffs validly served Sudan, and it rejected Sudan's argument that the judgments were void because the court lacked personal jurisdiction. *Id.*

ARGUMENT

THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PERMIT A LITIGANT TO SERVE A FOREIGN STATE BY HAVING PROCESS ADDRESSED TO THE FOREIGN MINISTER MAILED TO THE STATE'S EMBASSY IN THE UNITED STATES

1. The FSIA provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. The FSIA establishes the rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the statute. 28 U.S.C.

§ 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject matter jurisdiction in the district courts. 28 U.S.C. § 1330(a). The statute provides for personal jurisdiction over the foreign state in such suits "where service has been made under section 1608." 28 U.S.C. § 1330(b).

Section 1608 provides the exclusive means for serving a foreign state in civil litigation. See Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608."). Section 1608(a) provides for service on "a foreign state or political subdivision of a foreign state." Section 1608(b) provides for service on "an agency or instrumentality of a foreign state." Both subsections specify hierarchical methods of service. First, service must be effected on a foreign state or its agency in accordance with any "special arrangement for service" between the plaintiff and the foreign state or agency. 28 U.S.C. § 1608(a)(1), (b)(1). If no such special arrangement exists, then service must be provided "in accordance with an applicable international convention on service of judicial documents" or, in the case of an agency or instrumentality, on any agent authorized to receive service on behalf of the agency in the United States. *Id.* § 1608(a)(2), (b)(2).

If service cannot be made by one of those methods, then Section 1608 provides for service by delivery. The delivery provisions applicable to foreign states

and to their agencies or instrumentalities differ in an important respect, however. While Section 1608(b)(3) authorizes service on a foreign state agency by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) says nothing about actual notice. Instead, it authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3). In light of the differences between the text of the two delivery provisions, courts have concluded that a private party may serve a foreign state by delivery only through "strict compliance" with the terms of Section 1608(a). *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001); see also *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994); but see *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service on foreign state because of substantial compliance with Section 1608(a)(3)).[1]

Finally, Section 1608(a) provides for a fourth method of service on a foreign state, if service cannot be made under the delivery provision within thirty days. In

[1] By contrast, some courts have upheld service on agencies or instrumentalities of a foreign state based on "substantial compliance" with Section 1608(b)(3) combined with actual notice to the defendant. See *Straub v. A P Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (6th Cir. 1993); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982).

that case, a plaintiff may deliver process to the State Department for service on the foreign state through diplomatic channels. 28 U.S.C. § 1608(a)(4).

2. Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to the embassy of the foreign state in the United States, addressed to the minister of foreign affairs. See U.S. Department of State, Bureau of Consular Affairs, Foreign Sovereign Immunities Act, http://go.usa.gov/x9FGq ("Service on a foreign embassy in the United States or mission to the United Nations is not one of the methods of service provided in the FSIA.").

As noted, Section 1608(a)(3) authorizes service "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Although the provision does not expressly identify the place of service, the most natural understanding of the provision is that it requires that service be delivered to "the ministry of foreign affairs of the foreign state" and addressed to the specified government official, the head of the ministry. Thus, naturally read, the provision requires delivery to the official's principal place of business, the ministry of foreign affairs in the foreign state's seat of government. A state's foreign minister does not work in the state's embassies. Had Congress contemplated delivery to embassies, it

would have enacted a statute requiring service to be addressed to the foreign state's ambassador.

In construing Section 1608(a)(3), the D.C. Circuit has explained that the provision "mandates service on the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Transaero*, 30 F.3d at 154; see also *Barot v. Embassy of Republic of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015) (directing service to be sent "to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency") (citing 28 U.S.C. § 1608(a)(3)). The D.C. Circuit's interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit. See *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as "the dedicated venue for actions against foreign states") (quoting amicus brief); 28 U.S.C. § 1391(f)(4) (providing for venue in suits against a foreign state or political subdivision thereof in the United States District Court for the District of Columbia).

Construing Section 1608(a)(3) to require service on the foreign minister by delivery to the state's foreign ministry is consistent with the courts' recognition that Congress required strict compliance with the service-by-delivery provision applicable

to foreign states. See *Magness*, 247 F.3d at 615; *Transaero*, 30 F.3d at 154. While Congress permitted delivery on foreign state agencies or instrumentalities so long as the delivery is "reasonably calculated to give actual notice," 28 U.S.C. § 1608(b)(3), the provision governing service-by-delivery on a foreign state makes no mention of actual notice, *id.* § 1608(a)(3). A state's foreign minister's principal place of business is in the seat of government, not in the state's foreign embassies. Thus, a private party's service by mail or in person on a foreign minister at one of the state's embassies necessarily would require the further transmission of the summons and complaint to the foreign minister by the embassy staff. While the district court may have viewed that means of service as reasonably calculated to give actual notice to the foreign minister, that is insufficient for service by delivery under Section 1608(a)(3).

As we next show, the United States' treaty obligations and the FSIA's legislative history, which explains the statute's consistency with those treaty obligations, further support the understanding that Section 1608(a)(3) does not permit a private party to serve a foreign state by having process mailed to one of its embassies. Such service of process on a foreign mission would be inconsistent with the United States' treaty obligations. But because Section 1608(a)(3) may be interpreted to prohibit such service, it must be so construed. See Restatement

(Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1986) ("Where fairly possible, a United States statute is to be construed so as not to conflict with * * * an international agreement of the United States.") (Third Restatement); see also, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

Article 22, Section 1 of the VCDR provides that "the premises of the mission shall be inviolable." VCDR, *done* April 18, 1961, 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 104. There is an international consensus that a litigant's service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in VCDR Article 22. The United Nations International Law Commission prepared the preliminary draft of the Vienna Convention and presented the draft to the United Nations member states for their consideration. Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1, https://goo.gl/26RrG3 (Commission Report). In describing the almost identical provision that became Article 22, the International Law Commission explained that:

> [a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the

> premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Commission Report, [1957] 2 Y.B. Int'l L. Comm'n at 137.

The states that became parties to the VCDR have so understood Article 22, as is documented in numerous treatises describing state practice under the treaty. See, *e.g.*, Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the local Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] implicitly also protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). And, reflecting the international consensus, other nations' state immunity statutes do not authorize a litigant's service on a foreign state through mail or personal delivery to a foreign state's embassy, in the absence of express consent by the foreign state. See, *e.g.*, Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act No. 24 of 2009, art. 20 (Japan); Foreign States Immunity Law, 5769-2008, § 13 (Israel);

Foreign State Immunities Act 1985, §§ 24, 25 (Austl.); State Immunity Act, R.S.C. 1985, c S-18, § 9 (Can.); Foreign States Immunities Act 87 of 1981, § 13 (S. Afr.); State Immunity Act 1978, c. 33, § 12 (U.K.).

Moreover, the Executive Branch has long and consistently construed Article 22, and the customary international law it codifies, as precluding a litigant from serving process by mail or personal delivery to a foreign embassy as a means of serving a foreign state. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not implicitly or explicitly empower that mission to act as agent of the sending state for the purpose of accepting service of process." (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, to John W. Douglas, Assistant Attorney General, August 10, 1964)). The courts owe deference to that interpretation. See *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight." (quotation marks omitted)).

In light of that longstanding understanding of the Vienna Convention, the United States routinely refuses to recognize the propriety of a private party's service through mail or personal delivery to a United States embassy. When a foreign litigant (or foreign court official on behalf of a foreign litigant) purports to serve the

United States through its embassy, the embassy sends a diplomatic note to the foreign government explaining that the United States does not consider itself to have been served consistently with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. For that reason, the United States has a strong interest in ensuring that its courts afford foreign states the same treatment the United States contends it is entitled to under the Vienna Convention. *Cf. Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States' interest in reciprocal treatment abroad).

Reflecting the Executive Branch's understanding and international practice, United States courts have recognized that a private party's delivery of process to a foreign mission or ambassador in the United States for service on another is inconsistent with the concept of inviolability enshrined in the VCDR. Thus, the Seventh Circuit held invalid a private party's service on a foreign-state agency by delivery to the foreign state's embassy in the United States because "service through an embassy is expressly banned" by the VCDR. *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (2007). Similarly, the D.C. Circuit has held that a litigant's service of process on an ambassador "as an agent of his sending country" is

inconsistent with the inviolability of diplomatic agents established by VCDR Article 29. *Hellenic Lines*, 345 F.2d at 980; see *id.* at 980 n.4.

In addition, the FSIA's legislative history expressly addresses and repudiates the idea that a litigant's service on a foreign state may be effected by delivery of process to its mission in the United States. The House Report's section-by-section analysis explains that, prior to the FSIA's enactment, some litigants attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." H.R. Rep. No. 94-1487, at 26 (1976); see *id.* (describing such service as being of "questionable validity"). The report states that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR], which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill." *Id.*

Because the VCDR prohibits a private party from serving a state by having process mailed to a foreign mission, because Section 1608(a)(3) may fairly be construed to prohibit such delivery, and because the FSIA's legislative history demonstrates Congress's intent to prevent private-party service on an embassy, the district court erred in concluding that plaintiffs had properly served the Republic of Sudan. *Charming Betsy*, 6 U.S. (2 Cranch) at 118; Third Restatement § 114.

3. Relying in part on the Second Circuit's decision in *Harrison v. Republic of Sudan*, the district court held that plaintiffs properly served Sudan because Section 1608(a)(3) "does not prescribe the place of service, only the person to whom process must be served." J.A. 468; see *id.* (citing 838 F.3d 86, 93 (2016)). But the Second Circuit's reasoning was that plaintiffs' service through "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C." is permissible under the statute because it "could reasonably be expected to result in delivery to the intended person." *Harrison*, 838 F.3d at 90. That approach is legally erroneous. As we explained above, while Section 1608(b)(3) authorizes service on a foreign state *agency or instrumentality* by delivery "if reasonably calculated to give actual notice," section 1608(a)(3) does not permit service on a foreign state itself by delivery reasonably calculated to give notice.

In addition, in light of the United States' international treaty obligations and the FSIA's legislative history discussed above, Section 1608(a)(3) cannot plausibly be construed to permit a private party to serve a foreign state by delivering process to the foreign state's embassy. The Second Circuit believed that the House Report discussion of Section 1608 "fails to make the distinction at issue in the instant case, between '[s]ervice *on* an embassy by mail,' [H.R. Rep. No. 94-1487, at 26] (emphasis added), and service on a minister of foreign affairs *via* or *care of* an embassy."

Harrison, 838 F.3d at 92. But the distinction between service "on" an embassy and service on a foreign minister "via" an embassy is a false one. In both cases, the suit is against the foreign state itself. See 28 U.S.C. § 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against foreign state for purposes of the FSIA). There is no statutory basis for prohibiting a plaintiff's service at an embassy when the plaintiff names a foreign state's embassy as the defendant but not when the plaintiff instead names the foreign state.

Moreover, the Second Circuit plainly misconstrued the legislative history. The House Report unambiguously expressed disapproval for the method of "attempting to commence litigation against *a foreign state*" by "the mailing of a copy of the summons and complaint *to a diplomatic mission* of the foreign state." H.R. Rep. No. 94-1487, at 26 (emphasis added). Private parties' attempted service by mailing a summons and complaint to an embassy, however addressed, was the harm Congress sought to remedy in enacting Section 1608(a)(3).

That conclusion again is buttressed by the international obligation to respect mission inviolability. As discussed above, the House Report explains that Congress enacted Section 1608 to avoid inconsistency with VCDR Article 22(1), which provides categorically that "[t]he premises of the mission shall be inviolable," and

which precludes a private party from making a foreign state a defendant in a suit through any type of service through mail or personal delivery to its embassy. The district court below and the Second Circuit in *Harrison* believed that service on a foreign minister sent to an embassy is not precluded by the inviolability of the mission because it is the foreign minister who is served, not the embassy. J.A. 469; 838 F.3d at 92. But that purported distinction reflects a misunderstanding of Article 22 and the concept of inviolability it embodies, as explained above. See also Eileen Denza, *Interaction Between State and Diplomatic Immunity*, 102 American Soc. of Int'l L. Proc. 111, 111 (2008) ("At the very outset of legal proceedings against a state there is the problem of service of process—proceedings against the defendant cannot be begun through service on its embassy premises in the light of Article 22 of the Vienna Convention on Diplomatic Relations.").

The district court and the Second Circuit also believed that because an embassy employee had accepted the delivery of the service of process, the embassy had consented to receive service, even if service of process would otherwise be a violation of its inviolability. J.A. 469; 838 F.3d at 95 ("Here, the Sudanese Embassy's acceptance of the service package surely constituted 'consent.'"). Article 22(1) provides, however, that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent *of the head*

of the mission." (emphasis added). There is no evidence in either this case or *Harrison* that the Ambassador consented to receive plaintiffs' service of process by mail delivery on behalf of the foreign minister or Sudan. Other embassy employees do not have authority under Article 22 to consent to an action that otherwise would be a breach of a foreign mission's inviolability.[2]

In short, the text of the FSIA, its legislative history, and the United States' international treaty obligations all support interpreting Section 1608(a)(3) as not permitting private parties to serve process on a foreign state through its embassy in the United States. Because plaintiffs in this case did not properly serve Sudan, the district court lacked personal jurisdiction. 28 U.S.C. § 1330(b). Accordingly, the district court erred in denying Sudan's motion to vacate the judgments as void under Rule 60(b)(4). See *Wendt v. Leonard*, 431 F.3d 410, 412 (4th Cir. 2005).

[2] When staff at United States embassies around the world sign for or accept delivery of packages, the United States does not consider that to amount to consent within the meaning of Article 22, nor as legally proper service of process upon the United States if such a package contains a summons and complaint not transmitted through diplomatic channels.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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February 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Goudy Old Style, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,556 words, according to the Microsoft Word count, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

s/ Lewis S. Yelin
Lewis S. Yelin

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Lewis S. Yelin
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