No. 24-1770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B.B., by and through her mother, Chelsea Boyle,

Plaintiffs-Appellants,

v.

Capistrano Unified School District, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 8:23-cv-00306-DOC-ADS

BRIEF OF DOUGLASS LEADERSHIP INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Douglass Leadership Institute states that it has no parent corporation and does not issue stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Douglass Leadership Institute (DLI) is a national education nonprofit organization that does Christian work inspired by the life and legacy of Frederick Douglass. DLI stands for and with black America. It supports the strength of the black family, sensible criminal justice reform, and economic and educational opportunity for all.

DLI provides uniquely tailored programs and resources to a network of like-minded pastors and faith leaders across the country so that people of faith can be equipped to lead positive change in their communities, as well as on the state and national levels. DLI understands that America is a land of liberty where our natural rights precede and supersede the power of the state. DLI appreciates that the United States is a constitutional republic in which government power is limited and employed for the purpose of providing legitimate public goods rather than for the benefit of insiders and narrow interest groups.

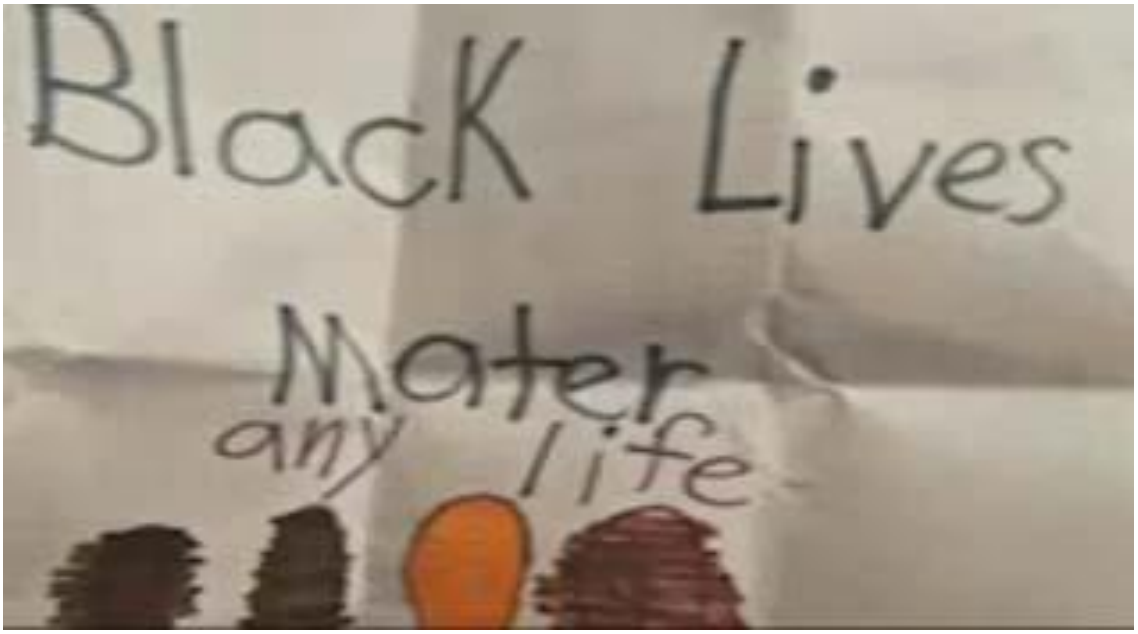
DLI wants to preserve the freedom for all—including elementary school students—to exercise their natural right to free speech. Open dialogue on issues of race helps people of different backgrounds come

[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus and its counsel made any monetary contribution to fund the preparation or submission of this brief. Appellants' counsel consented to the filing of this brief. Undersigned counsel sought consent from Appellees' counsel on July 12 and 17, but counsel did not respond. So amicus will also be filing a motion for leave to file this brief.

together to understand each other better and resolve differences. Free speech is an indispensable tool in our nation's quest to preserve a government of, by, and for the people. Without robust public discussion, DLI believes Americans will have little opportunity to solve the challenges facing our country.

BACKGROUND

After B.B.'s first-grade class learned about Dr. Martin Luther King Jr., she made this drawing (Doc. 56 at 6):



The circles portrayed children of different races holding hands. ER-23. B.B. gave the drawing to her classmate, M.C., as a gift to help her feel comfortable. ER-8, 14. M.C.'s mother objected to the message and complained to school officials that she would not "tolerate any more messages given to [M.C.] at school because of her skin color." *Id.*

In response, Principal Jesus Becerra condemned the drawing as contravening "everything" the school taught, "like kindness and respect and everyone is equal." ER-82. Becerra told B.B. her drawing was "racist" and "inappropriate." ER-108–09. He then forced B.B. to apologize to M.C., prohibited her from drawing other pictures, and prevented B.B. from playing at recess for two weeks. ER-8.

The district court granted Defendants summary judgment on B.B.'s First Amendment free-speech and retaliation claims. ER-14–15 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)). B.B.'s speech had not caused *any* disruption, including to M.C. So the court relied instead on "three principles" that it claimed "the cases reveal" to "help identify when speech unduly infringes on the rights of other students." ER-12.

First, the court thought that speech "directed at a particularly vulnerable student based on a core identifying characteristic, such as race, sex, religion, or sexual orientation," gives schools "greater leeway to regulate it." *Id.* (cleaned up). Second, the court added that "the mere fact that speech touches upon a politically controversial topic is not sufficient to" make the speech protected. *Id.* And third, the court reasoned that younger students have reduced First Amendment rights because elementary schools "are more about learning to sit still and be polite, rather than robust debate." ER-13.

Applying these novel principles, the district court ruled that the First Amendment did not protect B.B.'s drawing. ER-14. The court reached that conclusion by looking outside the record to establish two key points. First, it cited a *New York Times* article discussing that some people consider "All Lives Matter" to be an "offensive response" to the Black Lives Matter movement. *Id.* Second, it linked B.B.'s "any life" statement to "All Lives Matter"—never mind that B.B. did not write any of those words. *See id.*

Despite the court's focus on M.C.'s right "to be let alone," no evidence suggested the drawing hurt M.C. in any way. *See id.* Indeed, M.C. acted confused when B.B. apologized to her twice. ER-65. And M.C.'s parents agreed that B.B. acted innocently and didn't want her punished. ER-84, 88. Even so, the district court credited M.C.'s mother's testimony that such messages "hurt." ER-14. While the court agreed that B.B.'s intentions "[u]ndoubtedly" were "innocent," all that mattered were the "effects of [B.B's] speech on … other students." *Id.*

And despite zero evidence of any effect on M.C., the court deferred to school officials' judgment because "what is harmful or innocent speech is in the eye of the beholder." *Id.* School officials are "better equipped than federal courts at identifying when speech crosses the line from harmless schoolyard banter to impermissible harassment." *Id.* And Becerra thought B.B.'s admittedly "well-intentioned" drawing "fell on the latter side of that line." ER-15. So that ended the analysis. *Id.*

SUMMARY OF ARGUMENT

Free speech has helped solved some of our nation's thorniest problems. For example, for a century after the Civil War, black Americans suffered as second-class citizens. They did not have equal access to jobs, public facilities, and schools. But Dr. Martin Luther King, Jr., successfully used demonstrations, marches, and sit-ins to identify those injustices and advocate for change. That expressive conduct torpedoed state-sponsored segregation.

Debates about race continue. To work against injustices today, all Americans must remain free to speak, especially in our schools. As the Supreme Court has recognized, public schools serve as the nurseries of democracy. There, students learn to interact with each other and discuss topics from all angles. There, they develop informed opinions, which advances our representative democracy.

But the district court's opinion grants schools an unlimited license to clamp down on speech on important topics. B.B. gave her classmate a drawing depicting racial harmony to make her feel more comfortable. Nothing suggests that B.B.'s innocent picture injured her classmate or caused any disruption to the learning environment. Yet Principal Becerra labeled the drawing "racist" under the school's orthodoxy and punished B.B. for it. And the district court upheld that punishment, ruling that speech about race invaded other students' rights.

The district court's decision conflicts with *Tinker*. That case does not allow mere offense to justify censorship. Nor does it allow schools to adopt an overly expansive definition of harassment to squelch student speech. Schools must be held to a more demanding standard to avoid giving them unbridled power to do what Defendants did here: stopping students from speaking about important issues.[2] Schools can and should regulate unlawful harassment—conduct that is so severe, pervasive, and objectively offensive that it denies educational opportunities. But any lower standard would prevent the marketplace of ideas from flourishing in our nation's schools. This Court should make clear the constitutionally required definition of harassment and reverse.

ARGUMENT

I. Students must be free to discuss important issues like race.

Free speech on controversial issues has served as an indispensable tool to right great wrongs. Take the civil rights movement. For decades, black Americans "felt the stinging darts of segregation." Martin Luther King, Jr., *Letter from a Birmingham Jail* (April 16, 1963). They saw "vicious mobs lynch [their] mothers and fathers at will." *Id.* They felt

[2] This brief shows how the district court's first two principles distilled from *Tinker* and related cases in fact have no basis in *Tinker*. But Amicus also disagrees with the district court's overemphasis on B.B.'s age. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 nn.1–2. (1943) (holding unconstitutional a state regulation compelling the speech of elementary school children).

"smother[ed] in an airtight cage of poverty in the midst of an affluent society." *Id.* They found their "tongue[s] twisted" as they tried to explain to their "six year old daughter[s] why [they] can't go to the public amusement park." *Id.*

And free speech provided the solution. Dr. King's "[n]onviolent direct action" sought "to create such a crisis" to force "a community which [had] constantly refused to negotiate" to "confront the issue." *Id.* He used demonstrations, marches, and sit-ins to "help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood." *Id.* That free expression ultimately moved King's "beloved Southland" away from its "tragic effort to live in monologue" to a proper "dialogue." *Id.*

Today, our nation continues to debate issues of race. For example, opinions differ about the wisdom, necessity, and legality of affirmative action. Some argue affirmative action in employment corrects historic wrongs and helps "socially and economically disadvantaged individuals." *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995). But others see that as "racial paternalism," "teach[ing] many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence." *Id.* at 240–41 (Thomas, J., concurring in part and concurring in the judgment).

Similar discussions about race occur in university admissions. Some contend that providing certain races with an advantage allows for "better educating" students "through diversity" and produces "new knowledge stemming from diverse outlooks." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023). Others believe race-based admissions "demean[] the dignity and worth of a person" by judging the person "by ancestry instead of by his or her own merit and essential qualities." *Id.* at 220.

Many also debate diversity, equity, and inclusion initiatives. Some claim these laws and policies "encourage individual and systemic change" that will eliminate "disadvantages for others." *E.g.*, *Johnson v. Watkin*, No. 1:23-cv-00848, 2023 WL 7624024, at *6 (E.D. Cal. Nov. 14, 2023). Others argue such policies discriminate based on race and unlawfully compel adherence to a certain ideology. *See id.* at *8–9.

As the success of the civil-rights movement shows, Americans must remain free to discuss these issues. Free speech allows us to chart the best path forward. That freedom matters all the more in public schools. They are "the nurseries of democracy." *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 190 (2021). Our "representative democracy only works if we protect the 'marketplace of ideas.'" *Id.* The "free exchange" of ideas in schools "facilitates an informed public opinion," which ultimately "helps produce laws that reflect the People's will." *Id.*

Just as importantly, speech protection in schools "must include the protection of unpopular ideas." *Id.* Those ideas, like equality for all regardless of race, may be controversial to some, but they remain indispensable to our nation's pursuit of justice. Schools thus "have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

II. *Tinker*'s rights-of-others prong is concerned about coercive expressive activity like harassment, assault, or battery—not innocent speech that simply could be misunderstood.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. They "are 'persons' under our Constitution" with "fundamental rights which the State must respect." *Id.* at 511. But given "the special characteristics of the school environment" the Supreme Court has adjusted the standard free-speech rules. *Id.* at 506. A student "may express [her] opinions, even on controversial subjects," so long as she "does so without materially and substantially interfering with the … operation of the school and without colliding with the rights of others." *Id.* at 513 (cleaned up).

The Supreme Court has not offered a comprehensive explanation of what it means to "intrude[] upon … the rights of other students." *Id.* at 508. But five aspects of *Tinker* show the scope of that language. First,

the Court had *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), in mind. *Tinker* explicitly affirms *Blackwell*'s conclusion that the First Amendment doesn't protect students "wearing freedom buttons" who "harassed [other] students who did not wear them." 393 U.S. at 505 & n.1.

The problem in *Blackwell* was that students "accosted other students by pinning the buttons on them even though they did not ask for one," which caused at least one "younger child" to begin "crying." *Blackwell*, 363 F.2d at 751. Button-wearing students were eventually sent home but returned and tried pinning buttons "on anyone walking in the hall." *Id.* at 752. These assaults and batteries "colli[ded] with the rights of others" and showed a "complete disregard for the rights of … fellow students." *Id.* at 753–54.

When *Tinker* borrowed this language from *Blackwell*, it referenced expressive activity that involves (1) severe harassment, (2) assault, or (3) battery. Those are the prototypical infringements on other students' rights. In contrast, *Tinker* approved the holding in *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966), that button-wearing students who engaged in no "improper conduct" were constitutionally protected. 393 U.S. at 505 & n.1.

Second, *Tinker*'s rights-of-others analysis focused on the speaker's own behavior. There, students wore black armbands in a passive expression of sentiment against the Vietnam War. *Id.* at 508, 514.

Doing so made "their views known" and potentially "influence[d] others to adopt them." *Id.* at 514. But the Tinker children did not try to force anyone else to join them. As a result, the Court barely mentioned others' rights. It simply noted that armband-wearing students never "sought to intrude in … the lives of others." *Id.*

Third, the Supreme Court expected students to encounter a "marketplace of ideas," not an echo chamber. *Id.* at 512. Learning to listen, consider, and respond to divergent views prepares students for life in our "relatively permissive, often disputatious, society." *Id.* at 509. So *Tinker* placed a premium on students' "exposure to [the] robust exchange of ideas." *Id.* at 512.

Fourth, *Tinker* saw "personal intercommunication among the students" as "an important part of the educational process." *Id.* Learning is not confined to "supervised and ordained discussion" in the "classroom." *Id.* It happens when students talk face-to-face. Absent "carefully restricted circumstances," *Tinker* presumed that such discussions, "even on controversial subjects," are protected. *Id.* at 113.

Fifth, *Tinker* establishes that students have no right to avoid views with which they disagree. "Any variation from the majority's opinion may inspire fear." *Id.* at 508. But this "discomfort" doesn't justify censoring "unpopular viewpoint[s]." *Id.* at 509. Under the *Tinker* standard, students will necessarily see or hear "views" that "deviate[] from" their own. *Id.* at 508. They could hardly do otherwise because the

First Amendment bars schools from "foster[ing] a homogeneous people" by excluding minority opinions. *Id.* at 511 (quotation marks omitted).

III. This Court should clarify the standard for unlawful harassment in schools.

The First Amendment has "no categorical 'harassment exception,'" including in the school environment. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001)). But the Supreme Court has provided a roadmap that schools can use to address unlawful harassment. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). In *Davis*, the plaintiff alleged that a male classmate of her fifth-grade daughter had sexually harassed her daughter over many months. 526 U.S. at 633. On multiple occasions, the harasser had tried to touch the victim sexually, made vulgar statements, and acted in a sexually suggestive manner. *Id.* at 633–34. Each time, the victim reported the incident to her teachers and parent, and her parent followed up with school authorities. *Id.* The harassment caused the victim's grades to drop, prevented her from concentrating in school, and led her to consider suicide. *Id.* at 634.

The Supreme Court acknowledged that students and parents have an implied right of action under Title IX against schools that receive federal funds and do not adequately address harassment. *Id.* at 633. A school can be liable for deliberate indifference if it "exercises substantial

control over both the harasser and the context in which the known harassment occurs," and the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access" to educational opportunities. *Id.* at 645, 650. Whether conduct rises to the level of harassment "depends on a constellation of surrounding circumstances, expectations, and relationships." *Id.* at 651. Relevant circumstances in the school context include "the ages of the harasser and the victim," "the number of individuals involved," and the normal interactions of children "that would be unacceptable among adults." *Id.*

The *Davis* standard appropriately protects speech while respecting governmental interests. The Supreme Court crafted the standard to fit with First Amendment protections, explaining that "it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649; *accord Speech First, Inc. v. Khator*, 603 F. Supp. 3d 480, 482 & n.6 (S.D. Tex. 2022) (applying *Davis* standard to harassment policy). The Court used the *Davis* standard to articulate the scope of schools' civil liability. But it is equally useful as a guide to educational institutions for regulating student harassment. Matching the standard for a school's civil liability to its authority to regulate unlawful harassment makes eminent sense. Schools can regulate harassment consistent with the standard to which they would be held accountable.

This Court's precedent supports the application of the *Davis* standard. *See Chen ex rel. Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 718 (9th Cir. 2022). For five months, one of the students in *Chen* made "a number of cruelly insulting posts about" his classmates. *Id.* at 711. They included "disturbing posts that targeted vicious invective with racist and violent themes against specific Black classmates." *Id.* This Court upheld that student's expulsion for this "severe targeted harassment." *Id.* at 718. But the Court made clear: speech that is "merely offensive to some listener" doesn't invade anyone's rights. *Id.* at 717.

This Court should hold that schools must meet the *Davis* standard to regulate harassment under *Tinker*'s "rights of other students" prong. To protect the quintessential marketplaces of ideas, schools must show that the harassment at issue became so severe, pervasive, and objectively offensive that it deprived the victims of educational opportunities. A rule less protective of speech would chill important discussions on a variety of important topics. And this case proves that point. B.B. learned about Dr. King and wanted her classmate to feel comfortable. So she gave her an innocent drawing depicting racial harmony. Instead of having a productive discussion about race issues (which the school was teaching about), Principal Becerra punished B.B. for her drawing and prohibited her from drawing anything else. Instead

of allowing the marketplace of ideas to flourish, Principal Becerra imposed the school's orthodoxy.

IV. *Tinker* doesn't allow punishment for B.B.'s drawing.

B.B.'s drawing—depicting racial understanding and given to make a classmate feel comfortable—comes nowhere close to unlawful harassment. Giving the drawing to her classmate was not a "severe" act, as shown by its total lack of negative effect on M.C. Neither could this single instance of speech be "pervasive." And B.B.'s depiction of racial harmony does not qualify as objectively offensive. Finally, no evidence suggests M.C.'s education suffered at all.

Instead, as the district court conceded, *some* people find "All Lives Matter" to be "offensive." ER-14. And M.C.'s mother thought messages like B.B.'s "any life" message "hurt"—in some abstract sense because nothing indicates M.C. felt hurt by it. *Id.* All of that shows Principal Becerra punished B.B. not for unlawful harassment but for protected speech "merely offensive to some listener." *Chen*, 56 F.4th at 717.

The district court further erred by reading a protected-class limitation into the *Tinker* analysis. Relying on a vacated case, the court ruled that speech "directed at a particularly vulnerable student based on a core identifying characteristic, such as race, sex, religion, or sexual orientation" gives schools "greater leeway to regulate it." ER-12 (cleaned up). But *Tinker* itself contains no such limitation. *Tinker* lets schools regulate unlawful harassment on any basis—not just certain

characteristics. *Cf. Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) (holding that an overbroad ban on "discriminatory" "harassment" based on 25 protected characteristics discriminated based on viewpoint). And the district court offered no reason why certain characteristics take precedence over others. Why should a student harassed for wearing glasses remain unprotected? Or a student harassed for being short? Or for being tall? An underinclusive rule limited to certain classes leaves students vulnerable. But schools can—and should—regulate unlawful harassment across the board.

The district court's protected class analysis disfavors speech on topics some find controversial. By using an overbroad definition of harassment focused on protected classes, the district court's rule would chill important speech on issues related to those classes. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding ordinance prohibiting "fighting words … on the basis of race, color, creed, religion or gender" "impose[d] special prohibitions on those speakers who express views on disfavored subjects").

And this case shows exactly how. Principal Becerra thought B.B.'s message was "racist." It wasn't. But by allowing Principal Becerra to punish her for it, the district court's opinion greenlights censorship when administrators disagree with speech about certain topics. After all, according to the district court, "what is harmful or innocent speech is in the eye of the beholder." ER-14. As a result, the court's protected-

class analysis allows beholders—like Principal Becerra—to enforce their own orthodoxies by stifling messages they disagree with.

Discussions about race raise sensitive issues. They can involve a variety of perspectives on both historic and continuing injustices. But those are discussions that need to be had. Without them, the civil-rights movement may not have brought about the more equal society we have today. We could not work towards a more just society without that freedom. And that's especially true for schools—our nurseries of democracy.

B.B. wanted to make her classmate feel comfortable by sending a message of racial unity. Her classmate didn't take any offense to it. Yet her principal punished her for her drawing. Rather than allow two students to learn from each other on an important topic, the principal stepped in to enforce the school's preferred orthodoxy. Absent a substantial disruption or a true invasion of the rights of others, *Tinker* doesn't allow for that. The district court erred in ruling to the contrary.

CONCLUSION

Mere offense at a potentially controversial viewpoint cannot justify stopping speech. If it did, the students in *Tinker* couldn't have protested the Vietnam War. And the students in B.B.'s class could not discuss many important issues concerning race. To preserve the freedom for students to learn from each other and help our country

advance, this Court should clarify the definition of unlawful harassment and reverse.

Respectfully submitted,

By: */s/ Mathew W. Hoffmann*

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July 22, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-1770

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*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Mathew W. Hoffmann
Mathew W. Hoffmann
Attorney for *Amicus Curiae*