

NO. 17-55289

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ANDREW L. “KICKING HORSE” McCARTER  
*Plaintiff-Appellee,*

v.

D. ASUNCION, et al.  
*Defendants-Appellants,*

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. CV16-5672 BRO (JEMx)  
The Honorable Beverly Reid O’Connell, United States District Judge

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**MOTION FOR LEAVE TO FILE BRIEF OF HUY AS *AMICUS CURIAE* IN  
SUPPORT OF PLAINTIFF-APPELLEE McCARTER’S ANSWERING  
BRIEF**

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Pursuant to Federal Rules of Appellate Procedure Rule 29 and Ninth Circuit Court of Appeals Rule 29-2, *Amicus Curiae* Huy respectfully moves this Court for leave to file the *amicus* brief that accompanies this motion in support of Plaintiff-Appellee McCarter’s Answering Brief. *Amicus Curiae* Huy sought the consent of all parties in this case; counsel for Defendants-Appellants did not consent.

### **I. IDENTITY AND INTEREST OF AMICUS**

*Amicus Curiae* Huy is a nationally recognized non-profit organization established to enhance religious, cultural, and other rehabilitative opportunities for imprisoned American Indians, Alaska Natives, and Native Hawaiians (collectively hereafter referred to as “Native” or “Native People”). In the traditional Coast Salish language known as Lushootseed, the word huy (pronounced “hoyt”), means: “See you again/we never say goodbye.”

Huy’s directors include the immediate past President of the National Congress of American Indians, elected chairpersons of federally recognized tribal governments, a former Washington State legislator, and a past Secretary of the Washington State Department of Corrections. In addition to funding and supporting Native prisoner religious programs, Huy advocates for Native prisoners’ religious rights in federal courts, state administrative rulemakings, and through reports to the United Nations.

## II. THE PROPOSED BRIEF OF *AMICUS CURIAE* IS RELEVANT AND DESIRABLE

*Amicus Curiae* Huy's brief is desirable because it will provide this Court with the benefit of Huy's research, legal analysis, and experience advocating for Native prisoners' religious rights. To appreciate the significance of the sweat lodge deprivation for Mr. McCarter and his fellow Native prisoners, Huy's brief will provide this Court with information to better understand the role of the sweat lodge in Native religious life generally, as well as the rehabilitative role it plays for Native inmates and society at large.

Additionally, *Amicus Curiae* Huy offers substantial experience in the field as Huy has appeared as *amicus curiae* on Native prisoner religious freedoms issues, including the right to worship through sweat lodge ceremony, before the U.S. Supreme Court, U.S. Eleventh Circuit Court of Appeals, U.S. District Court for Hawaii, and Massachusetts Supreme Judicial Court.

## III. CONCLUSION

*Amicus* Huy respectfully requests that this Court grant them leave to file the *amicus* brief that accompanies this motion.

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Dated: January 22, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document, **MOTION FOR LEAVE TO FILE BRIEF OF HUY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE McCARTER'S ANSWERING BRIEF**, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 22, 2018.

Signed under penalty of perjury and under the laws of the United States this 22nd day of January, 2018.

/s/ Gabriel S. Galanda  
Gabriel S. Galanda, WA # 30331

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***AMICUS CURIAE BRIEF***

**BY HUY**

**IN SUPPORT OF PLAINTIFF-APPELLEE McCARTER’S ANSWERING  
BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1, *Amicus Curiae* Huy states that it is a tribally controlled non-profit corporation organized under the laws of the State of Washington and 501(c)(3) charitable organization registered with the IRS. Huy has no parent corporation and no publicly traded stock.

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Huy submits this *amicus curiae* brief in support of Plaintiff-Appellee McCarter's Answering Brief.<sup>1</sup>

### **INTERESTS OF *AMICUS CURIAE***

*Amicus Curiae* Huy is a nationally recognized non-profit organization established to enhance religious, cultural, and other rehabilitative opportunities for imprisoned American Indians, Alaska Natives, and Native Hawaiians (collectively hereafter referred to as "Native" or "Native People"). In the traditional Coast Salish language known as Lushootseed, the word huy (pronounced "hoyt"), means: "See you again/we never say goodbye."

Huy's directors include the immediate past President of the National Congress of American Indians, elected chairpersons of federally recognized tribal governments, a former Washington State legislator, and a past Secretary of the Washington State Department of Corrections. In addition to funding and supporting Native prisoner religious programs, Huy advocates for Native prisoners' religious rights in federal courts, state administrative rulemakings, and through reports to the United Nations. Huy has appeared as *amicus curiae* on Native prisoner religious freedoms issues, including the right to worship through sweat lodge ceremonies,

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(E), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

before the U.S. Supreme Court, U.S. Eleventh Circuit Court of Appeals, U.S. District Court for Hawaii, and Massachusetts Supreme Judicial Court.

This case presents issues vital to Native cultural survival.

Native People suffer from the highest incarceration rate of any racial or ethnic group—they are incarcerated at a rate 38% higher than the national average. LAWRENCE A. GREENFELD & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *AMERICAN INDIANS AND CRIME* (Feb. 1999), *available at* <https://www.bjs.gov/content/pub/pdf/aic.pdf>. While incarcerated, Native inmates struggle to remain connected to their culture due in part to unnecessary barriers that prevent Native inmates from practicing their traditional religion. The inability to participate in traditional religious practice is detrimental to Native inmates, as such religious practice, according to federal law, is “an integral part” of Native culture and heritage; it “form[s] the basis of [Native] identity and value systems.” American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2011). In fact, it is religious practice that has held Native communities together since time immemorial. Walter Echo-Hawk, *Native Worship in American Prisons*, *CULTURAL SURVIVAL Q.*, Winter 1995, *available at* <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/native-worship-american-prisons>.

Religious practice is also a proven way to rehabilitate all inmates, including Natives. *See, e.g.,* Byron R. Johnson et al., *Religious Programs, Institutional*

*Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145 (1997).

Native inmates remain “important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of . . . Native communities that returning offenders be contributing, culturally viable members.” *Id.* Native People are also a vital component of California state society, especially communities in and around Los Angeles, which is second only to New York as the city in the U.S. with the largest Native population. Sara Schwartzkopf, *Top 5 Cities With The Most Native Americans*, INDIAN COUNTRY TODAY (July 29, 2013), <https://indiancountrymedianetwork.com/news/native-news/top-5-cities-with-the-most-native-americans/>. As such, state, local, federal, and tribal governments share a penological interest in facilitating Native rehabilitation. *See* National Congress of American Indians Res. No. REN-13-005 (2013), *available* *at* [http://www.ncai.org/attachments/Resolution\\_eHEbGbYvhEkkepreLriGHQGnKTFydkHUPHLXdoUvjsPTU UWILbe\\_REN-13-005%20final.pdf](http://www.ncai.org/attachments/Resolution_eHEbGbYvhEkkepreLriGHQGnKTFydkHUPHLXdoUvjsPTU UWILbe_REN-13-005%20final.pdf). It is, therefore, essential that California prisons facilitate, and not impede, Native religious practices.

As this Court considers the failure of California State Prison, Los Angeles County (“CSP-LAC”) officials to provide an adequate sweat lodge location for

Appellee and his fellow Native inmates, *Amicus Curiae* Huy steps forward to provide this Court critical context and information on prison sweat lodge practices.

### **SUMMARY OF ARGUMENT**

CSP-LAC not only violated the First Amendment by failing to provide an adequate location for Andrew “Kicking Horse” McCarter to engage in Native sweat lodge ceremonies, but CSP-LAC also unnecessarily forwent an effective tool for accomplishing state penological objectives. The use of a sweat lodge is central to the practice of Mr. McCarter’s sincerely held religious beliefs; and CSP-LAC’s refusal to provide a suitable location for a sweat lodge has deprived him of the ability to engage in Native religious rituals, impeding his Native traditional religious exercise. In doing so, CSP-LAC disregarded evidence that a prison’s safe accommodation to the religious needs of Native inmates enhances rehabilitation and reduces violence and recidivism.

### **ARGUMENT**

To better appreciate the significance of the sweat lodge deprivation for Mr. McCarter and his fellow Native inmates, it is helpful to understand the role of the sweat lodge in Native religious life generally, as well as the rehabilitative role it plays for Native inmates and society at large.

**I. THE SWEAT LODGE IS A HISTORICAL NATIVE RELIGIOUS PRACTICE THAT IS ESSENTIAL TO NATIVE RELIGION AND CULTURAL IDENTITY.**

A sweat lodge is “a house of prayer and meditation” for those practicing Native religious tradition. *Yellowbear v. Lampert*, 741 F.3d 48, 52 (10th Cir. 2014). Courts have long recognized that the sweat lodge plays a central, and fundamental, role in Native religion. *See Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995); *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994); *Allen v. Toombs*, 827 F.2d 563, 565, 566 n.4, 566 n.5 (9th Cir. 1987); *McKinney v. Maynard*, 952 F.2d 350 (10th Cir. 1991). “Religion has special significance to Indians.” STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 260, (3d ed. 2002). “In the traditional Indian perspective religion is not something separate from life; the spirit world is part of everything, and one’s goal is to live in harmony with nature. In few other societies is the role of religion as central to its members’ existence as it is in Indian societies.” *Id.* The sweat lodge, in particular, is central to Native inmates’ existence. *See* ELIZABETH S. GROBSMITH, *INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA* 49 (1994).



**II. THE BASIC RELIGIOUS REQUIREMENTS OF A SWEAT LODGE SITE PRECLUDE CEREMONIES FROM BEING HELD IN AN AREA AS DISRUPTIVE AS THE CENTRAL YARD OF A PRISON.**

A sweat lodge is a dome-shaped structure, made by tethering together branches of willow or other saplings indigenous to the area. Fed. Bureau of Prisons, No. T5360.01, Technical Reference: Religious Beliefs and Practices 14-15 (2002), <http://www.acfsa.org/documents/dietsReligious/FederalGuidelinesInmateReligiousBeliefsandPractices032702.pdf>. The dome is then covered with a tarpaulin, blankets, or canvas to make it light-proof. *Id.* A small pit is dug in the center of the lodge, which is later used as a receptacle for hot rocks. *Id.* Outside the lodge, there is a fire pit for heating those rocks. *Id.*

The sweat lodge ceremony is generally conducted in four “rounds,” and at the beginning of each round hot rocks are carried from the fire into the lodge, where hot water is sprinkled on them, producing steam. *Id.* Although the prayers, songs, and rituals conducted in the lodge during the rounds are confidential, and vary between tribes and traditions, the common theme throughout is purification of the individual’s mind, body, and spirit. Participants are expected to have a good relationship with each other before entering the sweat lodge and must not bring any negativity into the sweat lodge. SUZANNE J. CRAWFORD & DENNIS F. KELLEY, AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA 1079-1080 (2005).

Since a sweat lodge is in an outdoor area in a prison system, the lodge site should be surrounded by fencing to provide a degree of privacy and respect to the ceremonies without jeopardizing security of the prison. Technical Reference: Religious Beliefs and Practices, *supra*, at 16. “To protect the sacredness of the ceremonies performed there, the outdoor worship area should be situated in an area that affords as much privacy as possible, given the custody and security issues of the institution.” *Id.*

Here, CSP-LAC’s designated sweat lodge site offered virtually no privacy, as the site was located in the prison’s central yard, surrounded by only a four-foot fence. Moreover, the prison’s central yard is an inadequate location for a sweat lodge because it is prohibitively disruptive. The prison yard is home to heavy inmate traffic; it is where inmates congregate, converse, and play sports. Inmates using the sweat lodge must be able to conduct prayers and to drum and sing sacred songs, none of which is possible in the middle of the noisiest and busiest part of the prison.

The ideal of a sweat lodge, as a house of worship and prayerful reflection is defeated by requiring that it be built in what amounts to the “Times Square” of a state prison. Without a suitable sweat lodge site, Mr. McCarter cannot engage in sweat lodge rituals, thus prohibiting his religious practice altogether.

**III. THE SWEAT LODGE FURTHERS THE CORRECTIONAL INSTITUTIONS' GOAL OF REHABILITATING NATIVE INMATES AND EASING THEIR EVENTUAL TRANSITION BACK INTO THEIR COMMUNITIES.**

No other group faces more regulation in the time, place, and manner of religious exercise than Native People. Echo-Hawk, *supra*. While most people in the United States are accustomed to free access to their churches and places of worship, Natives have the opposite experience. For Natives, certain prayers and ceremonies can only be held in sacred places, which are often located on Federal lands and Natives must first seek permission before accessing those places for ceremonies. *Id.* Furthermore, the use and possession of sacred objects, such as eagle feathers, peyote, and animal parts are often the subject of complex and comprehensive federal and state laws and regulations. *Id.* Incarceration further hinders Native religious practice because Native inmates are often completely cut off from Native Elders, sacred lands, and objects. Here, Mr. McCarter is not asking for a release to a sacred place, access to sacred objects, or contact with his Native Elders—he is seeking the bare minimum: access to an appropriate site within the prison to conduct sweat lodge ceremonies, which accommodates both his freedoms and CSP-LAC's penological interest.

Far from threatening safety and security, religious practice, including traditional Native religious practice, reduces recidivism, positively affects

discipline, reduces violence, and aids rehabilitation. *See, e.g.*, Melvina T. Sumter, Religiousness and Post-Release Community Adjustment (August 3, 1999) (unpublished Ph.D. dissertation, The Florida State University School Of Criminology and Criminal Justice), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Johnson et al., *supra*. It is, therefore, vital that prison systems accommodate religious practices such as sweat lodge ceremonies.

Prison officials who have accommodated Native religious practices generally do not report interference with penological interests. In fact, California corrections officials have acknowledged that such accommodation has reduced violence and afforded inmates a sense of pride and brotherhood, which carries over into their social reintegration upon release. GROBSMITH, *supra*, at 164. One of the stated goals of the California Department of Corrections “is to help offenders leave prison with better job or career skills, education, life skills, and confidence, so they can succeed in their futures despite past obstacles.” California Department of Corrections & Rehabilitation, *Division of Rehabilitative Programs*, <https://www.cdcr.ca.gov/rehabilitation/> (last visited Jan. 17, 2018). If this is indeed the case, CSP-LAC should wholeheartedly welcome the accommodation of a suitable location for Native religious practice.

Idaho prison officials have likewise reported that Native religious practices in prison enable Native inmates to come together in mutual self-help: “It is definitely rehabilitative for those individuals that have no direction in life or no concern or understanding for self or others.” GROBSMITH, *supra*, at 164. Oklahoma officials, too, have recognized that Native People’s practices have a positive effect on prison discipline. *Id.* Joseph Vitek, former director of the Nebraska Department of Correctional Services, who is thought to have established the first prison sweat lodge in the U.S., described the remarkable results of sweat lodges and other Native practices this way: “[W]hat I did see specifically . . . [was] that a lot of Indians, not all of them, developed a great deal of self-esteem and pride in themselves. . . . Sense of identity if you will.” *Id.* at 163.

The CSP-LAC’s denial of a suitable location for Mr. McCarter’s religious practice deprives him not only of his religious rights, but also a rehabilitative opportunity. Appellants’ actions here, therefore, frustrate California’s stated goals.

**IV. THE FEDERAL BUREAU OF PRISONS AND SEVERAL STATES HAVE RECOGNIZED THE IMPORTANCE OF PROVIDING A SWEAT LODGE TO NATIVE INMATES.**

Due to the prominence of the sweat lodge in Native religious life and the benefits of religious practice for inmates generally, several prison systems throughout the U.S. have safely and successfully accommodated sweat lodges, with

Nebraska believed to have provided the first prison sweat lodges in 1974. *See Roybal v. Deland*, Nos. C-87-0208A & C-87-8208G (D. Utah 1989). Today, the Federal Bureau of Prisons and various state prison systems require prison officials to provide sweat lodges for Native inmates. At least twenty prison systems have followed suit, adopting and implementing policies to accommodate sweat lodge facilities and ceremonies for Native inmates. *Id.*

As the rehabilitative nature of Native religious practices has become better understood, federal and state jurisdictions have increasingly provided sweat lodge and other Native religious accommodations; they have done so on their own accord. *See Echo-Hawk, supra*. That is because corrections experts also better understand that, Native sweat lodge practice, like religion in general, “targets antisocial values, emphasizes accountability and responsibility, changes cognitive approaches to conflict, and provides social support and social skills through interaction with religious people and communities” and is consistent with principals of effective treatment. Johnson, et al., *supra*, at 148 (internal citations omitted). The Federal Bureau of Prisons has gone so far as to mandate that all prisons under federal control afford sweat lodge opportunities. FED. BUREAU OF PRISONS, NO. P5360.09, PROGRAM STATEMENT: RELIGIOUS BELIEFS AND PRACTICES ¶¶ 2, 20 (f) (2004), available at [https://www.bop.gov/policy/progstat/5360\\_009.pdf](https://www.bop.gov/policy/progstat/5360_009.pdf).

Further, many states have enacted specific Native sweat lodge policies, which require that prison officials adhere to even more stringent requirements than those imposed by CSP-LAC. For instance, sweat lodges in Arizona “shall be constructed in an area approximately 30 to 40 feet under the guidance of an approved Native American advisor.” ARIZ. DEPT. OF CORR., CH. 900, DEP'T ORDER 904, DEP'T ORDER MANUAL: INMATE RELIGIOUS ACTIVITIES / MARRIAGE REQUESTS § 904.04 – 1.4.1.8 at 9 (2014), *available at* <https://corrections.az.gov/sites/default/files/policies/900/0904.pdf>. Similarly, Washington State enacted a policy that specifies the amount of wood needed for sweat lodge ceremonies. WASH. DEPT. OF CORR., DOC 560.200, POLICY: RELIGIOUS PROGRAMS, IV.C at 8-9 (2014), *available at* <http://www.doc.wa.gov/information/policies/files/560200.pdf>.

In 2017 California, which has long recognized the sweat lodge as a “fixed, large scale structure for worship purposes,” amended the Rules and Regulations of Adult Operations and Programs to clarify the distinction between (a) “Outdoor Religious/Spiritual Grounds,” and (b) “Native American Sweat Lodge Grounds.” State of California Office of Administrative Law, Adopted Regulations NCR 15-03, (May 12, 2016), at 6. This amendment is a clear acknowledgment of the intimacy between Native People and sweat lodge ceremony; the importance of a sweat lodge

facility to Native worship; and the distinct, sacred space needed for Native “the Native American Sweat Lodge Grounds.” *Id.*

CSP-LAC has deviated from these norms by prohibiting Mr. McCarter and his fellow Native inmates from worshiping via sweat lodge ceremony in serene setting.

### CONCLUSION

Failing to provide a suitable sweat lodge site not only denies Native inmates their right to religious exercise, but it also needlessly sacrifices an effective tool for accomplishing recognized penological objectives. CSP-LAC has undermined the chance for society to eventually receive Native offenders as rehabilitated citizens.

Dated: January 22, 2018

Respectfully submitted,

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Attorneys for *Amicus Curiae*



**CERTIFICATE OF COMPLIANCE**

See appended Form 8. Certificate of Complaint Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-35427.

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55289**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1)  separately represented parties; (2)  a party or parties filing a single brief in response to multiple briefs; or (3)  a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated   
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document, *AMICUS CURIAE* BRIEF BY HUY IN SUPPORT OF PLAINTIFF-APPELLEE McCARTER'S ANSWERING BRIEF, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 22, 2018.

Signed under penalty of perjury and under the laws of the United States this 22nd day of January, 2018.

/s/ Gabriel S. Galanda  
Gabriel S. Galanda, WA # 30331