

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**Nos. 15-3291 & 15-3555**

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THE STATE OF TENNESSEE,  
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
RESPONDENTS.

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THE STATE OF NORTH CAROLINA,  
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
RESPONDENTS.

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ON PETITIONS FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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**BRIEF FOR THE NORTH CAROLINA LEAGUE OF MUNICIPALITIES  
AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS' REQUEST TO AFFIRM ORDER**

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## STATEMENT OF INTEREST<sup>1</sup>

The North Carolina League of Municipalities (“NCLM”) is a membership organization of over 540 municipalities that seeks to preserve and enhance the authority of North Carolina municipalities, including their ability to provide the infrastructure necessary to maximize economic opportunities and quality of life in their communities. NCLM files this *amicus curiae* brief in support of respondent Federal Communications Commission (“FCC”) and intervenor city of Wilson (“Wilson”) and of the FCC’s decision<sup>2</sup> to invalidate provisions of North Carolina’s Session Law 2011-84<sup>3</sup> that have created significant obstacles to municipal deployment of broadband and have adversely affected the ability of NCLM members to provide the infrastructure required for full participation in the global economy.

The purpose of this brief is to provide this Court with background information and context for N.C. Session Law 2011-84 (introduced as House Bill 129 and commonly known as “H129”) that is missing from the submissions to this

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<sup>1</sup> Pursuant to Federal Rules of Appellate Procedure Rule 29(c)(5), *amicus* states that no counsel for a party authored this brief in whole or in part and neither the parties nor their counsel contributed money, nor any other person, to *amicus* to fund the preparation or submission of this brief.

<sup>2</sup> *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, Memorandum Opinion and Order, 30 FCC Rcd 2408 (2015).

<sup>3</sup> N.C. Session Law 2011-84; N.C. Gen. Stat. 160A-340 *et seq.*

Court by the parties and the *amici* and to explain why vacating the FCC's decision would adversely affect economic, educational, health care, and other opportunities for the North Carolina communities that likely would not have access to advanced broadband service in the absence of municipal involvement.

NCLM, individual municipalities, and other local government associations lobbied against H129, while North Carolina's largest incumbent telephone and cable companies lobbied aggressively for the enactment of H129 in 2011. Since its enactment, the law has effectively blocked broadband investment by municipalities and no new municipal broadband systems providing residential service have been deployed in North Carolina since 2011.

Access to advanced broadband has become essential for participation in modern life as many economic, educational, health care, and civic opportunities are now dependent on the capacity of the local broadband infrastructure. Yet an urban/rural digital divide has developed in North Carolina, where powerful and well-financed private companies like Google and AT&T have made public commitments to provide gigabit fiber-to-the-home broadband service in urban areas but have not made similar commitments for rural areas. In a number of instances, North Carolina municipalities have stepped in where the private sector has failed to provide this critical, advanced broadband infrastructure and they are succeeding in this area contrary to the claims of petitioners and their supporting *amici*.



H129 has effectively prohibited North Carolina's existing municipal broadband providers from serving their rural neighbors, including those that are unlikely to have access to gigabit or other advanced broadband service in the foreseeable future. The FCC's invalidation of N.C. Session Law 2011-84 means that North Carolina's municipalities can now take advantage of a full range of options, whether public-only ventures or public-private partnerships, to provide their communities with the broadband infrastructure necessary for competing in today's global economy and responding to community needs.

## ARGUMENT

### I. ACCESS TO BROADBAND IS ESSENTIAL FOR FULL PARTICIPATION IN THE 21<sup>st</sup> CENTURY ECONOMY

Access to broadband is no longer a luxury or discretionary service and has become essential for full participation in contemporary society and economic life.<sup>4</sup>

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<sup>4</sup> See White House statement that broadband is "taking its place alongside water, sewer, and electricity as essential infrastructure for communities." John Brodtkin, *Broadband is a 'Core Utility' like Electricity, White House Report Says*, Arstechnica (Sept. 22, 2015), available at <http://arstechnica.com/business/2015/09/broadband-is-a-core-utility-like-electricity-white-house-report-says/>; see also: "Access to high speed broadband is no longer a luxury; it is a necessity for American families, businesses, and consumers. Affordable, reliable access to high speed broadband is critical to U.S. economic growth and competitiveness..." *Broadband Opportunity Council Report and Recommendations*, Broadband Opportunity Council (Aug. 20, 2015) at 3, available at [https://www.whitehouse.gov/sites/default/files/broadband\\_opportunity\\_council\\_report\\_final.pdf](https://www.whitehouse.gov/sites/default/files/broadband_opportunity_council_report_final.pdf).

It now affects and shapes employment, health care, and educational opportunities, and even home values. Now, over 80 percent of Fortune 500 companies require job applicants to submit employment applications via their websites.<sup>5</sup> On-line healthcare services are surging in importance, not only for the elderly, who want to continue to live in their homes regardless of health challenges, but especially in rural communities, now home to numerous military veterans,<sup>6</sup> where distance is a barrier to specialized medical care.<sup>7</sup> K-12 educational coursework has moved from printed to e-books where the lack of Internet access at home means homework

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<sup>5</sup> Jordan Usdan and Kevin Almasy, *FCC Announces Job Focused Digital Literacy Partnership*, FCC Blog (July 23, 2012), available at <https://www.fcc.gov/blog/fcc-chairman-announces-jobs-focused-digital-literacy-partnership-between-connect2compete-and-28>.

<sup>6</sup> The U.S. Department of Veterans Affairs reported that its national on-line telehealth programs served “more than 690,000 vets during 2014 via 2 million online visits, and with more than 50% of those on-line visits from veterans who live in rural areas with limited access to a VA healthcare facility.” FederalSoup Staff, *VA Touts Growth of Telehealth Program*, Federal Soup (Oct. 14, 2014), available at <https://fedralsoup.com/articles/2014/10/14/va-touts-growth-of-telehealth-program.aspx>.

<sup>7</sup> “[T]elehealth, the ability to connect with health care professionals remotely via broadband, has significant potential to enrich a patient’s life by reducing the need for frequent visits to the doctor and by utilizing e-visits and remote telemetry monitoring. The Veterans Administration conducted a study of over 17,000 patients with chronic conditions, and found that by using telehealth applications, bed days of care were reduced by 25 percent and hospital admissions were reduced by 19 percent.” *In re: Connect America Fund*, Second Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 15-71 (rel. June 22, 2015) ¶¶ 5, 27, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-71A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-71A1.pdf).

cannot be completed<sup>8</sup> or parents have to drive their children to a library, which in a rural area may be at a distance of as many as 20 miles.<sup>9</sup> The Internet is also creating many new opportunities for education by, for example, removing income as a barrier to enrolling on-line in elite-level higher education courses.<sup>10</sup> Underscoring the importance of high-speed broadband service, access to a gigabit fiber Internet connection has been found to increase residential property values by 8 percent.<sup>11</sup>

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<sup>8</sup> Helen Brunner, *Equal Internet Access is a K-12 Must-Have*, Education Week (Jan. 29, 2013), available at <http://www.edweek.org/ew/articles/2013/01/30/19brunner.h32.html#>; Jessica Rosenworcel, Federal Communications Commission, *Bridging the Homework Gap*, Huffington Post (June 15, 2015), available at [http://www.huffingtonpost.com/jessica-rosenworcel/bridging-the-homework-gap\\_b\\_7590042.html](http://www.huffingtonpost.com/jessica-rosenworcel/bridging-the-homework-gap_b_7590042.html).

<sup>9</sup> Gerry Smith, *Many AT&T Rural Customers Lack High Speed Internet Despite Merger Promise*, Huffington Post (Nov. 18, 2012), available at [http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet\\_n\\_1914508.html](http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html); Gerry Smith, *On Tribal Lands, Digital Divide Brings New Form of Isolation*, Huffington Post (Apr. 20, 2012), available at [http://www.huffingtonpost.com/2012/04/20/digital-divide-tribal-lands\\_n\\_1403046.html](http://www.huffingtonpost.com/2012/04/20/digital-divide-tribal-lands_n_1403046.html).

<sup>10</sup> The CEO of edX, a Cambridge, Massachusetts-based, non-profit that offers “free online classes from elite universities to anyone in the world” stated that “[e]nrollment in edX courses has doubled over last year.” Issie Lapowsky, *Why Free Online Classes Are Still the Future of Education*, Wired (Sept. 26, 2014), available at <http://www.wired.com/2014/09/free-online-classes-still-future-education/>; Kimberly F. Colvin *et al.*, *Learning in an Introductory Physics MOOC: All Cohorts Learn Equally, Including an On-Campus Class*, The Int’l Rev. of Res. in Open and Distance Learning, Vol. 15 (Nov. 4, 2014), available at <http://www.irrodl.org/index.php/irrodl/article/view/1902/3009>.

<sup>11</sup> Jason Koebler, *Gigabit Internet Connections Make Property Values Rise*, Motherboard (Nov. 4, 2014), available at

In fact, with so much of economic and civic activity now moving over the Internet, the opportunities available to a business, home, student, or patient are defined and limited to a significant extent by the capacity of the Internet “pipe” to which they have access. The so-called “killer app” (this term refers to a use of the Internet that is increasingly becoming indispensable) is video- and image-related data, with video now constituting 63 percent of Internet use.<sup>12</sup> A medical x-ray, an engineering blueprint, a video homework assignment, and, in the not-too-distant future, a robot or cell-phone with 3-D vision,<sup>13</sup> requires thousands of times more bandwidth than an email. Households now are using from 5 to 15 Internet devices, from cell phones and tablets to videogame and streaming devices, all demanding simultaneous access to the Internet.<sup>14</sup> This evolution in use has caused the FCC to update its estimate of the bandwidth necessary to participate in modern life to 25

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<http://motherboard.vice.com/read/gigabit-internet-connections-make-property-values-rise>.

<sup>12</sup> *Global Internet Phenomena Report, 2H 2014*, Sandvine Intelligent Broadband Networks (2014) at 5, available at

<https://www.sandvine.com/downloads/general/global-internet-phenomena/2014/2h-2014-global-internet-phenomena-report.pdf>.

<sup>13</sup> Jack Nicas, *Why Your Gadgets can now See in 3-D*, Wall Street Journal (Oct. 15, 2015), available at <http://www.wsj.com/articles/more-devices-gain-3-d-vision-1444859629>.

<sup>14</sup> Olga Karif, *Average Household Has 5 Connected Devices While Some Have 15 Plus*. Bloomberg Tech Blog (Aug. 29, 2012), available at

<http://go.bloomberg.com/tech-blog/2012-08-29-average-household-has-5-connected-devices-while-some-have-15-plus/>.

Mbps downstream and 3 Mbps upstream.<sup>15</sup> Well-financed Internet service providers, such as Google<sup>16</sup> and AT&T,<sup>17</sup> are building fiber-based, symmetrical gigabit networks to the home (*i.e.*, networks capable of transmitting 1 million Mbps in both the upstream and downstream direction) based on their assessment that capacity of such magnitude will be required to handle future information needs. These large, well-established companies have not shown any interest in deploying similar networks in rural North Carolina or other rural areas of the United States.

The gap between urban areas and rural communities in terms of broadband deployment continues to widen.<sup>18</sup> The FCC reports that 53 percent of the house-

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<sup>15</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion*, 30 FCC Rcd 1375 (2015) ¶ 45.

<sup>16</sup> *Google Fiber Expansion Plans*, available at <https://fiber.google.com/newcities/>. On January 27, 2015 Google announced that it will deploy Gigabit fiber to the home in Charlotte and Raleigh-Durham, NC.

<sup>17</sup> Ray Sheffer, *AT&T has been expanding U-verse with its GigPower Offering, Part 2*, Market Realist (Apr. 17, 2015), available at <http://marketrealist.com/2015/04/att-expanding-u-verse-gigapower-offering/>.

<sup>18</sup> In a hearing before the Senate Commerce Committee on October 7, 2015, a Senior Vice President of Deere & Company described how the Internet of Things sensors allow farmers to track crop yields, soil nutrition, and rainfall with historical precision, but pointed out that America's farmers are suffering from a lack of broadband infrastructure. Anecdotal evidence was presented of farmers using the local McDonald's free Wi-Fi to communicate with their suppliers and shuffling information between equipment using flash drives because the wireless network in their area was "spotty" and unreliable. Jeff Hawn, *IOT set to Revolutionize Farming*, RCR Wireless News (Oct. 8, 2015), available at

holds in rural areas do not have access to the level of broadband that it recently deemed necessary to participate in modern life (the FCC's new 25/3 Mbps standard), compared to only 8 percent of households in urban areas.<sup>19</sup> According to the FCC, 80 percent of the underserved areas in the country are served by large incumbent providers, the majority of whom have turned to the FCC for rural broadband subsidies in recognition of the fact that these rural markets lack the population density and income necessary for these carriers to justify building or upgrading the necessary infrastructure.<sup>20</sup>

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<http://www.rcrwireless.com/20151008/internet-of-things/iot-wireless-set-to-revolutionize-farming-tag15>.

<sup>19</sup> “[P]arts of our country are being left behind. A digital divide persists between urban and non-urban parts of the country. The data show that this divide exists for broadband service at a variety of speeds. The data also show that the problem is one of supply, not demand.” *FCC 2015 Broadband Progress Report and Notice of Inquiry of Immediate Action to Accelerate Deployment*, GN Docket No. 14-126, FCC 15-10 (rel. Feb. 4, 2015) ¶¶ 5-6, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-10A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf).

<sup>20</sup> “More than 83 percent of the approximately 18 million Americans that lack access to residential fixed broadband at or above the Commission’s broadband speed benchmark live in areas served by price cap carriers—Bell Operating Companies and other large and mid-sized carriers. In these areas, the CAF will introduce targeted, efficient support for broadband in two phases.” *In re: Connect America Fund*, Report and Order & Further Notice of Proposed Rulemaking, WC Docket No 10-90, FCC 11-161 (rel. Nov. 18, 2011) ¶ 21, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-11-161A1.doc](https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.doc); *Wireline Competition Bureau Announces Connect America Phase II Support Amounts Offered to Price Cap Carriers to Expand Rural Broadband* (rel. Apr. 29, 2015), available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DA-15-509A1.doc](https://apps.fcc.gov/edocs_public/attachmatch/DA-15-509A1.doc).

Even with these subsidies, carriers are only required to provide speeds of 10 Mbps downstream and 1 Mbps upstream by 2020.<sup>21</sup> Recognizing the close relationship between gigabit fiber capacity and economic sustainability, this is not welcome news for states like North Carolina, where about half of the population lives in rural areas.

## **II. MUNICIPAL BROADBAND DEPLOYMENTS HAVE LED TO IMPROVED LOCAL ECONOMIC HEALTH AND QUALITY OF LIFE AND PUBLIC AND TAXPAYER SAVINGS**

In response to this marketplace failure, communities are stepping forward, using a full range of options, from public ownership to public-private partnerships, to build this critical infrastructure. About 450 communities operate broadband networks of varying geographic reach and capabilities, including 90 communities providing fiber-to-the-home networks that reach most or all of the community and 50 of them providing some form of 1 Gbps service.<sup>22</sup> As was the case with Wilson, these communities typically entered the broadband arena only after incumbent providers rejected the community's request to upgrade their networks.<sup>23</sup>

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<sup>21</sup> *In re: Connect America Fund*, Report and Order, WC Docket No. 10-90, FCC 14-190 (rel. Dec. 18, 2014) ¶ 15, available at <https://www.fcc.gov/document/fcc-releases-order-increase-connect-america-rural-broadband-speeds>.

<sup>22</sup> Institute for Local Self Reliance, *Community Network Map* (undated), available at <http://www.muninetworks.org/communitymap>.

<sup>23</sup> See Terry McSweeney, Federal Trade Commission, *Broadband Should be Encouraged: Not Restricted*, Recode (Jan. 13, 2015), available at

Despite attempts to paint municipal broadband networks as failures, success stories abound, with municipal networks sustaining the economic health of the community, enhancing quality of life, improving city services, and even saving public dollars. For example, the city of Thomasville, Georgia, with a population of 18,600 and one of the oldest municipal fiber-to-the-home networks in the nation, utilized its fiber broadband infrastructure to retain local businesses and keep its downtown vibrant and ultimately to end a local property tax.<sup>24</sup> In Tullahoma, Tennessee, with a population of 19,000, employment lagged behind statewide job

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<http://recode.net/2015/01/13/broadband-competition-should-be-encouraged-not-restricted/>: “Not surprisingly, a recurring story told by cities and towns that have built their own fiber networks is that they did so only after the incumbent providers declined to make those investments themselves. In these cases, the city or town stepped in where the market failed to meet the demand for more modern infrastructure.” *See also* Christopher Mitchell, *Salisbury Fibrant Launches 10 Gbps Citywide*, Community Broadband Networks (Sept. 15, 2015), available at <http://www.muninetworks.org/content/salisbury-fibrant-launches-10-gbps-citywide-community-broadband-bits-podcast-168>: “How it all happened is that we went to some of the incumbents and said, ‘What are your plans for expanding broadband in our community?’ They said, ‘Well, we have no plans.’ We went back to them again and said, ‘Can we pay and have you still expand within our community?’ They said, ‘No.’ The city made a decision, since we weren’t going to get any increase in service quality from the incumbents, that we’ll build our own fiber infrastructure. That started out about 2009, and we’ve turned it up at about 2010.”

<sup>24</sup> Lisa Gonzales, *In Georgia, Thomasville Combines Tradition and Technology for Downtown Success*, Community Broadband Networks (Feb. 20, 2013), available at <http://muninetworks.org/content/georgia-thomasville-combines-tradition-and-technology-downtown-success>; D. Collado, *Thomasville Removes Local Tax Citing Strong Broadband Revenues*, Community Broadband Networks (Nov. 20, 2013), available at <http://muninetworks.org/tags/tags/thomasville>.



growth before the city activated its fiber network, theLightTUBE. Two years after the city began offering broadband service, job growth in the city outpaced job growth in the state as a whole. J2 Software Solutions, which specializes in providing high-tech software to law enforcement agencies, located to Tullahoma due to its fiber network, helping to add a total of 3,598 jobs in the city from April 2009 to April 2014, a 1.63 percent annual growth rate or about double the statewide rate.<sup>25</sup>

Community-owned networks like the broadband system owned by Spanish Fork, Utah (population: 34,700), have produced cost savings for the public. Spanish Fork's community network has long been among the most successful community broadband projects. In response to complaints about the community's lack of high-speed Internet service, the municipality built a broadband network in 2001. The city recently completed payment on the 15-year bond used to finance system construction and is now using the income produced by the system to upgrade to a gigabit network. Despite competing with Comcast and Dish TV, the community's network has a take rate of 80 percent. Local officials calculate that the system produces annual savings for community residents equivalent to \$3 million in the form

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<sup>25</sup> Lisa Gonzales, *Center for Public Integrity and Reveal Radio Get into the Trenches on Local Internet Choice*, Community Broadband Networks (March 18, 2015), available at <http://www.muninetworks.org/content/center-public-integrity-and-reveal-radio-get-trenches-local-choice>.

of lower service cost due to the pressure on prices caused by the presence of genuine competition.<sup>26</sup>

Similarly, Martin County, Florida (population: 146,300), saved its taxpayers millions of dollars by building its own fiber optic network rather than continuing to lease costly connections from Comcast. When Comcast proposed increasing Martin County's lease payments for dark fiber by over 800 percent over five years, the county responded by building its own network and now has a more reliable network at lower cost and does not have to worry about future rate hikes. Projected savings are \$30 million over 20 years. After it pays off its initial capital investment in the fiber asset in 2017, the Martin County School District will save over \$340,000 a year: "It will pay just over \$6,000 per year for a gigabit connection to 26 locations, a rock bottom rate."<sup>27</sup>

Wilson, North Carolina (population: 49,900), has utilized its community-owned network, Greenlight, to bring symmetrical gigabit service to all its public schools. It also provides free 100 Mbps symmetrical service to its library, to every

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<sup>26</sup> Christopher Mitchell, *Spanish Fork Building Gig Fiber Over Cable Network*, Community Broadband Networks (Sept. 29, 2015), available at <http://muninetworks.org/content/spanish-fork-building-gig-fiber-over-cable-network-community-broadband-bits-podcast-170>.

<sup>27</sup> Lisa Gonzalez and Christopher Mitchell, *Florida Fiber: How Martin County Saves Big with a Gigabit Network*, Institute for Local Self Reliance (June 20, 2012), available at <https://ilsr.org/florida-fiber-gigabit/>.

community center in its public housing neighborhoods, and to after-school programs for underprivileged youth,<sup>28</sup> where participants use the city's state-of-the-art broadband service for video job interviews and to obtain a high school GED or a college degree.<sup>29</sup>

Greenlight also facilitates economic development in various forms. For example, the revenues of a small local computer and Internet business, Computer Central, have grown more than 100 percent due in large part to Greenlight's gigabit capacity, which makes it possible for the company to offer data backup and disaster recovery services that could not be provided over the incumbents' lower capacity networks. Computer Central's manager describes how, with Wilson's robust and uninterrupted gigabit capacity, the company was able to help a car dealership resume operations within 24 hours of a devastating tornado that decimated the dealership and hurled cars from the lot into the street.<sup>30</sup> A special effects film com-

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<sup>28</sup> See e.g., Catharine Rice, *What does it Mean to be a Gigabit City? Sharing Positive Outcomes Together*, Community Broadband Networks (Apr. 13, 2015), available at <http://www.muninetworks.org/content/what-does-it-mean-be-gigabit-city-sharing-positive-outcomes-together-spot>.

<sup>29</sup> *Petition of the City of Wilson Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition*, WC Docket No. 14-115 (July 24, 2014) at 21 (“Wilson Petition Proceeding”), available at <http://apps.fcc.gov/ecfs/document/view?id=7521737310>.

<sup>30</sup> Catharine Rice, *Gig City Wilson Helps Local Companies Thrive*, Community Broadband Networks (Aug. 17, 2015), available at

pany, Exodus-FX, after considering many other locations, including places as far away as Japan, relocated to Wilson after learning about the community's affordable gigabit upload speeds.<sup>31</sup>

Similarly, Salisbury, North Carolina (population: 34,000), built its own fiber network in 2009, and offers 1 Gbps service for \$100 a month. The city's entry into the market had the effect of producing the lowest cable prices in the region for its residents.<sup>32</sup> The city recently announced an upgrade to 10 Gbps, a first in the state of North Carolina, which had the immediate effect of attracting medium-sized businesses from "out of the woodwork."<sup>33</sup> The City's super high-capacity network has been a boon to its first 10 Gbps customer, Catawba College, which describes the network as a differentiator in a competitive college environment, and plans to

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<http://www.muninetworks.org/content/gig-city-wilson-helps-local-companies-thrive>.

<sup>31</sup> Catharine Rice, *Being a Gigabit City: It's All about the Upload*, Community Broadband Networks (Mar. 6, 2014), available at <http://www.muninetworks.org/content/being-gig-city-its-all-about-upload>.

<sup>32</sup> Christopher Mitchell, *Salisbury Fibrant Launches 10 Gbps Citywide*, Community Broadband Networks (Sept. 15, 2015), available at <http://www.muninetworks.org/content/salisbury-fibrant-launches-10-gbps-citywide-community-broadband-bits-podcast-168>.

<sup>33</sup> *Transcript: Community Broadband Bits Episode 168*, Community Broadband Networks (Oct. 1, 2015), available at <http://muninetworks.org/content/transcript-community-broadband-bits-episode-168>.

soon start using its ultra fast connections for high tech job training through its new Digital Media Creation and Collaboration labs.<sup>34</sup>

### III. H129 CREATED BARRIERS WHICH STYMIED MUNICIPAL FIBER BROADBAND INVESTMENT AND DEPLOYMENT IN NORTH CAROLINA

Counter to the suggestion of some of petitioners' supporting *amici* that H129 was enacted to guard against municipal financial "failures"<sup>35</sup> and "corruption,"<sup>36</sup> large cable and telecommunications companies were the principal advocates of H129 and were primarily interested in prohibiting municipalities from deploying more advanced fiber systems in the state and providing meaningful price and service competition to established incumbents.<sup>37</sup> The Southeast Association of Tele-

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<sup>34</sup> Lisa Gonzalez, *Fibrant Rolls Out 10 Gigabits: A Look at Salisbury's Challenges in FTTH*, Community Broadband Networks (Oct. 8, 2015), available at <http://muninetworks.org/tags-57>.

<sup>35</sup> "From these failures...states have passed laws aimed at preventing future poor planning and fiscal disasters." Amicus Brief of the National Governors Association, *et al.* ("Amicus Brief of National Governors Association *et al.*") at 22.

<sup>36</sup> "The FCC's order prevents States from governing their own instrumentalities, broadly usurps power without authority, and opens the door for financial instability and corruption." Amicus Brief of Alabama, Arkansas, Arizona, Colorado, Florida, Idaho, Michigan, Ohio, South Carolina, Utah, and West Virginia ("Amicus Brief of 11 States") at 2.

<sup>37</sup> The lobbying power of North Carolina's large incumbent Internet service providers has been well documented. *See, e.g.*, Todd Boyle and Christopher Mitchell, *How National Cable & DSL Companies Banned the Competition in North Carolina*, Institute for Self Reliance (Jan. 2013), available at: <http://ilsr.org/wp-content/uploads/2013/01/nc-killing-competition.pdf>.

communications Officers and Advisers (“SEATOA”), an association of local government officials and their representatives whose responsibilities included developing municipal broadband systems in North Carolina stated:

For four years, SEATOA was actively involved in opposing anti-competitive legislation strongly advocated by North Carolina’s large incumbent telephone and cable companies, whose efforts ultimately proved successful in 2011 with a new state law: Section 160A-340 (known as “H129”)... Numerous plans that were in the works by various local North Carolina communities to build competitive, 21st century fiber networks for retail business and residential use ground to a halt with the passage of H129. SEATOA’s anecdotal knowledge is that at least five communities stopped their plans to bring fiber to their local residents and businesses as a result of H129. There were five community-owned cable-broadband systems in 2011, and there are the same number today... There have been no known community-owned residential fiber networks built since the passage of H129.<sup>38</sup>

The telecommunications industry had little reason to advocate for the enactment of H129 if municipal broadband networks were failing as they claimed, as they would benefit from such failures by picking up their subscribers and purchasing their failed systems at rock-bottom prices. It is far more likely that they were lobbying for H129 because no municipally-owned broadband system had failed in North Carolina and those networks posed a serious competitive threat.

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<sup>38</sup> *Petition of the Electric Power Board, Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition*, WC Docket No. 14-116 (July 24, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521737334>; Wilson Petition Proceeding, Comments of SEATOA (Aug. 29, 2014) at 3, available at <http://apps.fcc.gov/ecfs/document/view?id=7521824804>.

According to the Town of Davidson, North Carolina, H129 created an unlevel playing field for municipalities and had the effect of suppressing local options for deploying broadband:

As Wilson's Petition underscores, H129 was a bill sponsored by the incumbent providers, and in no manner subjected these companies to the numerous and varied restrictions that in part and in whole effectively prohibit local communities from deploying modern broadband networks and services to their citizens....The uncertainty caused by the proposed legislation was a major reason a collaborative effort by the towns of Cornelius, Davidson, Huntersville, Mooresville and Troutman and Mecklenburg County ended with 3 of the entities dropping out. Communities throughout the state knew that North Carolina's "Level Playing Field" law was nothing of the sort.

In addition, the law had the collateral effect of suppressing the desire of numerous communities to even creatively engage in public private partnerships for fear of exposing themselves to a legal challenge... The legislation has prevented MI Connection (the network owned by the towns of Mooresville and Davidson) from partnering with private entities to expand broadband outside the service area created by the legislation. As such, laws like those in North Carolina have unreasonably delayed and suppressed local options and competition, broadband deployment and innovation.<sup>39</sup>

The inescapable conclusion is that H129 was not enacted to protect against financial irresponsibility, but rather was designed to create an unlevel playing field for municipalities that would prevent expansion of existing municipal broadband networks and virtually ensure financial failure for any new municipal project. The law established a new set of asymmetrical regulations applicable only to broadband

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<sup>39</sup> Wilson Petition Proceeding, Comments of the Town of Davidson, NC (Aug. 27, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521824857>.

networks operated by municipalities, placing them at a competitive disadvantage, a goal made apparent in the preamble to the law: “An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business.”<sup>40</sup> The law applied many stringent new regulatory requirements in addition to existing state laws that already required state financial review of municipal public enterprises, including municipal broadband systems. For example, North Carolina law already required the Local Government Commission (“LGC”), a division of the Department of the State Treasurer, to review and approve all local government projects before they can be funded with bonded debt.<sup>41</sup> In fact, during the deliberations on H129, the LGC—the state’s own expert agency on local government finance—determined that H129’s new service area boundaries “weakened the financial viability” of Greenlight and another existing municipal broadband system,<sup>42</sup> implying

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<sup>40</sup> N.C. Session Law 2011-84 at 1; *see also* Wilson Petition, Appendix A at 19: “No similar notice obligations apply to applications for approval of financing for any of the many other municipal activities for which LGC review and approval are required.”

<sup>41</sup> *See* N.C. Gen. Stat. §§ 159.104 and 151.

<sup>42</sup> “According to [LGC] representatives . . . the boundaries set forth in [H.B. 129] weaken the financial viability of both broadband systems. Greenlight and Fibrant’s financial plan estimated service to a larger area than described in the HB129 PCS.” General Assembly of North Carolina, Session 2011 Fiscal Note to H129 (4th Ed.) at 4, available at <http://www.ncleg.net/Sessions/2011/FiscalNotes/House/PDF/HFN0129v4.pdf> .



that it created new financial problems for municipalities instead of establishing new financial safeguards.

Nor was H129 a mechanism “to ameliorate the problem of bankrupt and financially struggling public entities,”<sup>43</sup> as is claimed in this case by petitioners’ supporting *amici*.<sup>44</sup> In direct contrast, H129 exacerbates financial risk by placing strict limits on the size of the service areas of municipal broadband providers and thereby their ability to increase their subscriber base and revenues to realize some of the economies of scale enjoyed by their giant private sector competitors. For example, in 2007, a consortium of North Carolina municipalities purchased the local cable system previously owned by a bankrupt provider (Adelphia Communications Corp.) to ensure the provision of reliable broadband service in their communities. The Town of Morrisville described how H129’s severe limits on the system’s service area harmed the community’s ability to expand the network and pay down the consortium’s debt:

MI-Connection was a collaborative effort of Mooresville and Davidson to provide reliable broadband service and economic devel-

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<sup>43</sup> Amicus Brief of 11 States at 10.

<sup>44</sup> See also Amicus Brief of National Governors Association *et al.* at 20-21, which implies that if municipalities build fiber networks they could end up like Detroit and other major cities in Chapter 9 bankruptcy proceedings. *Amici* make this suggestion even though Detroit did not provide broadband service to their residents and filed for bankruptcy for reasons that had nothing to do with the municipal provision of broadband service.

opment opportunities to the area. The Town of Mooresville borrowed close to \$80 million dollars to purchase the [bankrupt Adelphia] system. The Town borrowed an additional \$20 million dollars to upgrade the system to provide the reliable broadband service the communities enjoy today. However, the passage of H129 established fixed boundaries of the service area thereby eliminating the expansion and growth opportunities to enable the system to be able to pay for its debt service.<sup>45</sup>

The anti-competitive nature of H129 is self evident in its micromanaging of Mi-Connection's service area to such an extent that it names specific roads that establish outside boundaries for its service area, thereby arbitrarily defining areas as off-limits to municipal competition.<sup>46</sup>

Nor is H129 a state law created "to aid municipalities wishing to enter into the broadband market," as the National Governors Association *et al.* assert.<sup>47</sup> The law specifically restricts Wilson's service area to only one of the six counties where it provides electric service, despite the fact that the city owns utility infra-

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<sup>45</sup> Wilson Petition Proceeding, Comments of the Town of Morrisville (Aug. 28, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521825396>.

<sup>46</sup> N.C. Gen. Stat. §160A-340.2(c)(3)a:

For the joint agency operated by the cities of Davidson and Mooresville, the service area is the combined areas of the city of Cornelius; the town of Troutman; the town of Huntersville; the unincorporated areas of Mecklenburg County north of a line beginning at Highway 16 along the west boundary of the county, extending eastward along Highway 16, continuing east along Interstate 485, and continuing eastward to the eastern boundary of the county along Eastfield Road; and the unincorporated areas of Iredell County south of Interstate 40, excluding Statesville and the extraterritorial jurisdiction of Statesville.

<sup>47</sup> Amicus Brief of National Governors Association *et al.* at 22.

structure in five neighboring counties over which it could easily extend gigabit service to those communities, many of which are rural and underserved.<sup>48</sup>

H129's barriers did not "aid," but instead stopped, the city of Fayetteville, North Carolina, from pursuing entry into the broadband market and using existing fiber assets to stimulate the local economy.<sup>49</sup> Fayetteville operates a gigabit network consisting of more than 200 miles of fiber optic cables that monitor its electric, water, and sewer systems and provide Internet access to local government buildings, fire stations, and the city's hospital. Through its state senator, Fayetteville sought an amendment to H129 that would exempt Fayetteville from its restrictions so it could bring fiber-based Internet service to its residents, businesses, and the nearby military base, but lost that fight on the senate floor. H129 stifled the community's ability to take advantage of this fiber asset:

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<sup>48</sup> Wilson Petition at 22-23; *See also*: "There's been at least half a dozen communities in Wilson, Wake and other counties that have come to us in the last year and a half." Rochelle Moore, *Wilson Courted But Court Challenge an Issue*, *Wilson Times* (Oct. 22, 2015), available at <http://www.wilsontimes.com/News/Feature/Story/38817774---Wilson-courted-but-court-challenge-an-issue>.

<sup>49</sup> Wilson Petition Proceeding, Comments of the city of Fayetteville (Aug. 29, 2014): "Numerous plans that were in the works by various local North Carolina communities to build fiber networks for retail business and residential use ground to a halt with the passage of Section 160A-340 . . . Specifically, Fayetteville had already built its network and was in the process of extending its network to provide service to parts of the City that were not served by Time Warner Cable."

For Steven Blanchard, chief executive of Fayetteville’s Public Works Commission, [H129’s] prohibiting Fayetteville residents from using the fiber network that’s already there doesn’t make sense. “Why shouldn’t we be allowed to sell fiber if it runs by everyone’s house?” Blanchard said. “They are already paying for the fiber to be there, so why not allow them use it for telephone and Internet and capture back a lot of the cost they put in to have it there?”<sup>50</sup>

H129 also did not “aid” the City of Salisbury to expand further into the broadband market. The city’s fiber-to-the-home network, Fibrant, had its service areas specifically limited by the law to such an extent that the corridors to connect the various pieces of its service area were limited to a width of no more than 300 feet so Salisbury could not serve homes and businesses that its fiber lines passed along the route to reach other parts of its highly circumscribed service area.<sup>51</sup>

The law’s municipal broadband barriers also restrict expansion into North Carolina’s underserved rural broadband markets. Salisbury’s Fibrant network was recently upgraded to 10 gigabit speeds, faster than Google’s new high-speed fiber networks in Kansas City and elsewhere, yet H129 prevents Salisbury from serving neighboring small towns who otherwise do not have access to speeds anything like those offered by Fibrant:

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<sup>50</sup> Allen Holmes, *How Big Telecom Smothers City Run Broadband*, The Center for Public Integrity (Aug. 28, 2014), available at <http://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband>.

<sup>51</sup> N.C. Gen. Stat. §160A-340.2(c)(3)b.

**Chris:** (ILSR) You are seeing that there [are] people that are just on the wrong side of the political boundary, basically, and they're trying to figure out how they can get connected by your network.

**Kent:**(Salisbury) Yes. Weekly, I get emails from people from all over the place in our area, saying, "Can you help us, please. Google fiber isn't coming to us, so we have nothing else to go to. Can you help our city?" It's just from all over the little towns all around us, just asking for help. Of course, we've got the North Carolina law that was written after we developed our fiber system. We have to live within that law, even though it's been so called overturned by the FCC, we're still living by the law because we're not quite sure how that's all going to pan out yet, since it's still in the courts.<sup>52</sup>

Last year, the New York Times exposed the role of H129 in deepening the digital divide between North Carolina's urban and rural areas and negatively impacting farming by describing the frustrations caused by the law for a sweet potato farmer. That farmer's office is located in Wilson County and is served by Wilson's next generation broadband system, while his barns, although only about 3,000 feet from his office, are located in Nash County. The farmer could not obtain broadband connections to his barns to monitor and protect his crop yields, simply because his barns were on the wrong side of the county line used by H129 to limit artificially Wilson's service area<sup>53</sup>:

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<sup>52</sup> Christopher Mitchell, *Salisbury Fibrant Launches 10 Gbps Citywide*, Community Broadband Networks (Sept. 15, 2015), available at <http://www.muninetworks.org/content/salisbury-fibrant-launches-10-gbps-citywide-community-broadband-bits-podcast-168>.

<sup>53</sup> N.C. Gen. Stat. §160A-340.2(c)(3)c.

Jason Bissette could throw a sweet potato from his office here in eastern North Carolina, where he and his family oversee nearly 3,000 acres, to their newest barn....But despite his wishes, Mr. Bissette cannot extend the high-speed broadband from the office to his barns... The problem is that his office sits in Wilson County, where a municipal power company has built a high-speed fiber-optic network. The barns, however, sit in Nash County. And a three-year-old state law prohibits the city of Wilson's utility from expanding its broadband network outside its home territory....“The technology is right there across the county line,” Mr. Bissette said on a recent afternoon, after plowing up a field of sweet potatoes for harvest. “If we could get the service, we could make sure the temperature is right, that air is circulating. It would make life a whole lot simpler.”<sup>54</sup>

The Town of Highlands, North Carolina, located in the western mountains of North Carolina, describes how H129's barriers are causing economic harm to the community:

The Town of Highlands has suffered from the ban on municipal broadband. Our town is made up by largely of second home owners. Many of these home owners come from Atlanta, GA and are accustomed to having Gigabit broadband. They can only stay for short lengths of time in Highlands because in most areas the broadband speeds will not support their needs. This causes our businesses to lose sales and our town to lose sales tax revenue. We also have telecommuters who love the Highlands area, but choose to permanently move elsewhere, because they cannot telecommute from Highlands. There is no residential service in the Highlands area where more than 2 Mbps upload speed can be achieved....

... With potential home owners turning to other locations, our city and county loses tax dollars as vacant lots remain empty, builders go unemployed, and building suppliers lose sales as well. The town has

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<sup>54</sup> Edward Wyatt, *Communities Fight State Laws that can Divide Broadband Access*, New York Times (Nov. 9, 2014), available at <http://www.nytimes.com/2014/11/10/technology/in-rural-america-challenging-a-roadblock-to-high-speed-internet.html>.

spoken to Internet Service Provider's (ISP) in the area about improving speeds and coverage areas. These providers have expressed to the Town that they are simply not interested in serving our community with high bandwidth rates. This is largely because Highlands is a small mostly rural town and cannot offer the Return on Investment (ROI) of large metropolitan areas. Highlands owns its power utility and is prepared currently to pull fiber throughout the city and offer Gigabit speeds to our residents if the FCC will lift the bans on Municipal Broadband.<sup>55</sup>

A local business woman in Wilson, North Carolina, described the constraints imposed on possible growth of her business by H129's service area limits:

Mooring noted how her business suffers from North Carolina's state law that limits Greenlight's service area to only Wilson County... "It's the law itself that's bad for the private sector ... it is hurting the private sector," she explained. "All my clients" in the six counties surrounding Wilson "would benefit if Greenlight could serve them." Mooring adds, "I have CPA clients who tell me about their clients asking them: 'When can they get Greenlight,' when they hear what my CPA accomplishes with our services." CPAs, medical offices, supply houses with medical offices, clients who need metro-ethernet connections, small businesses and small municipalities all would benefit from gaining access to Greenlight" she emphasized. "Right now they are limited on the services that we can provide them due to bandwidth constraints of the current incumbent providers."<sup>56</sup>

SEATO described how H129's rural impact could soon affect educational equality in the state:

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<sup>55</sup> Wilson Petition Proceeding, Comments of the Town of Highlands (Aug. 28, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521825689>.

<sup>56</sup> Catharine Rice, *Gig City Wilson Helps Local Companies Thrive*, Community Broadband Networks (Aug. 17, 2015), available at <http://www.muninetworks.org/content/gig-city-wilson-helps-local-companies-thrive>.

In addition, the elimination of alternative community-owned broadband options created by H129 will soon become a dramatic educational issue for the state. In 2013, the North Carolina legislature expressed its intention to stop funding printed school books after 2016 with the passage of H44.<sup>57</sup> Families with children in rural North Carolina without sufficient internet access, will be faced with a decision to move away from their homes to obtain service in other areas, that is, if they could afford to consider that alternative. In such an environment, all options to deploy Internet access need to be on the table.<sup>57</sup>

In these and other ways, H129 has stymied broadband deployment in North Carolina communities and hindered the ability of North Carolina municipalities to protect the interest of residents.

#### **IV. THE FCC WAS CORRECT IN REMOVING H129'S ARTIFICIAL STATE BARRIERS TO BROADBAND INFRASTRUCTURE INVESTMENT, COMPETITION, AND INNOVATION**

Towns and cities are where economic activity and civic engagement happens at an intense level throughout this nation. Local elected officials live among their constituents and, as a result, are keenly aware of local needs and resources, the limited tolerance for risk, and the certainty of accountability for imprudent actions or mistakes in judgment.

Despite claims by *amici* that state government is ultimately responsible for the well-being of cities and towns,<sup>58</sup> it is local governments that are in the trenches on a daily basis in North Carolina, are best positioned to determine the most effec-

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<sup>57</sup> Wilson Petition Proceeding, Comments of SEATOA (Aug. 29, 2014) at 2.

<sup>58</sup> See, e.g., Amicus Brief of National Governors Association *et al.* at 19.



tive broadband options for local communities, are most accountable to the voters, and are ultimately responsible for the well-being of their communities. In the broadband context, this decision-making process should include a complete set of options as is contemplated by the FCC in its order, including working with incumbent providers, entering into public-private partnerships, building their own networks, or obtaining service from other municipalities with the capacity to deliver broadband service to other communities.

The FCC's removal of North Carolina's state law barriers to broadband investment and competition will enable North Carolina communities to be self-reliant and to maximize all resources. The impact of the FCC's decision is already apparent in North Carolina, where the communities of Holly Springs<sup>59</sup> and Bald Head Island<sup>60</sup> have sprung into action and are actively engaged in efforts to bring competitive fiber-to-the-home services to their communities to ensure sustained economic development through creative public-private partnerships.

The FCC's decision to remove H129's barriers to broadband investment by North Carolina municipalities is necessary and appropriate to ensure the ability of

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<sup>59</sup> Town of Holly Springs, *TING Internet to Provide Gigabit Speed Service* (Oct. 20, 2015), available at <http://www.hollyspringsnc.us/CivicAlerts.aspx?AID=569>.

<sup>60</sup> *A Small Island in North Carolina Exercises Local Internet Choice*, Coalition for Local Internet Choice (Oct. 13, 2015), available at <http://www.localnetchoice.org/connections/a-small-island-in-north-carolina-exercises-local-internet-choice/>.

North Carolina communities to determine their own broadband futures, with all options on the table to develop and improve local infrastructure and respond to community needs for better service and price competition.

### CONCLUSION

For the foregoing reasons and the reasons set forth in the briefs of respondent FCC and intervenor Wilson, NCLM respectfully requests that the Court deny the petitioners' requests and affirm and uphold the FCC's order in its entirety.

Respectfully submitted,

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Dated: November 12, 2015

### **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because: This brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 12, 2015

s/ Kimberly Hibbard  
Kimberly Hibbard  
*Counsel for Amicus Curiae*

### **CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2015, pursuant to 6 Cir. R. 25, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case that are registered CM/ECF users will receive service accomplished by the CM/ECF system. Pursuant to Sixth Circuit FRAP 25(f), a copy of this brief has been sent this same day by U.S. Mail, postage paid, to the following party not represented by counsel.

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Dated: November 12, 2015

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