No. 18-2773

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re JACQUELINE M. STERLING,
Debtor.

JACQUELINE M. STERLING,
Appellant,
– v. –
SOUTHLAKE NAUTILUS HEALTH & RACQUETT CLUB, INC.,
Appellee.

On Appeal from the United States District Court for the
Northern District of Indiana, No. 2:16-cv-384

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE BANKRUPTCY COURT'S DECISION

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February 6, 2019

CIRCUIT RULE 26.1 & DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Consumer Bankruptcy Rights Center

National Association of Consumer Bankruptcy Attorneys

(2) The names of all law firms whose partner or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Attorney's Signature: s/ Tara Twomey Date: February 6, 2019

Attorney's Printed Name: Tara Twomey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes: X No: ___

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

STATEMENT OF INTEREST OF *AMICI CURIAE*

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Affording an honest but unfortunate debtor the

opportunity to obtain a fresh start is perhaps the most fundamental principle underlying the bankruptcy construct, and the discharge is critical to the achievement of that goal. For that reason, the discharge operates as an injunction against collection efforts with respect to discharged debts. In this case, not only did collection efforts against Ms. Sterling persist post-discharge, but she was subjected to the most coercive and humiliating collection effort available: incarceration. In failing to hold the creditor and collection law firm to account for their conduct, the court below created a precedent that imperils the efficacy of the bankruptcy discharge and threatens the fresh start of countless debtors who may be subject to similar conduct.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC or NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The discharge injunction prohibits post-discharge collection activity by a creditor for a discharged debt thereby protecting the fresh start that is fundamental to bankruptcy. Although the discharge injunction, section 524(a), does not provide a private cause of action for a violation, courts have generally found that a bankruptcy court has authority under section 105(a) to enforce its orders under its civil contempt powers. A willful violation occurs when the creditor knew of the bankruptcy discharge and intended the conduct violating it. The discharge injunction further prohibits "continuation of an action" to collect. This language is generally held to require a creditor, upon learning of the discharge of its debt, to not only cease collection activities but to undo those already initiated.

Although the Seventh Circuit has not spoken on the issue of a creditor's affirmative duty to reverse collection activities, it has imposed such burden on creditors in the context of the automatic stay, acknowledging that even passive possession of an asset is an exercise of control over it. The same reasoning applies in the context of the discharge injunction.

Here, Southlake had an affirmative duty to withdraw Ms. Sterling's debt from Austgen, the law firm it hired for purposes of collection, once it learned of the discharge of that debt. Allowing Southlake to escape liability by shunting off responsibility to a third-party collector sets a dangerous precedent of allowing creditors to ignore bankruptcy court orders and shield themselves from civil contempt penalties. In addition, Austgen, suing in the name of Southlake, at the very least had constructive knowledge of the bankruptcy discharge and intended its own conduct violating that order. Austgen, therefore, is likewise in violation of the discharge order.

This Court should correct the decisions below and hold both Southlake and Austgen accountable for discharge injunction violation.

I. INTRODUCTION

A chapter 7 bankruptcy offers to the honest but unfortunate debtor the opportunity to discharge her debt and be free from the often oppressive collection activity of disgruntled creditors. Despite this promise, Debtor/Appellant Jacqueline M. Sterling was subjected to the most oppressive civil collection activity imaginable on a discharged debt

– 3 days of incarceration in the county jail. District Ct. Op. at 3, Debtor Appendix at A-3. This devastating event was initiated by a properly scheduled and noticed creditor, Appellee Southlake Nautilus Health & Racquet Club, Inc. (Southlake); the actions it initiated were in blatant disregard of the discharge injunction. Yet Southlake and its collection law firm, Appellee Austgen, Kuiper & Associates, P.C. (the Austgen Firm), were found by the bankruptcy court to be free of contempt. The court reasoned that Appellant failed to prove one of two required elements for contempt as to each respondent.

Amici submit this outcome is an injustice, a total failure to satisfy the primary purpose of a chapter 7 case and the policies of the bankruptcy system. Southlake, properly noticed of the bankruptcy and discharge, skated away scot-free by claiming that once it had sent Appellant's debt to the Austgen Firm for collection, it lost track of what the firm was doing on its behalf and therefore was not responsible for the acts which led to Appellant's incarceration. On the flip side, the Austgen Firm claimed it was still acting to collect the debt because it did not know about the bankruptcy. Combined, their defenses were a classic "point the finger at the other guy" shirking of responsibility. The

bankruptcy court accepted these arguments, leaving no party to respond to Appellant's damages and distress.

This court has the opportunity to right this wrong by following either of two paths analyzed below. First, this court could follow the reasoning of the Ninth Circuit and numerous bankruptcy courts by ruling that a creditor with notice of the discharge injunction must not only stop its collection efforts, but also must affirmatively undo or withdraw the acts taken in violation of such injunction. Here, that would mean that once Southlake had notice of the bankruptcy and certainly by the time it received notice of the discharge injunction, it was required to instruct its collection firm to reverse or undo any acts it had taken in violation of the stay and discharge injunction. Its failure to take affirmative steps must result in a finding of contempt for knowingly violating the discharge injunction.

In the alternative, this court could rule that Southlake may not disavow responsibility for its collection firm's acts by ignoring what was being done on its behalf. When Southlake sent the overdue debt to the Austgen Firm, it had to be aware the firm would take the logical civil steps to pursue a civil judgment, then enforce such judgment by the

means at its disposal. Southlake cannot now come into court and claim it did not "intend the acts" which were a violation of the injunction because it chose to ignore the firm's actions. Its purported ignorance about what the Austgen Firm was doing to collect money for its benefit cannot be a defense to its responsibility, and therefore intention, to enforce its civil judgment. In addition, Seventh Circuit contempt standards imbue the Austgen Firm with constructive knowledge of the bankruptcy discharge, satisfying the knowledge element found wanting by the bankruptcy court. As a result, both Appellees were in contempt of the discharge injunction.

Either path will lead to the just outcome Appellant deserves.

II. SOUTHLAKE HAD AN AFFIRMATIVE DUTY TO UNDO THE ACTIONS IT HAD DIRECTED BE TAKEN BY THE AUSTGEN FIRM

A. The Policy Behind the Discharge Injunction

The discharge injunction imposed by 11 U.S.C. § 524(a) "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [prepetition] debt as a personal liability of the debtor." *Green Point Credit, LLC v McLean (In re McLean)*, 794 F.3d 1313, 1320 (11th Cir.

2015). The discharge injunction plays a critical role in achieving the Bankruptcy Code's overall aim to give a debtor a "fresh start"; it is considered by many circuits to be an expansive provision that is sensitive to the diversity of steps a prepetition creditor might take to encourage a naïve debtor to pay an otherwise discharged debt. *Hardy v United States ex rel. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384, 1388-89 (11th Cir. 1996).

One of the primary purposes of federal bankruptcy law is to "give the debtor a 'new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.'" *Lines v Frederick* 400 U.S. 18, 19 (1921) (quoting *Local Loan Co. v Hunt*, 292 U.S. 234, 244-45 (1914). Legislative history demonstrates that the purpose of the discharge statute is to "eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts." H.R. Rep. No. 2, at 365-66 (1977)). In effect, the discharge injunction requires termination of all efforts to collect the debt personally from the debtor. *McLean,* 794 F.3d at 1321; *see also Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 442 (1st Cir. 2000).

B. Enforcement of the Discharge Injunction

Section 524(a) does not specify a remedy for a violation of the discharge injunction. However, the general consensus of bankruptcy and circuit courts around the country is that the discharge injunction order is enforceable by a civil contempt proceeding based on the authority of § 105(a), which allows the court to issue any order necessary or appropriate to enforce its orders. *In re Andrus*, 184 B.R. 311, 315 (Bankr. N.D. Ill. 1995); *In re Pincombe*, 256 B.R. 774, 782 (Bankr. N.D. Ill. 2000). The law is well-settled in this Circuit and others that a debtor damaged by a violation of section 524(a) has no private right of action, holding that contempt is the sole available remedy under the Bankruptcy Code. *Cox v. Zale (In re Cox)*, 239 F.3d 910, 915-16 (7th Cir. 2001); *Bessette*, 230 F.3d at 447-48.

For contempt sanctions to apply, the violation of the discharge injunction must be willful. *Pincombe,* 256 B.R. at 783. Therefore, the debtor has the burden of proving that the creditor knew of the discharge injunction and intended the actions that violated the injunction. *Id.* (citing *Hardy*, 97 F.3d at 1390.) The focus is not on the subjective intent of the alleged violators, but rather on whether the creditor objectively complied with the discharge order. As a consequence, a good

faith belief that the stay or injunction is not applicable is not a defense to a contempt citation. *I.R.S. v. Murphy*, 892 F.3d 29, 38 (1st Cir. 2018).

No Seventh Circuit case has specifically adopted these bankruptcy court cases' analyses of the contempt remedy. However, bankruptcy courts in the circuit rely on them, then cite *De Manez v Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 590-01 (7th Cir. 2008) for the generally accepted criteria for civil contempt, which they adopt and apply.

Important to the arguments below, courts in the Seventh Circuit (and others) have uniformly held that the test applicable to the determination of a willful violation of the automatic stay under section 362 is equally applicable to the determination of a willful violation of the discharge injunction. *Pincombe,* 256 B.R. at 783 (relying on *Hardy* 97 F.3d at 1390.) To find contempt for either violation, the debtor must prove the creditor (1) was aware of the bankruptcy stay/discharge and (2) intended the act which violated the stay/injunction. *Id.*

C. Statutory Analysis of Section 524 Shows That to Comply With the Discharge Injunction a Creditor Must Affirmatively Undo its Collection Efforts

Southlake argued (successfully below) that Appellant could not show that once it received the notice of discharge it took any further acts in violation of the injunction. *Amici* concedes that the factual finding by the bankruptcy court that Southlake itself took no affirmative steps in violation of the injunction is not clearly erroneous. It contends, however, that by doing nothing Southlake nevertheless did violate section 524(a) because it "continued" its collection actions against Appellant by not reversing the steps already taken.

The language of section 524(a)(2) is broad and all encompassing: "A discharge in a case under this title – operates as an injunction against the commencement or ***continuation of an action***, the employment of process, or an act to collect...any such debt as a personal liability of the debtor...." [emphasis added]. In keeping with the legislative purpose cited above of providing the debtor a fresh start, free of the threat of further collection, these words are to be read expansively,

The first and most important step in construing a statute is the language itself. *See Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). Courts look to the statutory text to "determine

whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil. Co.*, 519 U.S. 337, 340 (1997). If from the plain meaning of the statute congressional intent is unambiguous and the statutory scheme is coherent and consistent, the inquiry ceases. *Id.*

In construing section 524(a)(2), the only logical meaning of "continuation of an action" is to leave that action pending, since other specific provisions, "commencement" and "employment of process", are already forbidden. Unless the statute is construed to require dismissal or reversal of the acts already taken, the words "continuation of an action" would be superfluous, adding nothing to the other specific terms. Rendering the phrase to mere surplusage would be inconsistent with basic rules of statutory construction. *Dunn v. Commodity Futures trading Comm.*, 519 U.S. 465, 472 (1997); *Babbitt v Sweet Home Chapter of Cmtys. For a Greater Or.*, 515 U.S. 687, 698 (1995).

A stay violation case in the Ninth Circuit, *Eskanos & Adler, P.C. v. Leetien (In re Leetien)*, 309 F.3d 1210 (9th Cir. 2002), used this exact reasoning when it held that a creditor who had commenced a collection lawsuit against a debtor in violation of section 362(a) had willfully

violated the automatic stay when by failing to dismiss the litigation immediately upon learning of the bankruptcy filing. *Id.* at 1214. It construed the words of section 362(a)(1) – identical to those in section 524(a)(2) – to "require[s] an immediate freeze of the status quo by precluding and nullifying post-petition actions." *Id.* "Maintenance of an active collection action in state court does nothing if not carry forward or persist against a debtor." *Id.*

The principles of *Leetien* have been followed by bankruptcy courts around the country. For example, in *Hardesty v Chase (In re Hardesty)*, 442 B.R. 110 (Bankr. N.D. Oh. 2010), the bankruptcy judge ruled that Chase had an affirmative duty to ensure that its violative collection actions were discontinued by actually dismissing the pending lawsuit. *Id.* at 114. The "affirmative duty" to discontinue means actively withdrawing or dismissing the violative action.

As shown above, the outcome of this reasoning is identical whether the bankruptcy stay or the discharge injunction is in play.

Although the Seventh Circuit has not weighed in on the affirmative requirement to dismiss pending litigation or to withdraw or nullify actions already taken, it has construed similar, but not exact,

language in section 362(a)(3) to compel a car creditor to actively return a car repossessed prepetition to a chapter 13 debtor as soon as the bankruptcy petition is filed. In *Thompson v. GMAC (In re Thompson)*, 566 F.3d 699 (7th Cir. 2009), the car creditor refused to relinquish a repossessed car to a chapter 13 debtor upon demand. The Circuit ruled that not returning the car was a willful violation of the automatic stay. First, it determined that the debtor's estate had at a minimum an equitable interest in the automobile. It then noted that section 362(a)(3) prohibited a creditor from exercising "control" over property of the estate. The act of "passively holding onto an asset" was exercising control and therefore a willful violation. *Id.* at 702-03.

The court in *Thompson* determined that construing the statutory language to compel affirmative action by the creditor was consistent with the legislative purpose of a chapter 13 reorganization, Also consistent with this view would be construing the legislative purpose of providing a debtor with a fresh start, free of concerns about collection of old debt, to compel a collecting creditor to undo, withdraw, or dismiss the actions taken to collect in order to escape liability for contempt. In addition, *Thompson* compelled the car creditor to first return the car,

then petition the bankruptcy court to grant it adequate protection for the debtor's post petition use of the automobile. The court recognized the superior economic strength of the creditor compared to the debtor and placed the burden of taking affirmative steps on the party better able to bear such burden. *Id.* at 707. It is logical for the court to recognize that a debtor who has just completed a chapter 7 would have meager means with which to resist the collection force of pending litigation despite the discharge.

Amici urge this court to extend *Thompson's* policy and adopt a standard similar to *Leetien*. The impact on this case would be compelling. Here, years ago, Southlake sent the delinquent debt owed by Appellant out for collection by the Austgen firm.[1] When it received notice of the discharge injunction,[2] by not recalling the collection case from the firm or instructing the firm to dismiss the case, Southlake was continuing the action it had instructed the firm to take – collect the

[1] It is important to note that Southlake did not assign the debt for collection to the Austgen firm. The firm was suing not as an assignee, but in the name of Southlake. Therefore, its client, Southlake, was the ultimate decision maker.

[2] Actually, the collection case should have been recalled from the firm when Southlake received notice of the bankruptcy filing, creating an automatic stay, but that is not the issue on appeal.

debt. Under *Leetien the* only way for Southlake to avoid being in contempt of the discharge injunction would be to take affirmative steps to withdraw the matter from collection. Its failure to act affirmatively was the intended conduct that resulted in the discharge violation, a satisfaction of the second prong of the contempt test. Since the bankruptcy court made the factual finding that Southlake knew of the bankruptcy and discharge order, both parts of the test have been met. As a matter of law, this court may rule that Southlake is in contempt of the order and thereby reverse the courts below.

III. SOUTHLAKE MAY NOT DISAVOW RESPONSIBILITY FOR THE INTENTIONAL ACTS OF ITS COLLECTION FIRM

The bankruptcy court below accepted the testimony of Southlake's representatives that once it sent Appellant's debt to the Austgen Firm for collection, it had no knowledge of what the firm was doing at any point in time to achieve that collection. The court then concluded that Southlake could not have intended the specific act – issuance of the writ for arrest and its subsequent execution – that violated the discharge injunction and resulted in the incarceration of Appellant. Accordingly, it held that the Appellant did not prove the second part of the contempt test. Southlake was off the hook, notwithstanding that the violative acts were undertaken at its direction and for its ultimate benefit. Such restrictive interpretation of the proof necessary to satisfy the "intended the acts" part of the test invites mischief and cannot be condoned by this court.

Under the reasoning of the bankruptcy court, any creditor who had sent an unpaid debt out for collection could insulate itself from a contempt citation - no matter how egregious the acts of the collection firm might be in attempting to force a debtor to pay a discharged debt -

by ignoring the day to day activities of the firm. Yet, if that collection firm is successful in receiving payment, the creditor reaps the benefit of that payment, minus the commission earned by the firm. This unjust manipulation of potential liability runs directly contrary to the fresh start promised to the honest but unfortunate debtor, the freedom from the burden of collection threats achieved by discharge. As argued above, the language of the statute should be read expansively in order to comply with the legislative intent. Allowing a creditor to so easily thwart that intent is not consistent with policy nor required by the law.

By expanding the meaning of "intended the act which violates the injunction" to include the inevitable procedure which the Austgen Firm would follow, the court may take this unwarranted power away from a devious or reckless creditor. After all, no one questions that Southlake intended to send the overdue debt to the Austgen Firm to be collected. In doing so, common sense would dictate it knew full well the process which would follow: dunning phone calls; filing a civil collection lawsuit; obtaining a judgment for the debt; and enforcing that debt through the civil remedies available, including debtors' exams and writs for arrest. The record here shows that Southlake did not monitor the

steps taken by the firm to collect Appellant's debt, or any debt for that matter. The logical conclusion is that Southlake intended the firm to take any and all of those steps until the bill was paid. Southlake cannot claim it did not intend the Austgen Firm to obtain an arrest writ and take steps for its execution, because that is exactly what it wanted to occur; because it did not give permission nor monitor what the firm was doing, it had to *intend* whatever the Austgen Firm did.[3]

The bankruptcy courts in this circuit (and others) have simplified the contempt test to two elements. However, they frequently rely on the Seventh Circuit standard for civil contempt found in *De Manez,* 533 F.3d at 590-91, where the circuit adopted the Fourth Circuit elements found in *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000):

> (1) The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) ...that the decree was in the movant's 'favor'; (3) ...that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) ...that [the] movant suffered harm as a result.

[3] Amici also support Appellant's argument that agency theory would provide yet another alternative path to a just result under the facts of this case.

Amici urge the court to reach beyond the bankruptcy courts' simplified test and apply the *De Manez* elements in this case. If it does so, not only will Southlake be found a contemnor, but the Austgen Firm as well because of the double usage of the word "constructive." The firm had constructive knowledge of the discharge injunction since it was suing in the name of Southlake, which had actual knowledge of the bankruptcy and the injunction, so as a matter of this Seventh Circuit standard the first prong is met. And Southlake likewise had constructive knowledge of the acts the Austgen Firm was taking to collect the debt, including the issuance of the writ and the execution thereon which led to incarceration. For it, the second prong is now met. No more pointing the finger at one another or claiming isolated ignorance to escape their responsibility.

The bankruptcy court below is not the first to consider contempt where a creditor has employed a law firm to collect the debt and both parties have tried to insulate themselves from the strict contempt elements. Other bankruptcy courts have found a sensible solution. In *In re Hardesty*, 442 B.R. at 114-15, the N.D. Ohio court held a creditor responsible where it had commenced legal proceedings but then tried to

disown responsibility for the actions which occurred in that proceeding. In doing so, the Ohio court followed an Idaho bankruptcy court's ruling, *In re Johnson*, 262 B.R. 831, 845 (Bankr. D. Idaho 2001). The *Johnson* court stated:

> Creditors attempt to shield themselves from liability for the stay violation by asserting that it was the Sheriff who was in actual possession of the property. Creditors insist they had no independent duty to ensure return of the property. This argument is unavailing....
> Creditors and their counsel are not allowed to sit by and watch the litigation they have commenced proceed by shifting responsibility to local authorities charged with collecting judgments obtained through their efforts.

Johnson, 262 B.R. at 847-48.

As noted above, it makes no difference that these cases were stay violation matters, since the definition of willful violation is identical. Although the creditor in *Johnson* tried to fob the responsibility on the sheriff, it does not matter whether it be the government acting on a writ or a law firm acting on instructions from the creditor. In both instances, the creditor instigated the violative action and is responsible for its course and consequence.

The pathway to a just result is open. This Court may thwart the manipulation of the system suggested by the lower courts' decisions by

holding Southlake responsible for all acts taken by the Austgen Firm once it had sent Appellant's debt out for collection. In addition, following the constructive knowledge language of *De Manez,* Southlake's knowledge of the discharge is imputed to the Austgen Firm, which is pursuing litigation in Southlake's name. Both must answer for the damage they caused Appellant.

IV. CONCLUSION

This court may reach the just result by reversing the lower courts' rulings, finding both Appellees in contempt, and remanding for further proceedings to determine damages.

s/ Tara Twomey
Tara Twomey
Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 4245 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with 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 Century Schoolbook, 14-point type.

s/ Tara Twomey
Tara Twomey
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on February 5, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae