

No. 17-1320

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

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BRYAN MANNING; RYAN WILLIAMS; RICHARD DECKERHOFF;  
RICHARD EUGENE WALLS,

*Plaintiffs-Appellants,*

v.

DONALD CALDWELL, Commonwealth's Attorney for the City of Roanoke;  
MICHAEL NEHEMIAH HERRING, Commonwealth's Attorney for the City of  
Richmond,

*Defendants-Appellees.*

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On Appeal from an Order of the United States District Court  
for the Western District of Virginia (Hon. Glen E. Conrad)  
Civil Action No. 7:16-cv-00095-GEC

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**BRIEF OF NATIONAL LAW CENTER ON  
HOMELESSNESS & POVERTY AS *AMICUS CURIAE*  
IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR  
REHEARING EN BANC**

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES.....	2
INTRODUCTION .....	1
ARGUMENT .....	4
CONCLUSION .....	13
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE.....	15

## TABLE OF AUTHORITIES

<b>CASES</b>	<b>Page(s)</b>
<i>Driver v. Hinnant</i> , 356 F.2d 761 (4th Cir. 1966) .....	5, 6, 7
<i>Fisher v. Coleman</i> , 486 F. Supp. 311 (W.D. Va. 1979) .....	7
<i>Fisher v. Coleman</i> , 639 F.2d 191 (4th Cir. 1981) .....	7
<i>Marks v. United States</i> , 430 U.S. 188 (1977) .....	6
<i>Powell v. Texas</i> , 392 U.S. 514 (1968) .....	6, 7
<i>Robinson v. California</i> , 370 U.S. 660 (1962) .....	3, 5, 7
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958) .....	3

## FEDERAL AND STATE STATUTES

Pub. L. No. 111-22, 123 Stat. 1632 (2009) .....	9
Va. Code Ann. § 4.1-304 .....	5
Va. Code Ann. § 4.1-305 .....	3, 5
Va. Code Ann. § 4.1-322 .....	5

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Fairfax County Virginia, <i>Housing First to Prevent and End Homelessness</i> (last visited August 29, 2018), <a href="https://www.fairfaxcounty.gov/homeless/housing-first">https://www.fairfaxcounty.gov/homeless/housing-first</a> .....	10
The Healing Place, <i>Frequently Asked Questions</i> (2017), <a href="https://caritasva.org/wp-content/uploads/2017/02/Frequently-Asked-QuestionsForRichmondVA.pdf">https://caritasva.org/wp-content/uploads/2017/02/Frequently-Asked-QuestionsForRichmondVA.pdf</a> .....	10
HUD, <i>2017 Annual Homeless Assessment Report to Congress</i> 12 (Dec. 2017), <a href="https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf">https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf</a> .....	2
Joseph Dodson, <i>The Effectiveness and Efficiency of the Serial Inebriate Program</i> (2016), <a href="https://sdsu-dspace.calstate.edu/bitstream/handle/10211.3/183018/SD002%20POLS603_Sp16%20The%20Effectiveness%20and%20Efficiency%20of%20the%20Serial%20Inebriate%20Program.pdf?sequence=1">https://sdsu-dspace.calstate.edu/bitstream/handle/10211.3/183018/SD002%20POLS603_Sp16%20The%20Effectiveness%20and%20Efficiency%20of%20the%20Serial%20Inebriate%20Program.pdf?sequence=1</a> .....	11
Kristofor Husted, NPR, <i>A Permanent Home That Allows Drinking Helps Homeless Drink Less</i> (Jan. 23, 2012), <a href="http://www.npr.org/sections/health-shots/2012/01/19/145477493/a-permanent-home-that-allows-drinking-helps-homeless-drink-less">http://www.npr.org/sections/health-shots/2012/01/19/145477493/a-permanent-home-that-allows-drinking-helps-homeless-drink-less</a> .....	12
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National Law Center on Homelessness & Poverty, <i>Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities</i> (last visited Aug. 28, 2018), <a href="https://www.nlchp.org/documents/Housing-Not-Handcuffs">https://www.nlchp.org/documents/Housing-Not-Handcuffs</a> .....	10

	<b>Page(s)</b>
Office of the Press Secretary, The White House, <i>FACT SHEET: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration</i> (June 30, 2016), <a href="https://www.whitehouse.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle">https://www.whitehouse.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle</a> .....	10
U.S. Interagency Council on Homelessness, <i>Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness</i> (June 2012), <a href="https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf">https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf</a> .....	8
Va. Dep’t of Housing & Community Dev., <i>Virginia Homeless Solutions Program Guidelines 2016-2018</i> (2016), <a href="http://www.dhcd.virginia.gov/images/Housing/VA-Homeless-Solutions-Program-Guidelines.pdf">http://www.dhcd.virginia.gov/images/Housing/VA-Homeless-Solutions-Program-Guidelines.pdf</a> .....	9

## INTEREST OF AMICUS

The National Law Center on Homelessness & Poverty (“NLCHP”) is a non-profit organization, addressing issues related to homelessness and poverty at the national level. People who are poor and experiencing homelessness frequently lack an effective political voice or power. NLCHP advocates to protect the constitutional and statutory rights of homeless families and individuals.

Through policy advocacy, public education, and impact litigation, NLCHP’s programs address constitutional questions affecting homeless people and the root causes of homelessness. NLCHP also has published extensively on alternative methods of addressing homelessness and assisting persons living on the street. It believes that the insights derived from its experiences will assist this Court in understanding the unconstitutional, discriminatory, and counterproductive nature of Virginia’s Interdiction Statute, and the more effective options Virginia could employ. This brief complies with FRAP 29(b).<sup>1</sup>

## INTRODUCTION

Rehearing by this Court *en banc* is warranted here. This case raises a significant and heavily disputed Eighth Amendment issue concerning state imprisonment of homeless persons because of their involuntary conduct caused by addiction to alcohol.

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<sup>1</sup> No party’s counsel authored any part of this brief, and no party or person other than *amicus*, its members, or its counsel made any monetary contribution intended to fund preparation or submission of this brief.

This issue unfortunately affects a substantial number of individuals in Virginia, where state law results in the unconstitutional incarceration of persons because they are plagued with a debilitating illness. Because of their status, these individuals are jailed for engaging in conduct that is otherwise legal. The concurring panel opinion by Judge Motz (at 26-38) fully describes the legal issues implicated by this case, and the current incorrect state of the law within this Circuit, as well as the confusion in its sister Circuits, which has spawned inconsistent decisions in various federal and state courts.

According to the U.S. Department of Housing and Urban Development (“HUD”), approximately 6,067 homeless people lived in Virginia in 2017.<sup>2</sup> As we explained in our amicus brief before the panel here (at 2-3), the relationship between homelessness and substance abuse is complex, and substance abuse is more common among persons experiencing homelessness than in the general population.

Substance abuse often perpetuates homelessness, and homelessness exacerbates alcohol addiction, as the inability to meet basic survival needs results in stress that feeds back into the cycle of relying on alcoholism. *See* JA17-19, 32. As a result of this cycle, when succumbing to their addiction, homeless alcoholics have no choice but to do so in public view.

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<sup>2</sup> HUD, *2017 Annual Homeless Assessment Report to Congress* 12 (Dec. 2017) (available at <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf>).

Against this backdrop, Virginia's Interdiction Statute is unconstitutional. Plaintiffs allege that jurisdictions in Virginia use this statute to classify homeless individuals with chronic alcoholism as "habitual drunkards" and then repeatedly prosecute them for possessing, purchasing, or consuming alcohol—actions that their addiction compels them to take and that are legal for persons who have not been branded "habitual drunkards" by the state. *See, e.g.*, JA32-33; *see also* Va. Code Ann. § 4.1-305. The Supreme Court has held that the Eighth Amendment bars states from punishing a person based on a status. *Robinson v. California*, 370 U.S. 660, 666-67 (1962). It logically follows that the Eighth Amendment also prohibits punishing a person for involuntary conduct that would be legal but for that person's status, which is what Virginia is doing here.

Virginia's Interdiction Statute, which labels individuals as "habitual drunkards," is antiquated and counterproductive, and imposing such a regime makes Virginia an extreme outlier among the states. As Judge Motz noted (at 36 n.3), the fact that all states other than Virginia and Utah do not use this type of criminal sanction helps demonstrate that the Interdiction Statute violates the Eighth Amendment's "evolving standards of decency." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Moreover, prohibiting Virginia's application of its Interdiction Statute to homeless alcoholics interdicted as habitual drunkards will in no way hinder Virginia's ability to address the serious and complex issues surrounding homelessness and substance abuse, as other states and



localities have done; to the contrary, it will point Virginia toward approaches that are more effective.

## ARGUMENT

**A.** The Complaint’s well-pleaded allegations—which must be taken as true here—establish that Virginia’s Interdiction Statute unconstitutionally criminalizes the status of being a homeless individual who suffers from chronic alcoholism. The statute authorizes the state to target homeless alcoholics for arrest and punishment for conduct that is an involuntary manifestation of their disease and generally lawful for other Virginians. *See* JA21–26.

Specifically, Plaintiffs allege that they “lack fixed, regular, and adequate nighttime residences and are therefore homeless.” JA16–17. They also suffer from alcohol-use disorder, a chronic disease that they assert is exacerbated by their homelessness, and causes them to involuntarily and compulsively use alcohol. JA17; JA32. Because Plaintiffs are homeless, they have no choice but to live their lives as alcoholics in public and within the view of public authorities, creating a high likelihood of repeated imprisonment.

In fact, being homeless alcoholics in Virginia makes it a near certainty that Plaintiffs and those like them will be labeled as “habitual drunkards.” *See* JA32; *see also* JA89 (“It seems readily apparent that the statutory term ‘habitual drunkard’ applies to homeless alcoholics compelled to possess and consume alcohol with no choice but to do so in public spaces.”). And, once they have been branded “habitual drunkards,”

Plaintiffs' mere possession of alcohol—conduct that is involuntary for them—is criminal, which is not true for the everyday adult Virginian. *See* Va. Code Ann. §§ 4.1-304, 4.1-305, 4.1-322 (subjecting habitual drunkards to potential imprisonment for possession, consumption, or purchase of alcohol). This danger of facing criminal punishment for involuntary conduct distinctively applies to alcoholics who lack financial means, because those who have such means are better able to keep their disease private and therefore less likely to be deemed habitual drunkards in the first place.

**B.** Criminalizing an individual's status, as opposed to an individual's conduct, violates the Eighth Amendment. *See, e.g., Robinson*, 370 U.S. at 666-67. In *Robinson*, the Supreme Court held unconstitutional a California statute that criminalized narcotics addiction, because that statute made an addicted person “continuously guilty of [the] offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.” *Id.* at 666.

In *Driver v. Hinnant*, 356 F.2d 761, 764-65 (4th Cir. 1966), this Court applied *Robinson* to hold that a state could not criminally punish public intoxication involving an alcoholic who lacked the practical means of avoiding being in public. This Court explained that, although a state may deter and punish public drunkenness in general, *Robinson* “sustain[ed], if not command[ed],” the conclusion that an alcoholic may not be prosecuted for “those acts on his part which are compulsive as symptomatic of the disease,” because such conduct is involuntary. *Id.* at 764-65.

Two years after *Driver*, the Supreme Court issued a fractured 4-1-4 decision in *Powell v. Texas*, 392 U.S. 514 (1968), upholding a conviction under a statute that criminalized intoxication in public. A four-Justice plurality concluded that the conviction was not impermissibly status-based, because the “appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.” *Id.* at 532; *see also id.* at 521-25.

Significantly, Justice White cast the crucial fifth vote in *Powell*, but concurred only in the judgment, deciding the case on narrower grounds rooted in the voluntariness of the defendant’s conduct. *See id.* at 552-54. Justice White concluded that Powell—who was not homeless—had not demonstrated that he was incapable of avoiding public places while intoxicated. *See id.* at 548-51. Justice White distinguished the case before the Supreme Court from circumstances where the statute might be applied to homeless alcoholics, for whom, “[f]or all practical purposes the public streets may be home.” *Id.* at 551.

As Judge Motz explained in her concurring opinion in this case (at 27-30), because there was no majority rationale supporting the judgment in *Powell*, Justice White’s position represents the Court’s holding because he concurred in the judgment on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Justice White’s vote explicitly rested on the voluntariness of the conduct at issue.

Justice White’s concurrence in *Powell* and this Court’s decision in *Driver* therefore should be interpreted to mean that the Eighth Amendment precludes a state from

circumventing *Robinson* by targeting people with a particular status and punishing them for involuntary conduct arising from that status. The Virginia Interdiction Statute now before this Court violates that rule.

This Court's 1981 decision in *Fisher v. Coleman*, 639 F.2d 191 (4th Cir.), should not be read to undermine this conclusion, given the limitation of the factual record in that case. This Court in *Fisher* adopted a district-court opinion upholding Virginia's Interdiction Statute against an Eighth Amendment challenge. That ruling should not control here, though, because in *Fisher* "there [was] not a factual determination that alcoholism causes involuntary or uncontrollable symptomatic behavior such as alcohol consumption, purchase or public drunkenness." 486 F. Supp. 311, 316 (W.D. Va. 1979). The record in that case was "devoid of any evidence that plaintiff's purchase of alcohol [was] compulsive and uncontrollable," and there was "no suggestion that plaintiff's drinking [was] completely involuntary on his part." *Id.*

The case at bar, by contrast, like *Driver*, presents a situation where the proscribed conduct is involuntary and uncontrollable (as alleged in Plaintiffs' Complaint). And although the district court in *Fisher* (and therefore this Court upon its adoption of the district court's opinion) said that the plurality opinion in *Powell* "overruled" *Driver*, that broad statement should not govern here because determining whether the Interdiction Statute could constitutionally be applied to involuntary conduct was unnecessary to the disposition of the case, given the fatal gaps in the factual record.

C. If this Court were to bar Virginia from prosecuting homeless alcoholics interdicted as habitual drunkards for purchase, possession, or consumption of alcohol, the state would *not* lose its ability to address the serious issues posed by these individuals. Virginia still could use constitutionally valid methods that would be more humane and effective in combating the problem.

Virginia's practice is an outlier among the states in criminally prosecuting and incarcerating "habitual drunkards" for merely possessing alcohol. Other states instead impose civil restrictions on alcoholics' conduct or punish those who facilitate alcoholics' possession of alcohol. *See* Addendum A in our panel-stage *amicus* brief (listing state statutes related to habitual alcohol consumption).

Although Virginia's approach may temporarily remove some homeless alcoholics from the street by imprisoning them, criminalizing an alcoholic's possession of alcohol does not meaningfully improve public safety or reduce the factors that contribute to homelessness or alcoholism. As the Federal Government has recognized, "[r]ather than helping people to regain housing, obtain employment, or access needed treatment and services, criminalization creates a costly revolving door that circulates individuals experiencing homelessness [and alcohol dependency] from the street to the criminal justice system and back."<sup>3</sup>

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<sup>3</sup> U.S. Interagency Council on Homelessness, *Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness* 6 (June 2012) (available at

Federal policy consequently has discouraged laws that effectively criminalize homelessness. For instance, in 2009, Congress directed the Federal Government to “develop constructive alternatives to criminalizing homelessness and laws and policies that \* \* \* are selectively enforced against homeless persons.” Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, § 1004(a)(3)(G), 123 Stat. 1632, 1667 (2009). In response, HUD studied programs around the United States dealing with the problems of homeless alcoholics, and various conclusions emerged.

As described in our panel-stage *amicus* brief (at 21-29), instead of criminalization, Virginia could undertake other options—options that would be lawful, as well as more effective—to address homelessness and chronic alcoholism. For example, Virginia could expand its rapid-rehousing program, which: identifies those who need housing and those who can provide housing; provides temporary financial assistance; and provides case management and other services.<sup>4</sup> Virginia also can continue to invest in “Housing First” programs, which provide permanent housing instead of placing

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[https://www.usich.gov/resources/uploads/asset\\_library/Searching\\_Out\\_Solutions\\_2012.pdf](https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf)).

<sup>4</sup> See, e.g., Va. Dep’t of Housing & Community Dev., *Virginia Homeless Solutions Program Guidelines 2016-2018* at 12-13 (2016) (available at <http://www.dhcd.virginia.gov/images/Housing/VA-Homeless-Solutions-Program-Guidelines.pdf>).

homeless persons into shelters.<sup>5</sup> These efforts, which in states like Utah have reduced chronic homelessness by 91 percent in a decade, could lower costs by two-thirds annually compared with the cost of arrests, jail and hospital stays, and emergency-room visits.<sup>6</sup>

Chronic alcoholism also can be addressed through treatment to overcome this addictive disease. Various states and municipalities have undertaken innovative approaches to help jails, hospitals, mental healthcare facilities, and other entities implement plans for discharging people from those institutions directly into housing with supportive services, or bypassing jails and hospitals altogether.<sup>7</sup>

Several jurisdictions (such as Richmond, San Antonio, Houston, San Francisco, Seattle, and Portland) have “sobering centers,” where severely intoxicated homeless persons can recuperate and receive access to treatment services.<sup>8</sup> These efforts decrease

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<sup>5</sup> See, e.g., Fairfax County Virginia, *Housing First to Prevent and End Homelessness* (last visited August 28, 2018) (*available at* <https://www.fairfaxcounty.gov/homeless/housing-first>).

<sup>6</sup> See NLCHP, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* 38-39, 47 (last visited August 28, 2018) (discussing benefits of Housing First program in Central Florida) (*available at* <https://www.nlchp.org/documents/Housing-Not-Handcuffs>).

<sup>7</sup> See, e.g., Office of the Press Secretary, The White House, *FACT SHEET: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration* (June 30, 2016) (*available at* <https://www.whitehouse.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle>).

<sup>8</sup> See, e.g., The Healing Place, *Frequently Asked Questions* (2017) (*available at* <https://caritasva.org/wp-content/uploads/2017/02/Frequently-Asked-QuestionsForRichmondVA.pdf>).

the number of alcohol-only related ambulance transports and admissions to hospital emergency rooms, and are much less costly than traditional services.<sup>9</sup>

In addition, Serial Inebriate Programs provide individuals who are arrested multiple times for public intoxication with the opportunity to obtain treatment in lieu of incarceration. For example, in San Diego, an individual is classified as a “chronic” inebriate and evaluated for program eligibility after being transported to the Inebriate Reception Center five times within 30 days and being considered guilty of public intoxication by a judge.<sup>10</sup> Once in the program, patients receive case management, treatment and recovery services, housing support, and mental-health, education, employment, and job-training services. This program has had substantial completion rates, increasing graduation rates, and decreasing annual costs. *Id.* at 16-22.<sup>11</sup>

And Managed Alcohol Programs in cities like Seattle adopt a “Housing First” approach that provides stable housing before the provision of accompanying social

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<sup>9</sup> See Chris Richard, California Health Report, *Sobering Center Offers Homeless a Second Chance* (Apr. 17, 2017) (available at <https://www.calhealthreport.org/2017/04/17/sobering-center-offers-homeless-second-chance/>).

<sup>10</sup> Mental Health Systems, *Serial Inebriate Program* (last visited August 28, 2018) (available at <https://www.mhsinc.org/listing/serial-inebriate-program-sip-2/>).

<sup>11</sup> See Joseph Dodson, *The Effectiveness and Efficiency of the Serial Inebriate Program* 8 (2016) (available at [https://sdsu-dspace.calstate.edu/bitstream/handle/10211.3/183018/SD002%20POL603\\_Sp16%20The%20Effectiveness%20and%20Efficiency%20of%20the%20Serial%20Inebriate%20Program.pdf?sequence=1](https://sdsu-dspace.calstate.edu/bitstream/handle/10211.3/183018/SD002%20POL603_Sp16%20The%20Effectiveness%20and%20Efficiency%20of%20the%20Serial%20Inebriate%20Program.pdf?sequence=1)).



services, allowing individuals to consume their own alcohol and assisting them in progressively managing their consumption to reduce alcohol dependence.<sup>12</sup>

The success of these programs, both nationally and in parts of Virginia, illustrates that Virginia's current approach to addressing homelessness and alcoholism is obsolete. Striking down the Interdiction Statute will therefore serve not only to rectify this Circuit's Eighth Amendment jurisprudence, but also to encourage Virginia to modernize its approach to combating these serious problems.

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<sup>12</sup> See, e.g., Kristofor Husted, NPR, *A Permanent Home That Allows Drinking Helps Homeless Drink Less* (Jan. 23, 2012) (available at <http://www.npr.org/sections/health-shots/2012/01/19/145477493/a-permanent-home-that-allows-drinking-helps-homeless-drink-less>).

## CONCLUSION

This Court should grant rehearing *en banc* to consider the question whether, as applied to homeless alcoholics who are unable to control their consumption of alcohol in public places, the possession, purchase, and consumption prongs of Virginia's Interdiction Statute are unconstitutional.

Dated: August 29, 2018

Respectfully submitted,

/s/ Nicolas Y. Riley

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## CERTIFICATE OF COMPLIANCE

I, Nicolas Riley, hereby certify that the foregoing Brief of National Law Center on Homelessness & Poverty as *Amicus Curiae* in Support of Plaintiffs-Appellants' Petition for Rehearing En Banc complies with type-volume limits because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 2,596 words, and is proportionately spaced using Garamond typeface of 14-point.

*/s/ Nicolas Y. Riley*  
NICOLAS Y. RILEY  
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Dated: August 29, 2018

**CERTIFICATE OF SERVICE**

I, Nicolas Riley, hereby certify that on August 29, 2018, I electronically filed the foregoing Brief of National Law Center on Homelessness & Poverty as *Amicus Curiae* in Support of Plaintiffs-Appellants' Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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