

Case No. 15-15695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, TURTLE ISLAND RESTORATION
NETWORK, JAPAN ENVIRONMENTAL LAWYERS FEDERATION, SAVE
THE DUGONG FOUNDATION, ANNA SHIMABUKURO, TAKUMA
HIGASHIONNA, and YOSHIKAZU MAKISHI,

Plaintiffs-Appellants,

v.

ASHTON CARTER, in his official capacity as Secretary of Defense; and the
UNITED STATES DEPARTMENT OF DEFENSE,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California

**UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

ELIZABETH S. MERRITT
WILLIAM J. COOK
National Trust for Historic Preservation
2600 Virginia Ave., NW, Suite 1100
Washington, DC 20037
Tel: 202-588-6035; Fax: 202-588-6272
E-mail: emerritt@savingplaces.org
wcook@savingplaces.org

BRIAN R. TURNER
San Francisco Field Office,
National Trust for Historic Preservation
5 Third Street, Suite 707
San Francisco, CA 94103
Tel: 415-692-8083
E-mail: bturner@savingplaces.org

Counsel for Amicus Curiae National Trust for Historic Preservation

In order to assist this Court in resolving the issues presented in this case, the National Trust for Historic Preservation in the United States (“National Trust”) respectfully moves this Court for permission to participate as *amicus curiae*.¹ If leave to participate is granted, the National Trust would file an *amicus* brief in support of Appellants urging reversal. The National Trust’s brief would address the issue of standing, with a specific focus on “redressability” of harm arising from violations of the National Historic Preservation Act (“NHPA”). The district court ignored applicable case law in reaching its decision—including important Ninth Circuit precedent—which the National Trust’s *amicus* brief would highlight.

INTERESTS OF THE *AMICUS CURIAE*

The National Trust for Historic Preservation is a privately funded nonprofit organization, chartered by Congress in 1949, to further the historic preservation policies of the United States, and to “facilitate public participation” in the preservation of our nation’s heritage. 54 U.S.C. § 312102. The National Trust’s mission is to provide leadership, education, and advocacy to save America’s diverse historic places and revitalize our communities. In addition, the Chairman of the

¹ Pursuant to Ninth Circuit Rule 29-3, counsel for the National Trust contacted counsel for all parties to advise them of the National Trust’s interest in filing this *amicus curiae* brief. Counsel for all parties consented to the filing of an *amicus* brief by the National Trust, on this date, to address the issue of standing. Although the National Trust requests leave to file this *amicus* brief beyond the date on which the brief would otherwise be due, counsel for all parties, including Appellees, have specifically consented to the timing of this filing.

National Trust has been designated by Congress as a member of the federal Advisory Council on Historic Preservation, an independent federal agency responsible for overseeing compliance by other federal agencies with the NHPA. *Id.* § 304101(a)(8). As a member of the Advisory Council on Historic Preservation, which advises the President and Congress on historic preservation policy, the National Trust is in a unique position to assist the Court in interpreting the NHPA, including Section 402. The National Trust has a profound interest in ensuring that federal agencies engage in meaningful compliance with the NHPA. The requirement that federal agencies “take into account” the effects of their undertakings, prior to making decisions, is one of the primary administrative contexts in which the National Trust serves as an interested party and an advocate.

With approximately 800,000 members and supporters nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. This includes challenges to legal decisions that have the effect of undermining or circumventing preservation laws, including the National Historic Preservation Act, the statute involved in this appeal.

In carrying out its mission, the National Trust has participated as a party or *amicus curiae* in hundreds of cases in federal and state courts since 1970, including a number of cases involving standing and “redressability,” which this brief would

address in detail. With respect to this case, the federal district court's decision undermines existing precedent on "standing" to enforce the NHPA, which the National Trust has worked for decades to develop, and which preservation plaintiffs rely on to enforce agency compliance with the law.

The National Trust has a strong track record helping to persuade federal courts of appeal to reverse incorrect standing decisions from federal district courts. *See, e.g., Sierra Club v. Jewell*, 764 F.3d 1 (D.C. Cir. 2014); *City of Jersey City v. Consolidated Rail Corp.*, 668 F.3d 741 (D.C. Cir. 2012); *Lemon v. Geren*, 514 F.3d 1312 (D.C. Cir. 2008); *Pye v. U.S. Army Corps of Engineers*, 269 F.3d 459 (4th Cir. 2001); and *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000).² The National Trust's *amicus* brief will discuss these cases in more detail.

IMPORTANCE OF AN *AMICUS CURIAE* MEMORANDUM AND ITS RELEVANCE TO THE ISSUES BEFORE THE COURT

The Court's decision in this case has the potential to set important precedent for how and when federal agencies comply with their responsibilities to take into account effects on historic resources under the National Historic Preservation Act, including, but not limited to, the Department of Defense. The National Trust's experience in helping to develop case law on issues related to standing and redressability is directly relevant, therefore, to the issues before the Court.

² The National Trust also participated as *amicus curiae* in *Vieux Carre Property Owners, Residents & Assoc's, Inc. v. Brown*, 948 F.2d 1436 (5th Cir. 1991), which was relied on by this Court in *Tyler v. Cuomo*.

CONCLUSION

For the reasons stated above, the National Trust respectfully requests that this Court grant it leave to file the *amicus curiae* brief submitted contemporaneously with this Unopposed Motion.

Dated: December 11, 2015

s/Elizabeth S. Merritt
ELIZABETH S. MERRITT
WILLIAM J. COOK
National Trust for Historic Preservation
2600 Virginia Ave., NW; Suite 1100
Washington, DC 20037
Tel: 202-588-6035; Fax: 202-588-6272
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wcook@savingplaces.org

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National Trust for Historic Preservation
5 Third Street, Suite 707
San Francisco, CA 94103
Tel: 415-692-8083
E-mail: bturner@savingplaces.org

Counsel for Amicus Curiae
National Trust for Historic Preservation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 11, 2015. 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.

Dated: December 11, 2015

/s/ Elizabeth S. Merritt

ELIZABETH S. MERRITT

WILLIAM J. COOK

National Trust for Historic Preservation

2600 Virginia Ave., NW; Suite 1100

Washington, DC 20037

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