

Nos. 16-60477

United States Court of Appeals

for the

Fifth Circuit

RIMS BARBER; CAROL BURNETT; JOAN BAILEY; KATHERINE
ELIZABETH DAY; ANTHONY LAINE BOYETTE; DON FORTENBERRY;
SUSAN GLISSON; DERRICK JOHNSON; DOROTHY C. TRIPLETT;
RENICK TAYLOR; BRANDILYNE MANGUM-DEAR; SUSAN MANGUM;
JOSHUA GENERATION METROPOLITAN COMMUNITY CHURCH,

Plaintiffs-Appellees,

– v. –

GOVERNOR PHIL BRYANT, State of Mississippi; JOHN DAVIS, Executive
Director of the Mississippi Department of Human Services,

Defendants-Appellants.

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (NORTHERN DIVISION)
NOS. 3:16-CV-00417-CWR-LRA AND 3:16-CV-00442- CWR-LRA
THE HONORABLE CARLTON REEVES

AMICUS CURIAE BRIEF BY COMPANIES OPPOSED TO H.B. 1523 IN SUPPORT OF PLAINTIFFS-APPELLEES & AFFIRMANCE OF THE INJUNCTION ENTERED BELOW

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Consolidated with Case No. 16-60478

CAMPAIGN FOR SOUTHERN EQUALITY; THE REVEREND DOCTOR
SUSAN HROSTOWSKI,

Plaintiffs-Appellees,

– v. –

PHIL BRYANT, in his Official Capacity as Governor of the State of
Mississippi; JOHN DAVIS, in his Official Capacity as Executive Director of
the Mississippi Department of Human Services,

Defendants-Appellants.

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fifth Circuit Rule 29.2, which requires “a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the *amicus* brief,” the undersigned counsel of record certifies that the following listed persons have an interest in this *amicus curiae* brief. Further, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A) and Federal Rule of Appellate Procedure 26.1(a), which require that corporate *amici* “file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation,” the undersigned counsel of record provide the following representations concerning the ownership of any *amici curiae* that are companies. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. American International Group, Inc. (“AIG”), *amicus curiae* in this case. AIG is a publicly traded corporation, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

2. Belhaven Residential LLC, *amicus curiae* in this case. Belhaven Residential LLC is a Mississippi Limited Liability Company and is privately held. Belhaven Residential LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

3. Bloomberg L.P., *amicus curiae* in this case. Bloomberg L.P. is a limited partnership. Bloomberg Inc. is the general partner of Bloomberg L.P., and no publically held corporation owns ten percent or more of the stock of either Bloomberg L.P. or Bloomberg Inc.

4. Byrne and Associates, PLLC, *amicus curiae* in this case. Byrne and Associates, PLLC is a Tennessee Professional Limited Liability Company

authorized to do business in Mississippi and is privately held. Byrne and Associates, PLLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

5. Chism and Company, Inc., *amicus curiae* in this case. Chism and Company, Inc. is privately held, has no corporate parents, and no publicly held company owns ten percent or more of its stock.

6. Choice Hotels International, Inc., *amicus curiae* in this case. Choice Hotels International, Inc. has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

7. CVS Health Corporation, *amicus curiae* in this case. CVS Health Corporation is publicly owned, and no publicly held corporation owns ten percent or more of its stock.

8. David Neil McCarty Law Firm, PLLC, *amicus curiae* in this case. David Neil McCarty Law Firm, PLLC is a Mississippi Professional Limited Liability Company and is privately held. David Neil McCarty Law Firm, PLLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

9. First Natchez Radio Group, Inc., *amicus curiae* in this case. First Natchez Radio Group, Inc. is a closely held private Mississippi corporation. First Natchez Radio Group, Inc. is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

10. Front Porch Fodder Publishing, LLC, *amicus curiae* in this case. Front Porch Fodder Publishing, LLC is a Mississippi Limited Liability Company and is privately held. Front Porch Fodder Publishing, LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

11. Glassdoor, Inc., *amicus curiae* in this case. Glassdoor, Inc. has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

12. International Business Machines Corporation (“IBM”), *amicus curiae* in this case. IBM has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

13. Levi Strauss & Co., *amicus curiae* in this case. Levi Strauss & Co. has no corporate parents, shares of its common stock are not publicly held or traded, and no public company owns ten percent or more of its stock.

14. Mantle, LLC, *amicus curiae* in this case. Mantle, LLC is a Mississippi Limited Liability Company and is privately held. Mantle, LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

15. Molpus Woodlands Group, *amicus curiae* in this case. Molpus Woodlands Group is a Mississippi Limited Liability Company and is privately held. Molpus Woodlands Group is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

16. Ocean Springs Seafood Market, Inc., *amicus curiae* in this case. Ocean Springs Seafood Market, Inc. is a closely held private Mississippi corporation. Ocean Springs Seafood Market, Inc. is not publicly traded, has no corporate parents, and no publicly held company owns ten percent or more of its stock.

17. Paracosm Entertainment, LLC, *amicus curiae* in this case. Paracosm Entertainment, LLC is a Mississippi Limited Liability Company and is privately held. Paracosm Entertainment, LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

18. Pfizer, Inc., *amicus curiae* in this case. Pfizer, Inc. has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

19. Pritchett Engineering & Planning, LLC, *amicus curiae* in this case. Pritchett Engineering & Planning, LLC is a Mississippi Limited Liability Company and is privately held. Pritchett Engineering & Planning, LLC is not publicly traded, has no corporate parents, and no publicly held company owns ten percent or more of its stock.

20. Replacements, Ltd., *amicus curiae* in this case. Replacements, Ltd. has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

21. T Enterprises, Inc., *amicus curiae* in this case. T Enterprises, Inc. is a closely held private Mississippi corporation. T Enterprises, Inc. is not publicly traded, has no corporate parents, and no publicly held company owns ten percent or more of its stock.

22. The Mitchell Gold Co., d/b/a Mitchell Gold + Bob Williams (“Mitchell Gold + Bob Williams”), *amicus curiae* in this case. Mitchell Gold + Bob Williams is a North Carolina S-Corporation, and is wholly owned by Comfort Retail Holdings, Inc., a Delaware S- Corporation. No publicly held corporation owns ten percent or more of Mitchell Gold + Bob Williams’s or Comfort Retail Holdings, Inc.’s stock.

23. The ‘Sip Magazine, LLC, *amicus curiae* in this case. The ‘Sip Magazine, LLC is a Mississippi Limited Liability Company and is privately held. The ‘Sip Magazine, LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

24. Two Rivers Realty, LLC, *amicus curiae* in this case. Two Rivers Realty, LLC is a Mississippi Limited Liability Company and is privately held.

Two Rivers Realty, LLC is not publicly traded, has no corporate parents, and no publicly held corporation owns ten percent or more of its stock.

25. Carson Law Group, PLLC, Counsel for the above-listed *Amici Curiae* in this case (Dorsey R. Carson Jr., David S. Humphreys, Julie C. Skipper, and S. Anna Powers, representing).

26. O'Melveny & Myers LLP, Counsel for the above-listed *Amici Curiae* in this case (Charles C. Lifland and Justine M. Daniels representing).

Dated: December 23, 2016

/s/ Justine M. Daniels
JUSTINE M. DANIELS
Counsel of Record for Amici Curiae

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STATEMENT OF AUTHORITY TO FILE

All parties have consented to the filing of this brief, as required by Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D). In accordance with Rule 29(a)(4)(E), *Amici* aver that: (i) no party’s counsel authored this brief in whole or in part; (ii) no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND STATEMENT OF INTEREST

Amici Curiae are some of the largest companies in the United States, many located or operating in Mississippi, as well as small companies conducting business exclusively in Mississippi. The *Amici* are committed to equality and fairness for their employees and customers. They share a common desire to attract and retain a talented workforce from within Mississippi and across the country.

Most—if not all of the *Amici*—employ and/or serve lesbian, gay, bisexual, or transgender (“LGBT”) persons or other citizens targeted by House Bill 1523 (“H.B. 1523”). And all the *Amici* agree that H.B. 1523 propagates—indeed legalizes—discrimination, undermining the public’s interest in equality and acceptance. One of the key issues this Court must consider is whether enjoining H.B. 1523 “undermine[s] the public interest.” *Valley v. Rapides Parish Sch. Bd.*,

118 F.3d 1047, 1051 (5th Cir. 1997). The *Amici* believe that the opposite is true: H.B. 1523 itself undermines the public interest, because it is an affront to the fundamental principle of equality for all.

To aid the Court's public interest analysis, this brief addresses several of the ominous consequences this law portends for the *Amici*, their customers, and employees, as well as the State of Mississippi, if the injunction is not upheld. *First*, H.B. 1523 will stigmatize, degrade, and propagate discrimination against the estimated 60,000 LGBT individuals living in Mississippi along with the countless others who hold beliefs or live lives that are not in accord with the "sincerely held religious beliefs or moral convictions" advocated by H.B. 1523. *Second*, the law will adversely impact, both socially and economically, the *Amici* and other companies conducting business in Mississippi and across the United States. H.B. 1523 not only undermines the *Amici*'s corporate non-discrimination policies; it impairs the *Amici*'s ability to build and maintain the diverse and inclusive workplaces that are essential to the successes of their businesses. *Third*, the law endangers Mississippi's economy by driving away productive and profitable industries, including those in which some of the *Amici* are members. *Fourth*, H.B. 1523 is nothing more than a pretext for sanctioning discrimination, as religious freedom already enjoys a wealth of protections under existing Mississippi law.

In light of these significant adverse effects—and in the absence of evidence that possibly could justify them—the *Amici* respectfully submit that the public interest weighs heavily in favor of upholding the District Court’s grant of a preliminary injunction against H.B. 1523’s enforcement.

STATEMENT OF FACTS

H.B. 1523 authorizes legalized discrimination against large categories of people who live in or may travel to Mississippi, including the LGBT community, single mothers, and all intersex persons.¹ The statistics speak for themselves. Approximately 60,000 LGBT individuals call Mississippi home.² As of 2013, 10.5% of all Mississippi households were headed by a single-mother,³ and in recent years nearly half of the children born in Mississippi were born out of wedlock.⁴ Estimates suggest that intersex babies may constitute 2% of all live births.⁵

¹ The law also authorizes discrimination against anyone having sexual relations outside of traditional marriage, which would include the vast majority of the adult population. *See* Centers for Disease Control, *National Survey of Family Growth*, <http://tinyurl.com/zwjy9j5> (finding that 89% of women and 91% of men in 2011-2013 participated in premarital sex).

² Hasenbush, et. al., Williams Inst. Univ. of Cal. L.A. Sch. of Law, *The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain & Southern States* 23 (2015), <http://tinyurl.com/nb2zje7>.

³ *The Status of Women in Mississippi 2015: Highlights*, Institute for Women’s Policy Research 4 (2015), <http://tinyurl.com/jfme157>.

⁴ Press Release, Mississippi Kids Count, Twenty-Fifth Edition of KIDS COUNT Data Book Highlights Improvements In Health, Safety, Education And Decline in Teen Birth Rate Since 1990 (July 22, 2014), <http://tinyurl.com/hg4nrd3>.

⁵ Blackless et al, Abstract, *How Sexually Dimorphic Are We? Review and Synthesis*, American Journal of Human Biology (February 11, 2000), <http://tinyurl.com/j8nzaeb>. According to the UN

Although these groups and others targeted by H.B. 1523 are still marginalized in many respects, recent years have seen a shift of norms away from discrimination and towards acceptance. For example, as of 2014, 91% of Fortune 500 companies prohibited discrimination based on sexual orientation, and 61% prohibited discrimination based on gender identity.⁶ In a 2011 nation-wide voter poll, support for nondiscrimination laws was strong even among groups typically portrayed as less supportive of LGBT issues, including seniors (69% among voters over age 65), those with a high school degree or less (68%), observant Christians (77%), and born-again Christians (74%).⁷ Similarly, 75% of Mississippians have stated that they would support legislation prohibiting employment discrimination based on sexual orientation and gender identity.⁸ Thus, diversity and inclusion are progressively becoming the rule, not the exception, in the business community, the United States, and the State of Mississippi.

In keeping with the ever-growing public acknowledgement of the benefits of diversity and general trends towards inclusiveness and tolerance in society, the

Office of the High Commissioner for Human Rights, intersex individuals “do not fit the typical definitions for male or female bodies.” Such variations may involve genital ambiguity, and combinations of chromosomal genotype and sexual phenotype other than XY-male and XX-female.

⁶ FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business, Press Release, The White House (July 21, 2014), <http://tinyurl.com/zxzz7rt>.

⁷ *New HRC Poll Finds Vast Majority of Voters Support Employment Anti-Discrimination Laws*, Human Rights Campaign (Dec. 13, 2011) (hereinafter “HRC Poll”), <http://tinyurl.com/goeyvsl>.

⁸ Christy Mallory & Brad Sears, Williams Inst. Univ. of Cal. L.A. Sch. of Law, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Mississippi* 6 (2015), <http://tinyurl.com/zwnxsdl>.

legal landscape has also evolved to recognize and protect the fundamental rights of traditionally marginalized groups, including the LGBT community. The Supreme Court’s landmark decision in *Obergefell v. Hodges* affirmed the rights of same-sex couples to marry and, in so doing, condemned a discriminatory state action that had “the effect of teaching that gays and lesbians are unequal in important respects.” 135 S. Ct. 2584, 2602 (2015).

Seeking to roll back the clock and stem the tide of social and legal progress, less than a year after *Obergefell*, Mississippi Governor Phil Bryant signed into law the “Protecting Freedom of Conscience from Government Discrimination Act,” better known as H.B. 1523. The law authorizes individuals, religiously-affiliated organizations, and businesses to discriminate on the basis of certain “religious beliefs or moral convictions,” including disapproval of same-sex marriage, opposition to premarital sexual relationships, and intolerance towards individuals whose gender identities do not match their purported biological sex, including transgender and intersex citizens. H.B. 1523, §3 (2016).

This lawsuit is a constitutional challenge to the provisions of H.B. 1523. On June 3, 2016, Plaintiffs-Appellees filed a complaint seeking a preliminary injunction against the enforcement of H.B. 1523. After extensive briefing, testimony, and argument, the District Court ruled in Plaintiffs-Appellees’ favor, enjoining H.B. 1523 on June 30, 2016, one day before the law was due to go into

effect. Plaintiffs-Appellees now urge this Court to uphold the District Court’s order, and the *Amici* join in this prayer for relief.

ARGUMENT

I. H.B. 1523 Legitimizes Discrimination Against LGBT Mississippians.

H.B. 1523 lends the State’s support and protection—if not approval—to a wide range of discriminatory actions.⁹ In so doing, the law sends a resounding message to the public that anyone who does not believe or live in accordance with the particular religious beliefs espoused in the bill—i.e. that marriage exists only between one man and one woman, that sexual relations are reserved for that marriage, and that an individual’s immutable biological sex is determined by anatomy and genetics at birth—is undeserving of recognition or respect. While H.B. 1523 presents a clear threat to unwed mothers, children born outside of wedlock, and other individuals whose beliefs and lives do not fit within the narrow “moral” strictures of the law, the timing and legislative history of the bill show that it was particularly aimed at the LGBT community. As the District Court found: “The State says the primary motivating factor behind HB 1523 was to address the denigration and disfavor religious persons felt” after the legalization of gay marriage. *Barber v. Bryant*, No. 3:16-CV-417-CWA-LRA, 2016 U.S. Dist. LEXIS 86120, at *57–58 (S.D. Miss. June 30, 2016). “The title, text, and history of HB

⁹ See CSE Pltfs.-Apps’ Br. at *5-13.

1523,” however, are merely window-dressing behind which the State’s true intentions are unmistakable: “to put LGBT citizens back in their place after *Obergefell*.” *Id.* at *60. Accordingly, the *Amici* focus their arguments on H.B. 1523’s impact on that community.

In the wake of H.B. 1523’s passage, members of the LGBT community have felt increasingly unwelcome and unsafe in Mississippi due to their legitimate fears that the law has encouraged discrimination and will embolden even worse discrimination in the future. For example, Jocelyn “Joce” Pritchett—an LGBT woman, business owner, and a life-long Mississippi resident who served as a named plaintiff in the first Campaign for Southern Equality case¹⁰—described H.B. 1523 as “the final straw” behind her decision to leave Mississippi because she needs “to be somewhere where we can be safe.” Mot. for Prelim. Inj. Tr. vol. 1, *208. Ms. Pritchett lamented that the climate in Mississippi had become so hostile to the LGBT community that its members are “terrified of being public” about their relationships. *Id.* at *207. In addition to Ms. Pritchett, many other Mississippi business owners and residents also expressed plans to leave the state because H.B. 1523 has marked them as “second-class citizens.”¹¹

¹⁰ See *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 914 (S.D. Miss. 2014) (overturning Mississippi’s statutory and constitutional bans on same-sex marriage).

¹¹ Bracey Harris, *After HB 1523, Some Wedding Vendors Offer Inclusion*, The Clarion-Ledger (April 15, 2016), <http://tinyurl.com/zlryh8b>; Christopher Scott Helms, *Freedom from Discrimination Move*, GoFundMe (April 8, 2016), <http://tinyurl.com/gp7opqc>.

These fears are well grounded. Commentators have described the law as the “most dangerous” anti-LGBT law in the country.¹² Not coincidentally, during the months following the passage of the law, the Ku Klux Klan distributed fliers in Rankin County targeting “blacks, gays and illegal aliens,”¹³ and also harassed LGBT couples in Ocean Springs and Gautier by leaving anti-gay propaganda at their homes.¹⁴ Ms. Pritchett’s testimony aptly conveys the sense of fear and degradation engendered by the law:

Well, when H.B. 1523 was first being discussed in the legislature, I think there was a large change in the community’s feeling. We [in the LGBT community] felt like we were being attacked. We felt like we were being pursued, bullied by our own government. The federal government had come in and said we were legal families, and now our own state was saying that it’s okay to discriminate against us again. . . . We have friends who don’t go out to eat anymore. . . . We have friends with businesses in Fondren who have been harassed by their neighbors. We’ve seen KKK fliers for the first time in my lifetime.

Mot. for Prelim. Inj. Tr. vol. 1, *204-05.

H.B. 1523 sanctions discrimination against thousands of vulnerable Mississippians, including the *Amici*’s employees and customers, as well as their friends and families. As community stakeholders invested in Mississippi and its

¹² Katherine Stewart, *Why Mississippi’s New Anti-LGBT Law Is the Most Dangerous One To Be Passed Yet*, *The Nation* (April 8, 2016), <http://tinyurl.com/hgfvxuq>.

¹³ Scott Simmons, *Some Rankin County Residents Angry After KKK Info Left in Driveways*, *WAPT News* (July 12, 2016), <http://tinyurl.com/zovlrnn>.

¹⁴ Karen Nelson, *KKK Fliers Found in Driveways of Gautier, Ocean Springs homes*, *Sun-Herald* (June 19, 2016), <http://tinyurl.com/j8kkltz>.

residents, and in pursuit of the public interest, the *Amici* stand firmly against H.B. 1523 and in support of Plaintiff-Appellees, Jocelyn Pritchett, and the countless others fighting to achieve equality and acceptance.

II. H.B. 1523's Threatens To Deprive The *Amici* And Other Businesses Of The Benefits Of Diversity In The Workplace.

The Supreme Court has repeatedly recognized the “substantial” benefits of diversity in public institutions, and has tied diversity directly to the needs of American businesses, noting that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, idea, and viewpoints.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). The Court has further found that promoting the “robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders” are “compelling” governmental interests. *Fisher v. Univ. of Texas at Austin*, ___ S. Ct. ___, 2016 WL 3434399, at *10 (June 23, 2016) (internal quotation marks omitted). The *Amici*’s knowledge of and experiences in the modern business world are fully consistent with this, and have led them to emphasize the creation of diverse and open workplaces. H.B. 1523 poses a significant threat to those efforts.

A. Diversity Is Essential To The *Amici*'s Missions As Corporate Citizens And Provides Distinct Economic Advantages.

The *Amici* have adopted and implemented diversity and non-discrimination policies because they are good for their employees, customers, and communities. Those same policies also benefit the *Amici*'s bottom lines. The *Amici* know firsthand the advantages these policies confer, and empirical studies confirm what the *Amici* know: that policies of openness and acceptance increase company value, proficiency, and profitability.¹⁵

Studies show that the *Amici*'s policies make good business sense. Companies that embrace inclusive policies on sexual orientation and gender identity out-perform similarly situated businesses. A report by the Center for Talent Innovation showed that companies with teams including LGBT members are much more likely to understand LGBT consumers and achieve greater success: “diverse individuals are better attuned to the unmet needs of consumers or clients like themselves.”¹⁶ Another study, by Credit Suisse, demonstrated that LGBT-friendly businesses generate better market performance. The study compared the successes of 270 companies that openly support and embrace LGBT employees to

¹⁵ The *Amici* are not alone in this perspective: 63% of Fortune 500 companies have justified their non-discrimination policies with a business rationale. Brad Sears & Christy Mallory, Williams Inst. Univ. of Cal. L.A. Sch. of Law, *Economic Motives For Adopting LGBT-Related Workplace Policies* 5 (2011) <http://tinyurl.com/h8qma2z>.

¹⁶ Center for Talent innovation, *Innovation, Diversity and Market Growth* (2013), <http://tinyurl.com/h8qma2z>.

a Morgan Stanley-operated market capitalization weighted index known as “MSCI ACWI;” the pro-LGBT companies outgained the index by 3.0% per annum between 2010 and 2016, with improved returns by as much as 21%.¹⁷ And in yet another analysis, the Williams Institute at the UCLA School of Law reviewed thirty-six research studies and found that “the more robust a company’s LGBT-friendly policies, the better its stock performed over the course of four years (2002–2006), compared to other companies in the same industry over the same period of time.”¹⁸

There are many reasons why policies of openness and acceptance help businesses like the *Amici* thrive. Diverse workplaces are more receptive to new ideas and opportunities.¹⁹ Because employees at inclusive workplaces “are required to suppress far less,” they can bring far more of themselves to their jobs,” thereby

¹⁷ Credit Suisse, *Credit Suisse ESG Research, LGBT: The Value of Diversity* (2016), <http://tinyurl.com/h4fdnz3>.

¹⁸ M.V. Lee Badgett, et al., Williams Inst. Univ. of Cal. L.A. Sch. of Law, *The Business Impact of LGBT-Supportive Workplace Policies* 23 (2013) (hereinafter “Williams Institute 2013”), <http://tinyurl.com/kz6774e>. See also, e.g., Janell L. Blazovich, et al., *Do Gay-Friendly Corporate Policies Enhance Firm Performance?* 35-36 (Apr. 29, 2013), <http://tinyurl.com/zxxelak> (“[F]irms with gay-friendly policies benefit on key factors of financial performance, which . . . increase the investor perception of the firm as proxied by stockprice movements.”); Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* 4, 11 (2011) (hereinafter “Forbes Insights”), <http://tinyurl.com/3f9n2nq> (comprehensive study of 300 senior diversity officers as companies worldwide with revenues of at least \$500 million).

¹⁹ See Feng Li & Vicki Nagar, *Diversity and Performance*, 59 *Mgmt. Sci.* 529, 531 (2013).

“increase[ing] the total human energy available to the organization.”²⁰ Diverse workforces also help attract new clients and customers, not only among those who themselves identify as LGBT, but among customers attracted to LGBT-friendly companies.²¹ Customers and business partners consider social and ethical issues in deciding where to spend their money. For example, nearly nine in ten LGBT adults are likely to consider a brand providing equal workplace benefits and nearly a quarter have switched to brands that are LGBT-supportive, even if they are costlier or less convenient.²²

In short, the *Amici* have a significant interest in preventing the kind of discrimination H.B. 1523 will encourage, not only because it is the right thing to do, but also because it will help their businesses succeed in the marketplace.

B. H.B. 1523 Impairs The Ability Of The Mississippi *Amici* To Recruit, Retain, And Get The Most Out Of Their Employees.

In addition to their benefits from a business standpoint, diversity and inclusion are also imperative from a human resources standpoint. These policies and practices “enable[] [a company] to be the ‘employer of choice’ that hires,

²⁰ Deloitte Point of View, *Only Skin Deep? Re-examining the Business Case for Diversity* 7 (2011) (internal quotation marks omitted), <http://tinyurl.com/hs3wef6>. Similarly, another recent study, conducted by Deloitte and measuring the experiences of 1,550 employees in three large Australian companies, identified an 80% improvement in business performance when levels of diversity and inclusion were both high. Deloitte, *Waiter, is that Inclusion in My Soup?* 2 (2012) <http://tinyurl.com/jnnszk4>.

²¹ See Forbes Insights, at 11–12.

²² See Michaela Krejcová, *The Value of LGBT Equality in the Workplace*, GLAAD (Feb. 26, 2015), <http://tinyurl.com/j4lr2r9>.

engages, and retains the best talent.”²³ Mississippi’s enactment of H.B. 1523 poses a significant threat to the *Amici*’s ability to recruit and retain employees. Moreover, the law will harm the productivity and morale of employees who opt to stay in Mississippi.

1. The Law Will Harm Recruitment And Retention Efforts.

Today’s workers insist that their employers promote openness and inclusion. Studies demonstrate that both LGBT and non-LGBT employees from a wide variety of backgrounds value workplaces with nondiscrimination policies.²⁴ In fact, younger and more highly educated individuals, both LGBT and non-LGBT, prefer to work for companies with more diversity-supportive policies and in states with more diversity-supportive laws.²⁵ H.B. 1523 impedes the ability of the *Amici* who operate in Mississippi and all Mississippi businesses to recruit the best employees, by deterring talented members of the communities affected by the law, their supporters, and anyone who happens to hold beliefs other than those afforded preferential status under H.B. 1523 from seeking employment in Mississippi.²⁶

²³ *Diversity and Inclusion*, Proctor and Gamble, <http://tinyurl.com/zlpz9cw>.

²⁴ A pair of 2006 Harris Interactive/Witeck-Combs Communication polls confirm that 89% of LGBT prospective employees and 72% of non-LGBT prospective employees consider the fact that a company has a written LGBT nondiscrimination policy to be an important factor in making employment decisions. Williams Institute 2013 at 22.

²⁵ *Id.*

²⁶ See Paul Hampton, *Mississippi’s ‘Religious Freedom’ Law Under Fire From 75 CEOs*, The Sun-Herald (April 22, 2016), <http://tinyurl.com/jqzn377>.

Beyond creating challenges to recruiting, H.B. 1523 also impacts Mississippi businesses' ability to retain employees who are threatened by the law or find it reprehensible. "Ensuring a positive and respectful workplace and robust set of benefits for everyone is critical to retaining employees."²⁷ Indeed, 30% of LGBT individuals would consider changing jobs if their employer required them to move to a state where same sex marriage was not recognized, and 30% would decline a promotion if it required a move to a state that did not recognize same sex marriage.²⁸

When employees leave, businesses bear heavy costs. The Center for American Progress determined that when an employee leaves a job, the cost can be substantial and include a loss in productivity due to the unfilled position, the costs of hiring and training a new employee, and the new employee's lower initial rates of productivity.²⁹ The same study showed that replacing a worker costs approximately one-fifth of that worker's annual salary—excluding physicians and

²⁷ Brad Sears & Christy Mallory, Williams Inst. Univ. of Cal. L.A. Sch. of Law, *Economic Motives for Adopting LGBT-Related Workplace Policies* 5 (2011), <http://tinyurl.com/h8qma2z>.

²⁸ See Out & Equal *et al.*, *Most Americans Say Employers Should Never Discriminate, Even on Religious Grounds*, Harris Poll, Oct. 30, 2014, <http://tinyurl.com/z378d6g>. Moreover, And nearly one in 10 LGBT employees has reported leaving a job because the environment was unwelcoming. See *The Cost of the Closet and the Rewards of Inclusion*, Human Rights Watch 22-23, <http://tinyurl.com/gvcpryn>.

²⁹ Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, Center for American Progress (Nov. 16, 2012), <http://tinyurl.com/hwkphae>.

executives, whose departures can cost their former employers up to 213% of their annual salary.³⁰

H.B. 1523 further threatens Mississippi companies' retention efforts by sanctioning discrimination against those whose lives and identities conflict with H.B. 1523's prescribed religious beliefs, creating an unwelcome and demeaning environment for employees. In the days immediately following H.B. 1523's enactment, a coalition of 75 major businesses, several of them represented among the *Amici*, denounced H.B. 1523 because it will "make it far more challenging for businesses across the State to recruit and retain the nation's best and brightest workers and attract the most talented students from across the country."³¹

2. The Law Will Decrease Employee Productivity And Morale.

In addition to making it difficult for the *Amici* and all Mississippi businesses to recruit and retain employees, H.B. 1523 threatens the productivity of those employees who decide to continue their employment in Mississippi. As discussed above, the *Amici* have adopted diversity and inclusion policies because doing so has helped them get the best out of their employees. Though H.B. 1523 may not actively require the *Amici* that operate in Mississippi to amend those policies, the law threatens their employees' workplace productivity by subjecting them and

³⁰ *Id.*

³¹ Paul Hampton, *Mississippi's 'Religious Freedom' Law Under Fire From 75 CEOs*, The Sun-Herald (April 22, 2016), <http://tinyurl.com/jqzn377>.

their friends, families, and loved ones to discrimination outside the workplace. Studies affirm the impact of discrimination on employee productivity: “unwelcoming environments” for LGBT employees can drop their engagement with work by 30%, cause 15% to stay home from work, cause 30% to feel distracted at work, make 22% search for a different job, and lead 30% to feel unhappy or depressed at work.³² Further, because H.B. 1523 imposes a stigma on the Mississippi citizens it targets, including *Amici*’s employees, the *Amici* expect that H.B. 1523 may have “a corrosive influence on health” of some of their personnel, which could impair those employees’ social relationships and self-esteem and lead to numerous ill effects, including diminished productivity.³³

Employees are not concerned exclusively with the policies of their employer, but also with the laws of the community in which they will live. Although the *Amici* have put progressive programs and policies into place, they recognize that their employees (and their families and loved ones) can never truly feel truly safe while a law like H.B. 1523 sanctions discrimination against them. In the vital areas of recruitment, retention, and maintenance of employee productivity

³² *The Cost of the Closet and the Rewards of Inclusion*, Human Rights Watch 22-23, <http://tinyurl.com/gvcpryn>.

³³ Mark L. Hatzenbuehler, *et al.*, *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 Am. J. of Pub. Health 813, 815–16 (2013); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010) (“Structural stigma provides the context and identifies which members of society are devalued. It also gives a level of permission to denigrate or attack particular groups, or those who are perceived to be members of certain groups in society.”), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

and morale, H.B. 1523 stands to harm the *Amici*'s employees and those of many companies doing business in Mississippi if the injunction is not upheld.

C. H.B. 1523's Effects Extend Beyond Mississippi And Threaten The *Amici*'s Ability To Conduct Business Outside Of The State.

Because it stigmatizes LGBT persons and sanctions discrimination on the basis of gender identity under color of State law, H.B. 1523 could have adverse effects extending far beyond Mississippi. If the injunction is not upheld, H.B. 1523 will help to fuel discrimination against LGBT persons everywhere. Worse yet, it may even lead to comparable laws in other jurisdictions where the non-Mississippi-based *Amici* are located or operate. This risk is all too real. While a clear majority of Americans favor laws that prohibit discrimination based on sexuality and gender identity, anti-LGBT legislation is currently pending in 22 states.³⁴ Indeed, eight states and one governor have filed their own *amicus* brief in support of Defendants-Appellants and the law.

H.B. 1523 also makes it difficult for companies, including many *Amici*, to send employees to Mississippi without undermining their own anti-discrimination policies. For that very reason, several states and cities—including Connecticut, Minnesota, New York, Vermont and Washington, San Francisco, Santa Fe, Seattle, Cincinnati, Los Angeles, Philadelphia, Baltimore, San Jose, and Long Beach—

³⁴ Compare HRC Poll, *supra* Note 7, with *Everything You Need to Know About the Wave of 100+ Anti-LGBT Bills Pending in States*, The Huffington Post (April 15, 2016), <http://tinyurl.com/jv3xjsp>.

have instituted travel bans to Mississippi.³⁵ Lifting the injunction would likewise force the out-of-state *Amici* to choose between maintaining their policy of promoting diverse and non-discriminatory working conditions and sending employees into Mississippi, where they will potentially be subjected to discrimination and other intolerable conditions.

III. H.B. 1523 Damages Mississippi's Commercial Environment.

The *Amici* thrive as businesses by considering the values of all of their customers and commercial partners, including those targeted for discrimination under H.B. 1523 and many others who support them.³⁶ The LGBT community and those who support it are economically significant. Between 2006 and 2012, the buying power of LGBT consumers increased by 20%.³⁷ In the United States as a

³⁵ See e.g., Camila Domonoske, *States, Cities Limit Official Travel To Mississippi Over 'Religious Freedom' Law*, NPR (April 7, 2016), <http://tinyurl.com/jfumd8z>; *Cincinnati City Council Bans Travel To North Carolina, Mississippi Over Anti-LGBT Bills*, FOX 19 (April 13, 2016), <http://tinyurl.com/zpgdbdt>; *Mayor Garcetti, City Council Enact Travel Ban To North Carolina, Mississippi*, CBS Los Angeles (April 15, 2016), <http://tinyurl.com/j9jqxl9>; David Chang, *Philly Mayor Jim Kenney Bans City-Funded Travel To North Carolina, Mississippi In Aftermath Of Controversial LGBT Laws* NBC 10 News (April 20, 2016), <http://tinyurl.com/z2b9qt8>; Tim Prudente, *Baltimore Mayor Bans Government Travel To N.C., Mississippi Over Transgender Laws*, Baltimore Sun (May 20, 2016), <http://tinyurl.com/jcmu389>; *SJ Passes Travel Bans To NC, Mississippi Over Transgender Laws*, ABC 7 News (May 17, 2016), <http://tinyurl.com/jv7pdx8>; Jason Ruis, *Long Beach Joins Long List Of Cities Banning Non-Essential Travel To North Carolina, Mississippi*, Long Beach Post (June 22, 2016), <http://tinyurl.com/zwcfzy7>.

³⁶ See *supra* Section I.

³⁷ Michaela Krejcová, *The Value of LGBT Equality in the Workplace*, GLAAD (Feb. 26, 2015), <http://tinyurl.com/j4lr2r9>.

whole, it now stands at nearly a *trillion* dollars.³⁸ To cite just one statistic from Mississippi, “the total spending on wedding arrangements and tourism by same-sex couples and their guests would be approximately \$10.8 million over three years” and that “that economic boost . . . would generate over \$750,000 in tax revenue.”³⁹ H.B. 1523 threatens the Mississippi commercial environment by turning away and alienating millions of clients and consumers, in and outside of Mississippi.

Because the District Court’s injunction likely helped to forestall much of the economic damage from H.B. 1523, the law’s potential impact on Mississippi is not fully known. But an analysis of the law’s potential impact on Mississippi’s tourism and entertainment industries—both of which are major drivers of the State’s economy and highly sensitive to the effects of Mississippi’s reputation as a welcoming place for people of all identities and lifestyles—foreshadows the future economic harm to come if the injunction is not upheld.

A. Mississippi’s Tourism Industry Has Been Subject To State And Local Travel Bans.

Tourism is a major industry in Mississippi and 67% of its tourists come from out-of-state. Tourism accounts for 85,135 direct jobs (and over 100,000 total jobs), \$6.17 billion in tourist spending, and 7.2% of Mississippi’s General Fund in the

³⁸ Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, Bloomberg (July 20, 2016), <http://tinyurl.com/jzdaptl>.

³⁹ Justin M. O’Neill *et al.*, Williams Inst. Univ. of Cal. L.A. Sch. of Law, *Estimating the Economic Boost of Marriage for Same-Sex Couples in Mississippi* 5 (2014), <http://tinyurl.com/h8kru2v>.

2015 fiscal year.⁴⁰ Within that sector, a substantial portion of the jobs and revenue generated comes from the gaming industry: in 2014 alone casinos generated \$4 billion and supported one of every 10 jobs in Mississippi.⁴¹

To protect the tourism industry—and to emphasize that they do not condone discrimination in any form—multiple local governments, including Biloxi and City of Jackson, have condemned H.B. 1523 in hopes of assuring visitors that all are welcome in their locality and that tourists have should no concern of persecution.⁴² Likewise, the Mississippi Tourism Association and several casinos have condemned H.B. 1523 because they have serious concerns about the law’s impact on tourism and the state’s economy.⁴³

Those concerns are well founded. Even before the law became effective, the fears of its negative impact on tourism came to fruition. As noted above, many

⁴⁰ *Travel and Tourism Economic Contribution Report 2015*, Visit Mississippi 5 (2016), <http://tinyurl.com/gpnl2hv>. Indeed, the state’s official tourism site estimates that “[w]ithout travel and tourism, there would have been \$388.7 million less in General Fund revenues, 117,685 fewer total jobs . . . \$2.79 billion less in total annual payroll . . . and a decrease in the state’s overall quality of life” in 2015. *Id.*

⁴¹ Robert Rhoden, *Mississippi Casinos Have \$4 Billion Economic Impact Annually*, *Newspaper Reports*, NOLA.com (Dec. 12, 2014), <http://tinyurl.com/gwphbe>.

⁴² *See Resolution Stating Biloxi’s Commitment To Diversity And Hospitality*, Biloxi City Council, <http://tinyurl.com/gtmys9u>; Tim Summers Jr., ‘*These Are Human Beings*’: Jackson City Council Passes Resolution Against HB 1523, *Jackson Free Press* (April 5, 2016), <http://tinyurl.com/jlujnj4>.

⁴³ Statement, Mississippi Tourism Association, MTA Statement on HB 1523, <http://tinyurl.com/hwn26pu>; Kate Gibson, *Big Mississippi Employers Oppose Anti-Gay Law*, CBS Money Watch (April 15, 2016), <http://tinyurl.com/hea6p8d>; *see also, e.g.*, Jeff Clark, *Updated List: Companies, Local Businesses, Public Figures Oppose HB 1523*, *Sun-Herald* (April 6, 2016), <http://tinyurl.com/h43134j>; Press Release, Caesars Entertainment, Caesars Entertainment Issues Statement on Mississippi H.B. 1523 (April 6, 2016), <http://tinyurl.com/h6fmec7>.

states and municipalities have instituted official travel bans prohibiting government-funded travel to Mississippi in light of H.B. 1523.⁴⁴ Travel to Mississippi for business and personal purposes has also suffered. The Mississippi Hotel and Lodging Association confirmed that its members were losing business because of H.B.1523: “Our members statewide are reporting calls, emails and social media posts from people cancelling or postponing trips to Mississippi due to national media reporting on this new law.”⁴⁵

B. Mississippi’s Burgeoning Film And Entertainment Industries Have Lost Lucrative Investments And Engagements.

Although Mississippi’s film industry is smaller and newer than its tourism industry, it is still an important piece of Mississippi’s economy. Even in its nascence, the film industry accounts for substantial spending in Mississippi including direct instate production spending from 31 film and TV productions totaling about \$34 million in 2014, with \$4.8 million paid in wages to Mississippians that year.⁴⁶

H.B. 1523 threatens this burgeoning industry by driving out lucrative investments. Indeed, given the early stage of the industry, some filmmakers

⁴⁴ See *supra* Note 36.

⁴⁵ See Arielle Dreher, *HB 1523: Bad For The Business Sector*, Jackson Free Press (June 8, 2016) <http://tinyurl.com/hcm4h6p>.

⁴⁶ Ted Carter, *Film Office Won’t Address Movie Industry Reaction to Anti-Gay Law*, Mississippi Business Journal (April 6, 2016), <http://tinyurl.com/z4m2ow>. Similarly in 2015, 21 productions brought an approximate direct instate production spending of \$29.2 million and salaries to Mississippians of approximately \$4.6 million. *Id.*

expressed concern that H.B. 1523 could cripple filmmaking in Mississippi.⁴⁷ These concerns have been borne out by events following H.B. 1523's passage. For example, the actress Sharon Stone spent \$300,000 dollars in order to move shooting of her film "The Principal" to a location outside of Mississippi.⁴⁸ Wes Benton, president of film production company Red Planet Entertainment, which has an office in Biloxi, explained that an independent group of financiers had been planning a commitment to six productions in Mississippi—with an estimated total production budget of \$70 million—until passage of H.B.1523, at which point the investors asked that the projects be moved.⁴⁹

Beyond film, other sectors of Mississippi's entertainment industry have also suffered severe fall-out from H.B. 1523, including the cancellation of scheduled events and the disruption of plans for future events. For example, numerous entertainers, including the musician Bryan Adams, the comedian Tracy Morgan, and the author Sherman Alexie, have canceled scheduled performances or

⁴⁷ See e.g. Coop Cooper, *Law "HB 1523" has ruined a good thing (i.e. film) for Mississippi*, The Small Town Critic (April 11, 2016), <http://tinyurl.com/gptyq6x>.

⁴⁸ Cheryl Lasseter, *Sharon Stone Refuses to Shoot Film in MS, Citing New Bill*, WLBT, April 13, 2016, <http://tinyurl.com/znwxweg>.

⁴⁹ Bracey Harris, *HB 1523 Sends Entertainment Biz Into Damage Control Mode*, The Clarion-Ledger (April 15, 2016), <http://tinyurl.com/j2lhlwn>.

appearances in Mississippi because of the law.⁵⁰ H.B. 1523 has even threatened Mississippi's ability to host sporting events like NCAA championships.⁵¹

Thus, even before going into effect, H.B. 1523 has cost Mississippi's economy—including the local *Amici* and the many other businesses and individuals who rely on the state's economy—millions of dollars. The public interest in economic prosperity weighs heavily against lifting the preliminary injunction.

IV. H.B. 1523 Is Based On Pretextual Concerns About Securing Religious Freedoms That Are Already Protected Under Mississippi Law.

The *Amici* understand and share concerns about the need to protect religious freedoms. Indeed, many of the people who comprise the *Amici*'s ownership, management, employees, and customers, along with their friends, neighbors, and community members, have strongly-held religious beliefs. But religious convictions cannot and should not be used as pretext for State sanctioned discrimination. And that is exactly what H.B. 1523 does.

H.B. 1523 purports to protect the free exercise of religion in Mississippi. Defs.-Apps' Br. at *8. But Mississippians' free exercise of religion is already protected by the First Amendment, the Mississippi Constitution, and by

⁵⁰ Julia Glum, *The HB 2, Anti-LGBT Laws Effect: List Of Concerts, Events Canceled In North Carolina And Mississippi*, *The International Business Times* (April 20, 2016), <http://tinyurl.com/zevbatc>.

⁵¹ *HB 1523 Could Keep MSU, Ole Miss And USM From Hosting Baseball Regionals*, *Mississippi Business Journal* (May 4, 2016), <http://tinyurl.com/jbbtztz>.

Mississippi's Religious Freedom Restoration Act, Miss. Code Ann. § 11-61-1 ("RFRA"). *See generally* CSE Pltfs.-Apps' Br. at *2-3. In particular, RFRA provides that any individual who believes that the government has substantially burdened his or her exercise of religion can sue in order to seek an exemption from the allegedly burdensome law or regulation. Miss. Code. Ann. § 11-61-1(6). Defendants-Appellants concede that RFRA provides substantial protections to Mississippians. As their brief explains, *prior to* passage of H.B. 1523, conscientious-objector protections—the protections that the State identifies as a central rationale for passing and defending H.B. 1523—were available “under [RFRA]—at least to the extent that their conscientious objections rest on religious rather than secular beliefs.” Defs.-Apps' Br. at *7-8.

In acknowledging the scope of existing protections under RFRA, Defendants-Appellants effectively concede that the State's goal in enacting H.B. 1523 was to create a mechanism by which the State could promote the interests of particular Mississippians with select religious beliefs at the expense of other groups. *See id.* at *8. But “[t]he Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (internal citations and quotations omitted). H.B. 1523 is nothing more than an attempt to legislate around a compelling government interest in

protecting vulnerable Mississippians' basic dignity. Therefore, H.B. 1523 must be struck down in the same manner as other instances of invidious discrimination. *See, e.g., Windsor*, 133 S. Ct. at 2693 (invalidating the Defense of Marriage Act); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the government has a compelling interest in "eradicating racial discrimination").

CONCLUSION

Given its significant adverse effects on Mississippi's economy, the business community, the public, and anyone whose beliefs do not directly align with H.B. 1523's "sincerely held religious beliefs or moral values," the *Amici* urge this Court to uphold the District Court's ruling in furtherance of the public interest. For the foregoing reasons, this Court should uphold the District Court's Order granting Plaintiffs-Appellees a preliminary injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE UNDER RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,115 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 type.

Dated: December 23, 2016

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CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, on this the 23rd day of December, 2016:

(1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of December 2016, I electronically filed the foregoing *amicus curiae* brief with the Clerk for the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record.

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