

Nos. 16-60477, 16-60478

**IN THE 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; BRANDIILYNE 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.

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.

On Appeal from the United States District Court for the
Southern District of Mississippi (Northern Division)
Nos. 3:16-cv-00417-CWR-LRA, 3:16-cv-00442-CWR-LRA (Hon.
Carlton Reeves)

**UNOPPOSED MOTION OF GLBTQ LEGAL ADVOCATES &
DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, AND
AMERICAN CIVIL LIBERTIES UNION TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES' PETITIONS FOR
REHEARING EN BANC**

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**Admission Pending*

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record for *amici curiae* GLBTQ Legal Advocates & Defenders (“GLAD”), the National Center for Lesbian Rights (“NCLR”), and the American Civil Liberties Union (“ACLU”) state that GLAD, NCLR, and ACLU are nonprofit corporations with no parent, subsidiary, or stock held by any person or entity, including any publicly held company; and certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- Rims Barber, *Plaintiff-Appellee*
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- Kevin Hayden Theriot, Alliance Defending Freedom, *Counsel to Defendants-Appellants*
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- National Center for Lesbian Rights (NCLR), *Amicus Curiae*
- American Civil Liberties Union (ACLU), *Amicus Curiae*

- Mary L. Bonauto, *Counsel for Amicus Curiae GLAD*
- Kim B. Nemirow, *Counsel for Amici Curiae GLAD, NCLR, & ACLU*
- Andrew J. O'Connor, *Counsel for Amici Curiae GLAD, NCLR, & ACLU*

Dated: July 13, 2017

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UNOPPOSED MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE*

Amici Curiae GLAD, NCLR, and the ACLU (collectively “*Amici*”) respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 29, for leave to file the attached brief as *amici curiae* in support of Plaintiffs-Appellees’ petitions for rehearing *en banc*. All parties have indicated that they do not oppose this motion.

I. IDENTITY OF MOVANTS AND STATEMENT OF INTEREST

Amici have substantial expertise and experience in issues related to the rights of lesbian, gay, bisexual and transgender (“LGBT”) persons.

Through litigation, public policy advocacy, and education, GLAD works to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts regarding marriage, the federal Defense of Marriage Act, and marriage recognition, as well as equal treatment for LGBT persons like all others.

NCLR is a national legal advocacy organization for LGBT people. NCLR has litigated cases representing same-sex couples seeking both the freedom to marry and equal recognition of their marriages in states across the country. NCLR has also represented transgender children, parents, and individuals seeking equal protection and recognition in a variety of employment, family law, school, asylum, and health care cases.

ACLU is a nationwide, nonprofit, nonpartisan organization with over 1,500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU and its state affiliate, the ACLU of Mississippi, have advocated for equal rights of LGBT persons and the freedom to marry for same-sex couples in Mississippi and across the country. They have also advocated for single parents, and people who engage in sexual relations outside of marriage, groups that are also targeted by HB 1523.

II. *AMICI'S* BRIEF IS DESIRABLE AND RELEVANT TO THE DISPOSITION OF THE ISSUES BEFORE THE COURT

Amici's perspective is both desirable and relevant because *Amici* and related organizations work closely with underserved members of the LGBT community directly impacted by HB 1523. The Court should consider *Amici's* brief because it will assist the Court by providing their perspectives regarding the exceptional importance of the constitutional and fundamental rights curtailed by HB 1523.

Amici respectfully submit that, because HB 1523 imposes immediate and concrete harms on Plaintiffs by both causing them dignitary and emotional harms and by limiting their rights under existing contracts and laws, this case warrants the consideration of the full Court regarding issues of great public and legal significance. *Amici's* brief will also show how *en banc* consideration is necessary to achieve uniformity of the Court's law of standing. In a break from a long line of cases in this and other circuits, the panel failed to address the fact that direct,

immediate impairment of contracts and access to the courts are injuries-in-fact sufficient to confer Article III standing.

CONCLUSION

For these reasons, *Amici* respectfully request that the Court grant this unopposed motion and order that the attached brief be filed.

Dated: July 13, 2017

Respectfully submitted,

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**Admission Pending*

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 13, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2).

1. In compliance with Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6), the motion has been prepared in proportionally spaced Times New Roman Font with 14-point type using Microsoft Word 2016.

2. Exclusive of the exempted portions of the motion, as provided in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the motion contains 496 words, consistent with Federal Rule of Appellate Procedure 27(d)(2)(A) and Fifth Circuit Rule 27.4. As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied upon the word count feature of Microsoft Word 2016 in preparing this certificate.

Dated: July 13, 2017

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INTEREST OF *AMICI CURIAE*¹

Amici Curiae GLAD, NCLR, and ACLU hereby incorporate by reference the Interest of *Amici Curiae* section of their brief in support of Plaintiffs-Appellees and affirmance of judgment, ECF No. 513811871.

¹ All parties have consented to the filing of this brief and accompanying motion. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

INTRODUCTION

For the reasons discussed in the petition for rehearing *en banc*, this case presents questions of exceptional importance deserving *en banc* review. Indeed, the full Court should consider whether individuals who suffer dignitary and emotional harms because of HB 1523, a statute that enshrines their unequal status into the law, may seek enjoinder of that statute where it runs afoul of clear Supreme Court precedent. *Barber v. Bryant*, 193 F. Supp. 3d 677, 708 (S.D. Miss. 2016) (finding that HB 1523 was intended to put LGBTQ citizens “back in their place” after the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

But HB 1523 also imposes other immediate, concrete harms overlooked by the panel decision, which are themselves sufficient to support standing and allow Plaintiffs to challenge HB 1523. In a break from a long line of cases in this and other circuits, the panel failed to address the fact that direct, immediate impairment of contracts and access to courts are injuries-in-fact sufficient to confer Article III standing. *En banc* review is thus warranted to avoid anomalous development in the law of standing.

Because of the exceptional importance of the issues, and the need for uniformity in the Court’s decisions, the Court should grant rehearing *en banc*.

I. HB 1523’s Immediate Impairment of Contractual Rights Is Sufficient To Support Standing

In focusing exclusively on the dignitary and emotional harms imposed by HB 1523, the panel decision neglected to consider the traditional property and legal rights the statute would impair.

To support standing, an injury-in-fact must be “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1991). As Plaintiffs observe, HB 1523 “give[s] people who subscribe to the beliefs and convictions endorsed in Section 2 the right to . . . raise violations of the bill as a defense in any judicial or administrative proceeding.” ROA.16-60477.29. This defense may be raised “without regard to whether the proceeding is brought by or in the name of the state government, any private person or any other party.” HB 1523 § 5(1). As a result, HB 1523 directly limits the rights of Mississippians who contract with parties that hold a Section 2 belief, by effectively permitting protected parties to breach or rescind contractual provisions with impunity so long as the party defends the action based on a Section 2 belief. In other words, HB 1523 purports to render contracts *per se* unenforceable in the face an “assert[ed]” Section 2 belief.²

² A “violation[] of the bill” sufficient to establish the Section 5 defense would include whenever a Mississippi court “discrimin[ates]” against a defendant by awarding damages in a breach-of-contract case in the face of the defendants’ “assert[ion]” that the breach was in connection with a Section 2 belief. *See* HB 1523 §§ 4(e), 5(1), 9(2)(b).

It is axiomatic that contractual rights are legally protected interests, and this this Court has long held that the invasion of a contractual right is sufficient to support Article III standing. *See Servicios Azucareros De Venezuela, C.A. v. John Deere Thibodeaux, Inc.*, 702 F.3d 794, 800 (5th Cir. 2012) (“Injuries to rights recognized at common law—property, contracts, and torts—have always been sufficient for [Article III] standing purposes”). Indeed, the right to enforce contractual obligations is so fundamental that the U.S. Constitution expressly prohibits states from interfering with those rights. *See* U.S. Const. art. I § 10 (setting forth that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

Where a party alleges that legislation impairs contractual rights, courts in this and other circuits have consistently held a party has Article III standing to challenge the legislation as unconstitutional. *Ass’n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950–53 (9th Cir. 2013) (noting that, in prior case, “plaintiffs [] established ‘injury in fact’ when the alleged unlawful [legislation] deprived them of rights they held under contract” (citing *Maricopa–Stanfield Irrigation and Drainage District v. United States*, 158 F.3d 428, 435 (9th Cir. 1998))); “Here, as in . . . *Maricopa–Stanfield*, [plaintiff] has an interest in receiving whatever it is guaranteed under its contracts . . . By alleging that the [legislation] will directly affect the rates it is charged, resulting in economic harm,

[plaintiff] has sufficiently established an invasion of a legally protected interest.”); *Western Nat’l Mut. Ins. v. Lennes (In re Workers’ Compensation Refund)*, 46 F.3d 813, 822 (8th Cir. 1995) (finding standing to challenge cost-shifting legislation that would “probably” reduce payments to which plaintiffs were entitled under existing contracts); *Benefit Recovery, Inc. v. Wooley*, CIVIL ACTION No. 03-652-D-M3, 2004 U.S. Dist. LEXIS 30877, at *6–7 (M.D. La. Apr. 15, 2004) (finding plaintiff “clearly has standing in the ordinary sense under *Lujan*” where state insurance commissioner’s directive “will limit the amount of money recoverable by” plaintiff under existing contracts). And the Supreme Court has made clear that a plaintiff “does not have to await the consummation of threatened injury to obtain preventive relief.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (citation omitted).

Plaintiffs have identified contractual rights impaired by HB 1523 sufficient to support standing here.³ For example, the pleading alleges that Plaintiff Taylor is privately employed. ROA.16-60477.21. The impairment of Plaintiff Taylor’s personal contractual rights is both concrete and particularized to Plaintiffs. *See Mich. Bldg. & Constr. Trades Council v. Snyder*, 846 F. Supp. 2d 766, 777 (E.D. Mich. 2012) (“Plaintiffs allege . . . that the Act substantially impairs their rights

³ “The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.” *Skaff v. Meridien N. Am. Beverly Hills*, 506 F.3d 832, 838 (9th Cir. 2007) (citing *Lujan*, 504 U.S. at 569 n.4).

under existing contracts. These are palpable legal injuries sufficient to confer standing.”); *see also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (“the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement” for all plaintiffs). And because HB 1523 creates a blanket defense to “any judicial or administrative proceeding,” and thus effectively impairs the rights of Mississippians (and those who contract with Mississippians) such as Plaintiffs to enforce their contracts in Mississippi courts in the face of an asserted Section 2 belief, it is clear that the impairment is actual.⁴ *Mich. Bldg.*, 846 F. Supp. 2d at 777; *Lake Forest Elem. v. Orleans Parish Sch. Bd.*, CIVIL ACTION NO: 16-2323 SECTION: “H”(4), 2016 U.S. Dist. LEXIS 71357, *12–13 (E.D. La. June 1, 2016) (“[I]f the breaching party is able to assert the law at issue as a defense to a claim for damages, then the law has constitutionally impaired an obligation of the contract” (citing *E & E Hauling, Inc. v. Forest Preserve Dist.*, 613 F.2d 675, 680–81 (7th Cir. 1980))).

Plaintiffs have thus alleged an injury-in-fact sufficient to support Article III standing.

⁴ To require Mississippians such as Plaintiff Taylor to, for example, wait until they are fired for their beliefs or conduct to bring an action for breach of their employment contracts—at which point the doors to the courthouse will be effectively closed to them by the express terms of HB 1523, *see infra* Section II—would be a Catch-22 of the most devastating proportions and would be contrary to established law. *See Babbitt*, 442 U.S. at 298.

II. HB 1523’s Limitation on Plaintiffs’ Access to the Courts to Vindicate Existing Rights Also Supports Standing

Plaintiffs also have standing on the additional ground that the discriminatory impact of HB 1523 interferes with Plaintiffs’ abilities to access the courts to vindicate rights otherwise protected by law. The panel decision applies the incorrect standard in weighing this potential harm. Under the Equal Protection clause of the Fourteenth Amendment, a party establishes injury-in-fact for the purposes of standing when a party is denied the opportunity to receive a benefit because of a discriminatory action. A party need not wait until he or she is actually denied the benefit to bring a claim. *Babbitt*, 442 U.S. at 298.

When considering standing for an Equal Protection claim, “the gravamen . . . is differential government treatment.” *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) (citing, *inter alia*, *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)); *see also Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 n.2 (5th Cir. 1991) (“[I]llegitimate unequal treatment is an injury unto itself” (citing *Heckler v. Mathews*, 465 U.S. 728, 739 (1984))). And the “loss of an opportunity to seek some particular order of relief” from the courts to which a party is otherwise entitled is a concrete harm sufficient to support standing on its own. *Christopher v. Harbury*, 536 U.S. 403, 414 (2002).⁵

⁵ The Supreme Court has recognized the importance of the right of access to the courts in a number of Constitutional contexts. *See, e.g., Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907) (Article IV Privileges and Immunities Clause); *Bill Johnson’s Restaurants, Inc.*

Here, HB 1523 Section 5 discriminates against LGBT Mississippians⁶ by denying them the constitutional right to petition the courts to enforce not only contracts, as discussed *supra*, but also ordinances, policies, and other measures designed to protect LGBT persons within Mississippi from discrimination. HB 1523 provides an absolute defense to judicial and administrative proceedings to those Mississippians who harbor Section 2 beliefs, but not to those who have different views, such as LGBT Mississippians.

Despite HB 1523's clear differential treatment of citizens holding the protected beliefs and those who do not, the panel decision incorrectly applied the reasoning of *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) to conclude that Plaintiffs lacked standing under the Equal Protection clause. *Cf. Moore*, 853 F.3d at 250 (“[S]tanding often turns on the nature and source of the claim asserted.” (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal quotations omitted))). In fact, in *Clapper*, the respondents alleged standing based on a Second Circuit standard that conflicted with the Court's standing precedent. 568 U.S. at 408–11. There was no disparate or discriminatory harm alleged to invoke an Equal

v. NLRB, 461 U.S. 731, 741 (1983) (First Amendment Petition Clause); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335 (1985) (Fifth Amendment Due Process Clause); *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (Fourteenth Amendment Equal Protection Clause); *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) (Fourteenth Amendment Due Process Clause).

⁶ While this brief focuses on its impact on LGBT individuals, HB 1523 also directly harms single parents, and anyone else who has sexual relations outside of marriage. HB 1523 § 2(b).

Protection standing analysis. *Id.* This Court’s decision in *Public Citizen, Inc. v. Bomer* is equally inapplicable. 274 F.3d 212 (5th Cir. 2001). In *Bomer*, the plaintiffs did not allege standing based on Equal Protection violations at all, but instead asserted standing only under the Due Process Clause, which does not rest on disparate treatment. *Id.* at 214.

For Equal Protection purposes, “the ‘injury in fact’ . . . is the denial of ***equal treatment*** resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis added). The party challenging the barrier “need not allege that he would have obtained the benefit but for the barrier in order to establish standing.” *Id.* To establish standing, Plaintiffs need only show that they are ready to receive the benefit “and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.*

This Court’s recent decision in *Moore* clarifies the factors required to establish harm under the Equal Protection clause. 853 F.3d at 250. In *Moore*, this Court ruled that exposure to a discriminatory message alone is not sufficient to establish standing; a plaintiff must allege unequal *treatment*. *Id.* at 249–50. Unlike the plaintiff in *Moore*, however, Plaintiffs here allege that HB 1523 results in unequal treatment with respect to enforcement of tangible rights. *Id.* at 250–51. Throughout the pleadings, Plaintiffs have alleged HB 1523’s discriminatory impact

and described the barriers it establishes to enforcing existing rights against those who assert Section 2 beliefs. *See, e.g.*, ROA.16-60477.29; ROA.16-60478.14–15, 37–38, 42–49.

Non-discrimination ordinances and policies of state institutions, for example, confer tangible rights that HB 1523 prevents Plaintiffs from enforcing. The City of Jackson affirmatively protects by ordinance residents and visitors from discrimination based on sexual orientation and gender identity. ROA.16-60477.254–55 (Jackson Mun. Code § 86-226 (the “Ordinance”)). The Ordinance empowers the City of Jackson to hear discrimination complaints and issue penalties and equitable relief. *Id.* § 86-230. Plaintiff Day, as described in the Complaint, ROA.16-60477.20, is a transgender woman, whom the Ordinance was passed to protect from discrimination. But HB 1523 Sections 2(c), 4(e) and 5 erect a barrier to her enforcement of the Ordinance in the face of an asserted defense that her transgender status conflicts with the defendant’s Section 2 beliefs or convictions. That disparate impact on the opportunity to assert a right constitutes an injury-in-fact. *Ne. Fla.*, 508 U.S. at 666 (“[T]he ‘injury in fact’ . . . is the denial of ***equal treatment*** resulting from the imposition of the barrier.” (emphasis added)).

Moreover, students and employees of universities in Mississippi, as Plaintiff Glisson is alleged to be, ROA.16-60477.21, likewise enjoy protections under institutional antidiscrimination policies. *See* ROA.16-60477.258–62 (Univ. of S.

Miss. Antidiscrimination Policy); *see also* Univ. of Miss., *Non-Discrimination and Complaint Procedure* (2016), https://law.olemiss.edu/assets/10848182_active_20140604.pdf (setting forth procedures for individuals to “seek relief” against discrimination based on sexual orientation, or gender identity or expression). Similarly, healthcare institutions, including state-run hospitals, maintain institutional policies against discrimination on the basis of sexual orientation or gender identity or expression and provide mechanisms for addressing grievances, of which all individual Plaintiffs may take advantage. *See, e.g.*, Miss. State Hosp., *Notice of Nondiscrimination*, http://www.msh.state.ms.us/Notice_of_Nondiscrimination.pdf. But HB 1523 impairs the Plaintiffs’ rights to enforce all such antidiscrimination measures in the courts and administrative forums by providing defendants with an absolute defense by asserting Section 2 beliefs.

In sum, the imposition of barriers to enforcing these antidiscrimination measures impairs the right of access to the courts, which establishes an injury-in-fact under the Equal Protection clause that is sufficient to confer Article III standing on Plaintiffs. *See Ne. Fla.*, 508 U.S. at 666.

CONCLUSION

For all the reasons discussed above, *Amici* respectfully submit that this Court should grant the petitions for rehearing *en banc* and affirm the judgment below.

Dated: July 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman Font with 14-point type using Microsoft Word 2016.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the brief contains 2561 words, consistent with Federal Rule of Appellate Procedure 29(b)(4). As permitted by Federal Rule of Appellate Procedure 32(g)(1), I have relied upon the word count feature of Microsoft Word 2016 in preparing this certificate.

Dated: July 13, 2017

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