Commonwealth of Massachusetts
Supreme Judicial Court

DAR-27419

ATTORNEY GENERAL MAURA HEALEY,

Petitioner-Appellee,

v.

FACEBOOK, INC.,

Respondent-Appellant.

On Reservation and Report from the
Supreme Judicial Court for Suffolk County

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENT-APPELLANT FACEBOOK, INC.

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April 23, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, Chamber of Commerce of the United States of America, by its undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of Chamber of Commerce of the United States of America: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of Chamber of Commerce of the United States of America Stock: None.

/s/ *Kevin P. Martin*
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ISSUE PRESENTED

1. Whether a company can be compelled to produce information and communications generated as part of an internal investigation that was conducted by and at the direction of counsel for purposes of assessing legal risk and providing legal advice.

2. Whether a company that conducts an attorney-led internal investigation in anticipation of litigation can nonetheless be compelled to provide information developed according to lawyer-developed search criteria for various levels of scrutiny and analysis during the course of that investigation, simply because that company also employs routine non-legal enforcement of its policies.

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every

[1] The Chamber declares, in accordance with Mass. R. App. P. 17(c)(5), that: (1) no party, nor any party's counsel, has authored this brief in whole or in part; (2) no party, nor any party's counsel, has contributed money that was intended to fund preparing or submitting this brief; (3) no person or entity—other than the Chamber or its counsel—has contributed money that was intended to fund preparing or submitting this brief; and (4) neither the Chamber nor its counsel represents or has represented one of the parties to this case in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case is significant to the Chamber because businesses regularly engage counsel to conduct internal investigations into compliance with regulatory and contractual obligations. These investigations often have some "business" purpose, even as they are intended to guide the businesses' efforts to avoid or minimize litigation risk. The Superior Court's decision below—that corporate internal investigations are not protected by the attorney-client privilege or work-product doctrine unless litigation risk was a "but for" cause of the investigation, and that any privilege is waived when a corporation makes any disclosure regarding the investigation—is wrong as a matter of law, and risks discouraging America's business community from conducting such investigations (to the ultimate detriment of corporate compliance). For these reasons, the Chamber has a considerable interest in the Court's direct and prompt review of the Superior Court's judgment.

INTRODUCTION

It is undisputed that the internal investigation conducted by Facebook in this case is a "lawyer driven effort" undertaken because of the inevitable prospect of widespread litigation in the wake of the Cambridge Analytica incident. Yet the Superior Court held that the investigation cannot be privileged, because the

investigation bears some resemblance to Facebook's pre-existing compliance efforts, and because Facebook made general disclosures regarding the existence and scope of the investigation to the public. This Court should exercise its discretion and grant direct appellate review, because the Superior Court's decision was not only wrong, but because it implicates important issues regarding the scope of the attorney-client privilege and work-product doctrine requiring the Court's immediate attention.

Direct appellate review is necessary in this case because the issue presented by the Superior Court's decision is of widespread, immediate consequence. Corporations have long relied on the expectation that the attorney-client privilege and work-product doctrine extend to internal investigations, and scores of government agencies encourage or require such investigations to ensure compliance with the law. Investigations that mix business, compliance, and legal objectives therefore have become commonplace. The decision below would strip these investigations of the privilege's protections and would chill corporations from undertaking them, a result that would have significant social costs.

Review is also necessary because the decision below sets a dangerous precedent, undermining settled principles regarding the attorney-client privilege and the work-product doctrine. This Court has long aligned its interpretation of the privilege and the work-product doctrine with that of the federal courts. But authoritative federal opinions have come to the opposite conclusion from the Superior Court's in this case. Those opinions have held that an internal investigation does not lose its privileged

status simply because it fulfills a business purpose *in addition to* a legal purpose. They have likewise rejected the proposition that the privilege is waived when the corporation merely discloses the existence of the investigation in general terms. If left undisturbed, the Superior Court's decision would make Massachusetts privilege and work-product doctrine an anomaly, undermining the doctrine's uniform application across the country. That is particularly dangerous for a nationwide corporation, such as Facebook and many of the Chamber's other members, which often face litigation and investigations over the same subject matter in multiple jurisdictions.

Accordingly, for the reasons given by Facebook and herein, the Chamber urges the Court to grant Facebook's application for direct appellate review.

I. THE ISSUE PRESENTED IS OF GREAT IMPORTANCE.

The Court should grant Facebook's application for direct appellate review because this case presents significant questions regarding the scope of the attorney-client privilege and work-product doctrine in internal investigations, an issue with national ramifications. *See* Mass. R. App. P. 11(a)(3) (direct appellate review is appropriate for "questions of such public interest that justice requires a final determination by the full Supreme Judicial Court"). Internal corporate investigations conducted on a regular basis to ensure compliance with regulatory and contractual obligations have become ubiquitous. Corporations rely on the attorney-client privilege's and work-product doctrine's protections in order to ensure that they, and their counsel, may engage in candid and full disclosure during the course of these

investigations. Government regulators and prosecutors also depend on these investigations to ensure cooperation and compliance from corporations. The decision below would eviscerate the application of the attorney-client privilege and work-product doctrine in this context, discourage corporations from conducting internal investigations, and undermine the significant public interest in encouraging these investigations.

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has long recognized that "[a] construction of the attorney-client privilege that would leave internal investigations wide open to third-party invasion would effectively penalize an institution for attempting to conform its operations to legal requirements by seeking the advice of knowledgeable and informed counsel." *In re Grand Jury Investigation*, 437 Mass. 340, 351 (2002). *See also In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2001) (work-product doctrine "facilitates zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party").

By their very nature, internal-investigation materials represent a company's effort to ensure compliance with its contractual and/or regulatory obligations and to avoid the risk of litigation. To be meaningful, they *must* contain candid assessments not only of the strengths, but also of the potential weaknesses, of a company's

compliance efforts, and are likely to highlight areas in which a company may face litigation exposure. *See Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 395 (2013) (referring to "the policy rationale underlying the attorney-client privilege: it promotes candid communications between attorneys and organizational clients"). Without the "assurance" that the privilege's protections extent to internal investigations, "attorneys and clients might be inhibited from engaging in the free, complete and candid exchange of information that is the cornerstone of an effective attorney-client relationship." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 289 (D. Mass. 2000) (internal quotation marks and citation omitted); *see also Fleet Nat. Bank v. Tonneson & Co.*, 150 F.R.D. 10, 14 (D. Mass. 1993) ("To the extent there is any risk that they will have to deliver to those opponents their ideas, theories and analyses and those of their consultants, they will be far more circumspect in what they put down or permit their consultants to put down on paper, assuming they remain willing to retain consultants at all. Without the privilege, efficiency and effectiveness will, thus, inevitably decline.").

The reliance of corporations on the expectation that internal investigations led by counsel will be afforded the protections of the attorney-client privilege and work-product doctrine has only grown with time. Today, "[i]nvestigations are a fact of life at any large corporation." Carl Jenkins & Norman Harrison, *Standard Issues in Corporate Investigations: What GCs Should Know*, in *Corporate Investigations 2018* 8 (2d ed.). Indeed, experienced practitioners in the field estimate that "a typical

multinational company may have dozens of probes under way at any given time." *Id*. Regulatory and criminal agencies now often encourage, sometimes require, and frequently depend upon companies conducting internal investigations. Government contractors and businesses in closely-regulated industries often must institute compliance programs and self-report violations to these agencies. *See, e.g.*, 48 C.F.R. § 52.203–13 (contracting regulations); 12 C.F.R. § 44.20(a) (Federal Bank Act); 12 C.F.R. § 21.21 (Bank Secrecy Act); 42 C.F.R. § 423.504 (Medicare Part D providers); Pub. L. No. 107-204 § 301, 116 Stat. 745, 775-77 (2002) (Sarbanes-Oxley requirements for public companies to establish procedures for resolving complaints concerning accounting and auditing).[2] Similarly, prosecutors encourage and consider compliance measures in charging decisions. *See, e.g.*, United States Sentencing Guidelines Manual § 8B2.1 cmt. n.3 (2018); Dep't of Justice, Criminal Div., and Sec. & Exch. Comm'n, Enforcement Division, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 52–54 (Nov. 2012); Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Apr. 2019). These regulations and policies

[2] *See also, e.g.*, 45 C.F.R. § 75.113 (Department of Health and Human Services regulations requiring grant applicants and awardees to disclose certain criminal violations affecting awards); 20 C.F.R. § 683.200(h) (similar Department of Labor rule); 22 C.F.R. § 126.1(e)(2) (International Traffic in Arms regulations requiring disclosure of sale of defense articles to certain prohibited countries); 19 U.S.C. § 1592(c)(4) (merchandise exporting self-disclosure policy); 65 Fed. Reg. 19,618 (Apr. 11, 2000) (EPA Audit Policy); 22 C.F.R. § 127.12(c) (arms trafficking self-disclosure policy).

recognize the social value of internal compliance programs, including internal investigations.

The Superior Court's decision in this case would drastically undermine these policies. According to the Superior Court's logic, an internal investigation cannot be privileged if it is related to some pre-existing compliance policy, *see* Add. 54 & n.4, effectively stripping the privilege away from any investigation required or encouraged by the government. Likewise, under the Superior Court's reasoning, any privilege attaching to the investigation is waived if its existence is described in any manner to an external audience, *id.* at 57–58—precisely what happens in highly regulated industries, where corporations often must certify that they have undertaken required compliance measures and are encouraged to self-report violations, and when any public company discloses a material event.

In other words, the rule articulated by the Superior Court—that an investigation is only privileged if legal advice was its "but-for" cause, and that any privilege attaching to an investigation is waived if the investigation is disclosed in even general terms—risks eviscerating the privilege in the internal-investigation context. Such a rule would benefit no one. It would discourage corporations from undertaking rigorous compliance efforts and discovering misconduct in the first instance, and it would undercut the government's significant interest in encouraging and rewarding compliance and self-reporting. This Court should grant direct appellate review to protect these significant interests.

II. THE SUPERIOR COURT'S DECISION WAS WRONG AND SETS A DANGEROUS PRECEDENT.

Direct appellate review is also warranted because the Superior Court's decision was wrong as a matter of law and sets a dangerous precedent with national implications. The Superior Court's decision constituted an unprecedented and aggressive application of applicable Massachusetts law concerning the attorney-client privilege and work-product doctrine. Other courts around the country, confronting similar situations, consistently have reached the opposite result from that which the Superior Court reached here. Leaving the decision below undisturbed risks transforming Massachusetts into an outlier in privilege law, which would have repercussions far beyond the Commonwealth.

A. The Superior Court's Decision Contradicts The Federal Privilege Authority.

The contours of the attorney-client privilege and the work-product doctrine under Massachusetts law are the same as under federal law in this context. *See Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 316 n.25 (2009) (Massachusetts work-product rule mirrors federal rule); *In re Grand Jury Investigation*, 437 Mass. at 350–51 (relying on *Upjohn* to conclude that attorney-client privilege applies to corporate investigations). And the decision below is irreconcilable with the federal authority on privilege to which this Court has looked for guidance.[3]

[3] The Superior Court's decision is also contrary to this Court's precedent, for the reasons stated more fully in Facebook's application for direct appellate review.

The Superior Court concluded that Facebook's investigation could not be privileged as a matter of law—*despite* acknowledging the undisputed facts that the investigation was a "lawyer driven effort" that was "born amid and because of the Cambridge Analytica incident"—because it arguably had a mixed purpose and because Facebook would have engaged in *some* sort of more routine compliance review regardless. Add. 54 & n.4 (internal quotation marks omitted). Authoritative federal opinions have come to the exact opposite conclusion. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (*"KBR I"*), the D.C. Circuit, in an opinion by then-Judge Kavanaugh, granted the extraordinary remedy of issuing a writ of mandamus to vacate a district court opinion that relied on the same reasoning that the Superior Court employed in this case. The district court had held that the results of an internal investigation led by counsel for Kellogg Brown & Root ("KBR") was not privileged, because the investigation was undertaken pursuant to an internal corporate policy and helped ensure compliance with relevant Department of Defense regulations. *KBR I*, 756 F.3d at 758–59. The district court reasoned that "if there was any other purpose behind the communication [other than the provision of legal advice], the attorney-client privilege apparently does not apply." *Id.* at 759.

The D.C. Circuit emphatically rejected this as "the wrong legal test." *KBR I*, 756 F.3d at 759. Withdrawing the protections of the privilege simply because an

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internal investigation also fulfills a compliance purpose would punish corporations in a variety of heavily regulated industries. *Id*. And attempting to divine the *one* determining purpose of an investigation "can be an inherently impossible task." *Id*. The court held instead that:

> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.

Id. at 760.[4]

That holding applies with full force to the Attorney General's request for Facebook's internal investigation materials. To hold otherwise "would eradicate the attorney-client privilege for internal investigations conducted by businesses that are

[4] The rule articulated by then-Judge Kavanaugh in *KBR I* has been cited favorably and applied by courts across the country. *See, e.g.*, *SEC v. Navellier & Assocs., Inc.*, 2018 WL 6727057, at *3 (D. Mass. Dec. 21, 2018); *Pitkin v. Corizon Health, Inc.*, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig.*, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); *Edwards v. Scripps Media, Inc.*, 2019 WL 2448654, at *1–2 (E.D. Mich. June 10, 2019); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015); *Todd v. STAAR Surgical Co.*, 2015 WL 13388227, at *6 (C.D. Cal. Aug. 21, 2015); *Smith-Brown v. Ulta Beauty, Inc.*, 2019 WL 2644243, at *2–3 (N.D. Ill. June 27, 2019); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 231 (E.D.N.Y. 2019).

required by law to maintain compliance programs, which is now the case in a significant swath of American industry." *KBR I*, 756 F.3d at 759.[5]

The Superior Court's conclusion that internal-investigation materials are not protected by the work-product doctrine is similarly contrary to federal authority. The Superior Court agreed with the Attorney General that the materials could not be work-product because their "primary motive" was not preparation for litigation. Add. 52–54. But that is not the test—indeed, it is precisely the test that this Court has *rejected*. In *Comcast*, this Court expressly declined to adopt a "primary, ultimate, or exclusive purpose" test for work product, and instead adopted a "because of" test. *Comcast*, 453 Mass. at 316–17 (2009). The Court, following the lead of the majority of federal courts of appeals, reasoned that the "because of" test was most consistent with the doctrine, because "work product protection should not be denied to a document that analyzes expected litigation *merely because it is prepared to assist in a business decision*." *Id.*

[5] *Cf. In re Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable . . . the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d at 530 ("Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line.").

at 316 (emphasis added) (quoting *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998)).[6] The decision below goes against this broad consensus.

Likewise, the Superior Court's aggressive holding that Facebook waived any privilege over its internal investigation materials is directly contrary to well-established principles. The Superior Court held that materials could not be privileged because Facebook had "touted" the internal investigation and provided "updates" regarding it to the public. Add. 57. In other words, the court found that Facebook had put the entire investigation at issue merely by describing it generally to the public.

That is not the law—and once again, an authoritative federal opinion demonstrates that it is not. In a follow-on to the *KBR I* decision, the D.C. Circuit again granted a writ of mandamus to correct another erroneous privilege decision in the same case. This time, the district court had held that KBR had put its internal investigation at issue, and therefore waived privilege over it, by (among other things) representing in a footnote to its summary judgment papers that it had conducted the investigation and reported no wrongdoing from it, and that it does report wrongdoing when

[6] As the *Comcast* Court observed, at least seven federal circuit courts have adopted the "because of" test. *Comcast*, 453 Mass. at 317 n.26; *see also Adlman*, 134 F.3d at 1199; *State v. United States Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118–19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987); Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.) (endorsing "because of" test).

discovered. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 146 (D.C. Cir. 2015) ("*KBR II*"). The district court reasoned that this was meant to create an inference that the investigation found no wrongdoing occurred. *Id*. The D.C. Circuit disagreed, finding that because KBR "neither directly stated that the [internal] investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation . . . [they had] not based a claim or defense upon the attorney's advice." *Id*. at 146. The same logic applies here: The Superior Court did not find that Facebook has raised the existence of its investigation as a defense to liability or proof that no wrongdoing has occurred.

In short, the decision below repeatedly runs afoul of established principles of privilege law. This Court should grant direct appellate review and reaffirm those principles.

B. The Superior Court's Decision Risks Making Massachusetts Privilege And Work-Product Law An Outlier, With Negative Consequences Nationwide.

Direct appellate review is also warranted because the Superior Court's decision would take the privilege and work-product laws of the Commonwealth far outside the mainstream. As explained above, *see supra* Part II.A, this would be a radical departure from this Court's practice of harmonizing Massachusetts privilege and work-product law with analogous federal law. It also threatens the consistent application of privilege and work-product law across the country.

Courts have long acknowledged that in order to be effective, the attorney-client privilege and work-product doctrine depend on clear, predictable, and uniform application. "If the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.[7] This principle requires coherence and stability not only within jurisdictions, but across them—particularly for corporations such as Facebook and the Chamber's membership, which operate all over the country.

Internal investigations such as the one undertaken by Facebook in this case will almost certainly identify the key facts and documents pertinent to the subject matter of the investigation, as determined by counsel in consultation with its client (or vice versa). Internal investigation materials might also identify the names of a company's employees, or customers or contractual counterparties, that are suspected of wrongdoing—or whom the company might have wronged. Internal investigation

[7] *See also, e.g.*, *KBR I*, 756 F.3d at 763 (Kavanaugh, J.) (finding mandamus appropriate in part because "uncertainty matters in the privilege context"); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain."); *Ross v. City of Memphis*, 423 F.3d 596, 604 (6th Cir. 2005) (rejecting lower court's interpretation of privilege because it "renders the privilege intolerably uncertain"); *Nesse v. Pittman*, 206 F.R.D. 325, 331 (D.D.C. 2002) (noting "the societal interest in predicting with certainty when the attorney-client privilege would apply").

materials, in other words, can serve as a roadmap for litigation against the company, identifying vulnerabilities that may never have occurred to an adversary and, in any case, greatly simplifying the adversary's task. *See Chambers*, 464 Mass. at 395 (noting the "unfair disadvantage that would result" if a party "with adverse interests, and who seeks to vindicate those interests against a corporation, could access the corporation's confidential communications with counsel"); *Fleet Nat. Bank*, 150 F.R.D. at 14 ("to the extent such disclosure [of work-product materials] is actually mandated, less conscientious opponents, who are unable or unwilling to invest the time or money to prepare as thoroughly, will gain a windfall").

The Superior Court's decision risks exposing these materials to discovery not only in Massachusetts, but also in other jurisdictions. If the materials in this case were not produced subject to a protective order foreclosing their further distribution, they may be shared with other government bodies or potential private litigants. Enterprising litigants in one case might submit requests for production specifically seeking materials produced in related litigations or government investigations. And production of a company's internal investigation in Massachusetts could undermine its efforts to claim privilege or work-product protection elsewhere. The decision below, if left undisturbed, would cause immediate instability nationwide.

CONCLUSION

The Court should grant Facebook's application for direct appellate review.

Respectfully submitted,

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April 23, 2020

CERTIFICATE OF COMPLIANCE

I, Kevin P. Martin, counsel for *Amicus Curiae*, certify pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 17 and 20. This brief contains 4,100 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

/s/ Kevin P. Martin
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CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for *Amicus Curiae*, hereby certify this 23rd day of April, 2020, that I have served a copy of this Brief by causing it to be delivered by eFileMA.com to counsel of record for Petitioner-Appellee who are registered users of eFileMA.com:

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