Nos. 18-2175 & 18-2176

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GREATER PHILADELPHIA CHAMBER OF COMMERCE,
INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS
Plaintiff-Appellee

v.

CITY OF PHILADELPHIA AND PHILADELPHIA COMMISSION ON HUMAN RELATIONS
Defendant-Appellant

On Appeal From The United States District Court for The Eastern District Of Pennsylvania
Case No. 2:17-cv-01548

BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, THE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLEE/CROSS-APPELLANT THE GREATER PHILADELPHIA CHAMBER OF COMMERCE

Steven P. Lehotsky
Jonathan Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

Robert L. Byer
Robert M. Palumbos
Andrew R. Sperl
John E. Moriarty
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae

United States Court of Appeals for the Third Circuit

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

NOS. 18-2175 & 18-2176

GREATER PHILADELPHIA CHAMBER OF COMMERCE,
INDIVIDUALLY AND ON BEHALF OF ITS MEMBERS

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CITY OF PHILADELPHIA AND PHILADELPHIA COMMISSION ON HUMAN RELATIONS

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, the amici, Chamber of Commerce of the United States, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Manufacturers' Association, and the National Federation of Independent Business Small Business Legal Center, make the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

None.

/s/ Robert M. Palumbos
Counsel for Amici

November 28, 2018

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INTRODUCTION

Under the Ordinance, Philadelphia prohibits employers from inquiring about and relying on information that has been central to non-discriminatory hiring processes for decades. By prohibiting any employer that does business in the City from inquiring about or relying on the wage history of potential employees, the Ordinance effects a content-based restriction on legitimate speech and a substantial change to the hiring practice of thousands of employers. This regulation of speech does not pass strict or intermediate scrutiny because it sweeps far more broadly than necessary to serve its stated purpose.

The Ordinance will significantly impact how members of the Chamber of Commerce of the United States of America ("U.S. Chamber"), the Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber"), the Pennsylvania Manufacturers' Association ("PMA"), and the National Federation of Independent Business ("NFIB") do business. It will make hiring harder and more expensive and will harm many workers it is intended to benefit. In return, the Ordinance will not even serve its stated goals. As a result, the Ordinance is not just questionable policy, it is unconstitutional.

The district court properly enjoined the City from implementing the Ordinance's prohibition on inquiring about wage history. By declining to enjoin the Ordinance's companion prohibition on employer reliance on wage history, the district court drew a line that is both constitutionally irrelevant and impossible to police. The Court should enjoin the Ordinance in full.

STATEMENT OF INTEREST

The U.S. Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. More than 96% of the U.S. Chamber's members are small businesses with 100 or fewer employees. An important function of the U.S. Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The Pennsylvania Chamber is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ more than 50% of Pennsylvania's private workforce. The Pennsylvania Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

PMA is the century-old statewide trade organization representing the interests of the manufacturing sector in the state's public policy process. PMA's mission is to improve Pennsylvania's economic competitiveness by enacting a pro-growth legislative agenda in Harrisburg. The manufacturing sector adds over $82 billion to Pennsylvania's economy each year, directly employing more than a half-million Pennsylvanians on the plant floor, and that core manufacturing function sustains millions of additional Pennsylvania jobs in supply chains, distribution networks, and vendors of industrial services.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The Ordinance will affect the hiring practices and business of members of the U.S. Chamber, the Pennsylvania Chamber, PMA, and the National Federation of Independent Business Small Business Legal Center. Many of these members do business in Philadelphia and routinely inquire about and rely on wage histories of potential employees for legitimate business reasons. The Ordinance will also indirectly affect the interests of members in other cities and states that are considering whether to follow in Philadelphia's footsteps.

The amici have moved for leave to file this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. They state 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 this brief; and (iii) no other person contributed money that was intended to fund preparing or submitting this brief other than the amici and their counsel. *See* Fed. R. App. P. 29(a)(4)(E).

ARGUMENT

I. The Ordinance unconstitutionally restricts significant amounts of legitimate speech that is essential to hiring processes.

The Ordinance states that employer inquiries and reliance on wage history "only serv[e] to perpetuate gender wage inequalities."[1] That is simply not true. The Ordinance bans what have long been accepted best practices in hiring: asking prospective employees how much they make, and using that information to propose a competitive and fair salary. Because the Ordinance restricts the speech of every employer that does business in Philadelphia, no matter where that employer is based, it affects thousands of employers across the country. And it has the potential to discourage many employers from choosing to do business in Philadelphia at all.[2]

To understand the significance of the Ordinance's changes, and to see why those changes are unnecessary, one need only consider how wage history is

[1] Phila. Code § 9-1131(1)(d).

[2] *See* Craig Ey, *Push back against anti-business regs*, Philadelphia Business Journal, Jan. 12, 2017.

used at each stage of the hiring process and what hiring processes will look like when that information is unavailable. When viewed in that light, it becomes clear that both the inquiry and reliance provisions of the Ordinance are unconstitutionally broad.

A. The availability of wage history helps employers throughout the hiring process.

The Ordinance is based, in part, on the implausible premise that employers can determine at the outset of every hiring process what salary to offer for a position. In testimony before the City Council, the Executive Director of the Philadelphia Commission on Human Relations made that assumption explicit, stating that "the goal is to get people to set a base salary for the job before they start hiring."[3]

In reality, employers do not always have perfect—or even good—information about the labor market for any particular job when they begin a hiring process. That is particularly true for small businesses that operate with less knowledge about the labor market. Larger employers may have access to information about the market for a particular position through dedicated human resources departments, recruiters, and more significant experience. By contrast, an owner of a new, five-employee business may not have any way to accurately estimate the prevailing market wage for a bookkeeper, a business

[3] Hearing on Bill No. 160840 before the Philadelphia City Council Committee on Law and Government at 28:5-7 (Nov. 22, 2016) (testimony of Rue Landau).

manager, or a controller, especially where the business is hiring for newly created positions.

Inquiring about and relying on prior wage information from the pool of potential employees is a highly efficient way for employers to determine a competitive salary for a position as the hiring process progresses, instead of at its outset.[4] The Ordinance does away with that information gathering entirely and requires employers to take a "shot in the dark" before the hiring process even begins. That change necessarily makes it more expensive for employers to get information about the labor market. It also makes it harder for them to post a job because, when employers decide how to define a position and whether to post it, they have a budget in mind as well as a perceived need. Inquiring about pay history throughout the hiring process gives the employer accurate and timely information about whether their expectations going into the labor market were realistic and whether their search is likely to be fruitful. It also allows them to adjust their proposed salary if they have overestimated or underestimated the prevailing market wage.

By taking away an important tool through which employers can sharpen and, if necessary, correct their understanding of the labor market, the Ordinance imposes a new burden on them to understand that market in advance. Once again, this change disproportionately harms small businesses.

[4] Editorial, *What You Can't Ask a Job Candidate*, Wall Street Journal, Apr. 8-9, 2017, at A12.

The marginal costs of attempting to understand the labor market at the outset of a hiring process are far greater for small businesses than large ones.

B. Inquiring about wage history allows employers to efficiently screen applicants whose salary expectations are a poor match for the position.

On average, it takes 52 days and $4,000 to fill an open position.[5] Employers have a legitimate interest in making hiring as efficient as possible. Once employers post a position, the Ordinance will make it even harder for them to screen applications. Because employers will have less information about the wage market for a particular position before they post it, the applicants they attract may diverge from the employer's budget for the position. Not being able to ask applicants about their salary history will force employers to potentially keep in the mix numerous applicants who are simply not a good fit for the position. This restriction not only makes the process lengthier, it also diverts the employer's attention from applicants who may be a better fit.

If it turns out that a job posting is not attracting applicants with salary expectations that match the employer's expectations, the employer can rework the job description and repost the position. The Ordinance would hinder that, if fully implemented. By depriving employers of past salary information, the Ordinance will often cause employers to find out much later—during the

[5] Bersin by Deloitte, *WhatWorks Brief: Talent Acquisition Factbook 2015: Benchmarks and Trends in Spending, Staffing, and Key Recruiting Metrics* (April 2015), available at https://legacy.bersin.com/uploadedfiles/042315-ta-factbook-wwb-final.pdf.

interview and negotiation process—that the prospective applicants they have attracted are not a good fit. If it turns out after the interview process that an applicant's salary requirements do not fit with the employer's offer, "the entire process was a waste of time" for both employer *and* applicant.[6] In that case, they will have to start the process over again, at significant expense.

Prohibiting inquiries about pay history at the screening stage also potentially hurts applicants with a history of lower wages. The Council appears to have assumed that a history of lower wages will always reduce the salary that an applicant will ultimately be offered or be able to negotiate. That is a significant oversimplification. At the screening stage, an employer might be *more* likely to consider a qualified candidate with a lower wage history. That is not to suggest that workers benefit from being paid less than the market can bear, only that the Ordinance does not account for the complex realities of the labor market.

The Ordinance may also result in employers more frequently guessing the salary history of applicants, with the result that opening salary offers from employers to persons with lower wage history will be lower than they would be if the employers actually knew and could rely on the wage history.[7] That effect

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[6] Gerald Skoning, *When It's Illegal to Ask, 'How Much Do You Make?'*, Wall Street Journal, Dec. 12, 2017, https://www.wsj.com/articles/when-its-illegal-to-ask-how-much-do-you-make-1513124971.

[7] Fabiola Cineas, *Here's How the Wage Equity Law Kenney Just Signed Could Hurt Women*, Philadelphia Magazine, Jan. 23, 2017, available at http://www.phillymag.com/business/2017/01/23/wage-equity-women-philadelphia/.

is one of many potential unintended consequences of the Ordinance. Such consequences are unpredictable and likely to hurt the people the Ordinance is intended to help.

C. Because wage history conveys legitimate information about an applicant, prohibiting reliance on wage history will not make negotiations fairer.

Once an employer has decided to interview an applicant, the Ordinance makes it harder for the employer to find out and rely on legitimate information about the applicant's performance and qualifications. Consistent history of salary increases and bonuses are a reliable indicator of a prospective employee's performance quality, particularly in the financial, legal, and accounting sectors, where an individual employee's performance is closely tied to bonuses and salary increases.[8] By prohibiting employers from inquiring about or relying on pay history, the Ordinance denies them useful information for evaluating the quality of candidates during the hiring process.

The City Council identified no evidence establishing that pay disparities between men and women are the result of discrimination, let alone that they are due *primarily* to discrimination. Accordingly, as the Chamber of Commerce for Greater Philadelphia pointed out, "the Ordinance does not serve the City's interest in eliminating *discriminatory* pay disparities." (Emphasis in original).[9]

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[8] Am. Compl. Ex. C ¶ 9(a) (JA0129); Am. Compl. Ex. D ¶¶ 9(d), 18 (JA0138, JA0141); Am. Compl. Ex. L¶ 9 (JA0205-06); Am. Compl. Ex. N ¶ 10(c) (JA0225-26).

[9] Amended Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction ("Pl. Br.") (ECF No. 32-1, Filed April 6, 2017) at 9.

Likewise, the district court found that "[n]ot one witness pointed to any study, data, statistics, report, or any other evidence to support the proposition that initially depressed wages reflect discrimination. And, none of the testimony addressed why asking about wage history necessarily results in the perpetuation of an initial discriminatory wage."[10]

That is not to deny that wage discrimination exists. But the City's unsubstantiated supposition that discrimination may affect wage history does not undermine the fact that wage history can convey legitimate information about an applicant, such as how successful they have been in their current job and their reasonable salary expectations. Discrimination may theoretically taint many aspects of an applicant's resume, including the applicant's college grades, job titles, or gaps in employment. But the law does not prevent employers from inquiring about or relying on these other aspects of an applicant's resume. Nor should it. An applicant's wage history similarly conveys legitimate and important information to a potential employer.

The Ordinance also does not make salary negotiations fairer. It is an oversimplification to suggest that applicants will necessarily negotiate higher salaries if employers are forbidden from inquiring about their salary history. Without knowledge of an applicant's previous salary, an employer may be more likely to "bid low" and offer less than if the applicant's salary were known, which will often ultimately result in a lower salary for a successful applicant.[11]

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[10] JA0036.

[11] Cineas, *supra* note 7.

The problem of low bidding is likely to disproportionately affect women, because employers may assume that they make less and will therefore accept a lower salary.[12]

By declining to enjoin the Ordinance's prohibition on "rely[ing] on the wage history of a prospective employee . . . in determining the wages for such individual," the district court created significant uncertainty and risk for employers.[13] It is unclear whether the statute makes it illegal for employers to consult publicly available salary information—for instance, information about starting salaries for associates at a competitor law firm—and then use that information in making a competitive salary offer. It is likewise uncertain whether the Ordinance imposes liability, including potential *jail time*, on human resources staff who might use wage history information without investigating whether it was obtained "knowingly and willingly" from an applicant they might have never spoken to personally. Not only does this uncertainty burden employers, it also illustrates the Ordinance's overbreadth and demonstrates that it is not narrowly tailored and is "more extensive than necessary." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001).

The district court permitted employer inquiries about wage history but not employer reliance on that same information. That distinction is infeasible for employers to observe in practice. An employer that permissibly inquires about and has knowledge of wage history is inevitably at risk. The Ordinance

[12] *Id.*

[13] *See id.*

provides no guidance about when permissible knowledge of wage history within a corporate organization crosses into impermissible reliance.

The uncertainty in the Ordinance leads to a high likelihood of litigation under it. Indeed, the Executive Director of the Philadelphia Commission on Human Relations made this possibility quite clear during testimony before the City Council:

> In our practice at the Commission, we investigate all claims. If somebody believes that the job was supposed to be set at 45,000 and is being paid 35,000, they would file a complaint with our office. We do an investigation. We have subpoena power. We always ask for a production of documents. We'd ask for every document the employer had based on the hiring of this person and do the analysis. If somebody conducted a wage history search and then we realized that that was the trigger for setting the salary lower, that would be a violation of the law.[14]

The vague and hard-to-police nature of the Ordinance creates significant litigation risks for employers.[15] In addition, in the words of Governor Jerry Brown of California when he vetoed similar legislation, the Ordinance "broadly prohibits employers from obtaining relevant information with little evidence

[14] Hearing on Bill No. 160840 before the Philadelphia City Council Committee on Law and Government at 32:8-22 (Nov. 22, 2016) (testimony of Rue Landau).

[15] *See* Ey, *supra* note 2.

that this would assure more equitable wages."[16] The Ordinance is not narrowly tailored to its stated interest.

II. Less restrictive options are available to the City to address pay equity issues more effectively than the Ordinance.

There are myriad ways that the City could have pursued its goal of pay equity without restricting the content of employer speech. Thus, in addition to prohibiting significant amounts of speech with a legitimate purpose, the Ordinance's speech restrictions are more extensive than necessary to address pay-equity issues.

One alternative to the Ordinance would have been for the City to encourage employers to conduct audits to evaluate gender pay differences. The Chamber of Commerce for Greater Philadelphia proposed this during the legislative process.[17] Employer self-evaluations have been used "to great effect."[18] For example, one employer, Salesforce, performed an analysis of 17,000 employees in 2015. The result was salary adjustments for 6% of its employees and a 33% increase in the number of women promoted that year.[19] Similarly, "Minnesota requires public-sector employers to conduct a pay equity

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[16] Gov. Edmund G. Brown Jr., Veto Message to Assembly Bill 1017, Oct. 11, 2015, available at https://www.gov.ca.gov/docs/AB_1017_Veto_Message.pdf.

[17] Am. Compl. Ex. B at 2 (JA0125).

[18] American Association of University Women, *The Simple Truth About the Gender Pay Gap* at 22 (Spring 2017), available at https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth.

[19] *Id.*

study ever few years and eliminate pay disparities between female-dominated and male-dominated jobs that require comparable levels of expertise."[20] The result is that "Minnesota has virtually eliminated the pay gap in public-sector jobs of comparable value."[21]

Employers engage with such government facilitated programs to encourage such audits. In 2016, for example, the Obama Administration introduced an "Equal Pay Pledge" through which employers committed, among other things, "to conducting an annual company-wide gender pay analysis across occupations."[22] As of December 2016, over 70 companies had signed the pledge, including Accenture, AT&T, Amazon, Dow Chemical, L'Oreal, PwC, and Yahoo.[23] As Barbara Price, the Executive Director of the Philadelphia Commission on Human Relations, testified, "[W]hen employers are given the opportunity, they will step up and do the right thing."[24]

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[20] *Id.* at 23.

[21] *Id.*; *see also* Legislative Office on the Economic Status of Women, *Pay equity: The Minnesota experience* (2016), available at http://www.oesw.leg.mn/PDFdocs/Pay_Equity_Report2016.pdf.

[22] White House, FACT SHEET: White House Announces New Commitments to the Equal Pay Pledge, Dec. 7, 2016, available at https://obamawhitehouse.archives.gov/the-press-office/2016/12/07/fact-sheet-white-house-announces-new-commitments-equal-pay-pledge.

[23] *Id.*; White House, "These Businesses Are Taking the Equal Pay Pledge," June 14, 2016, available at https://obamawhitehouse.archives.gov/blog/2016/06/14/businesses-taking-equal-pay-pledge.

[24] Hearing on Bill No. 160840 before the Philadelphia City Council Committee on Law and Government at 73:13-15 (Nov. 22, 2016).

The City could also have more aggressively enforced existing pay equity laws, such as the Equal Pay Act and Title VII (and their state and local analogues). The Obama Administration, for example, established a National Equal Pay Enforcement Task Force "to crack down on violations of equal pay laws," "[c]ollect data on the private workforce to better understand the scope of the pay gap and target enforcement efforts," and "[u]ndertake a public education campaign to educate employers on their obligations and employees on their rights."[25] The City could have implemented a similar strategy instead of a far-reaching, content-based restriction on speech.

Finally, there were less restrictive legislative options before the City Council when it considered the Ordinance. The Chamber of Commerce for Greater Philadelphia proposed several amendments that would have left the Ordinance's operation intact while making it less restrictive on speech. Those amendments included redefining "to inquire" to make clear that accessing wage history from publicly available sources was not a violation of the Ordinance and striking the requirement that an employee who voluntarily discloses wage history information does so "knowingly."[26] Those changes would not have undercut the Ordinance's ability to serve its stated interests, but the City Council rejected them. As a result, the Ordinance is not narrowly tailored.

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[25] National Equal Pay Enforcement Task Force, Summary, available at https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

[26] Am. Compl. Ex. B at 2 (JA0125).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's grant of a preliminary injunction to enjoin the implementation of Philadelphia Code § 9-1131(2)(a)(i) and reverse the district court's denial of an injunction to prevent the implementation of Philadelphia Code § 9-1131(2)(a)(ii).

Respectfully submitted,

/s/ Robert L. Byer
Robert L. Byer
Robert M. Palumbos
Andrew R. Sperl
John E. Moriarty
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

Counsel for Amici Curiae the Chamber of Commerce of the United States, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Manufacturers' Association, and the National Federation of Independent Business Small Business Legal Center

Of counsel:
Steven P. Lehotsky
Jonathan Urick
U.S. Chamber Litigation Center
1615 H Street NW
Washington, DC 20062-2000
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America
November 28, 2018

COMBINED CERTIFICATIONS

L.A.R. 28.3(d) CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) and RULE 29(a)(5)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(a)(5) because it contains 3,597 words.

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 it has been prepared in 14 pt. Garamond, a proportionally spaced typeface, using Microsoft Office Word 2016.

L.A.R. 31.1(c) CERTIFICATE REGARDING ELECTRONIC FILING

I certify that an electronic version of this brief, in PDF format, was filed; that the text of the electronic version is identical to the text in the paper copies; and that the Crowdstrike version 4.14.7702 antivirus protection program was run on the PDF version and no virus was detected.

/s/ Robert M. Palumbos
Robert M. Palumbos
Pa. I.D. 20063
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

November 28, 2018

CERTIFICATE OF SERVICE

I certify that I served the foregoing brief on counsel of record for all parties through the Court's Electronic Case Filing system on November 28, 2018.

/s/ Robert M. Palumbos
Robert M. Palumbos
Pa. I.D. 20063
DUANE MORRIS LLP
30 South 17th Street
Philadelphia, PA 19103
(215) 979-1000

November 28, 2018

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