**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS,<br><br>Defendants. | No. 17-1548<br><br>Hon. Mitchell Goldberg |

**MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

The Chamber of Commerce of the United States of America (the "U.S. Chamber") and the Pennsylvania Chamber of Business and Industry (the "Pennsylvania Chamber") respectfully move the Court for leave to file the attached amicus curiae brief in support of Plaintiff's Motion for a Preliminary Injunction. Plaintiff consents to the filing of this amicus brief. Counsel for the City has indicated that the City objects to the filing of this amicus brief.

## I. Identity and Interest of Amici

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. More than 96% of the 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 the 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, including cases in the district courts. *See, e.g.*, *Associated Builders & Contractors of Ark. v. Perez*, No. 4:16-cv-00169-KGB (E.D. Ark.); *United States v. Vascular Solutions, Inc.,* No. 14-cr-00926 (W.D. Tex.); *United States v. Bayer Corp.*, No. 07-cv-00001 (D.N.J.).

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.

The City's unprecedented Ordinance will affect the hiring practices and business of members of the U.S. Chamber and the Pennsylvania Chamber. Many of these members do business in Philadelphia and routinely inquire about wage history of potential employees for legitimate business reasons. The Ordinance will also indirectly affect the interests of the U.S. Chamber's members in other cities and states that are considering whether to follow in Philadelphia's footsteps. The U.S. Chamber and Pennsylvania Chamber thus have a strong interest in this case.

No Party's counsel authored the attached brief in whole or in part. No person, aside from amici curiae, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

## II. Reasons Why Motion Should Be Granted

The role of an amicus is to assist the Court "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Harrison*, 940 F.2d 792, 808 (3d Cir. 1991)

(internal quotation omitted). "A district court has inherent authority to designate amici curiae to assist it in a proceeding." *Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005). Federal courts in Pennsylvania regularly permit non-parties to file amicus briefs. *See, e.g.*, *Burlington v. News Corp.*, No. CIV.A. 09-1908, 2015 WL 2070063, at *3 (E.D. Pa. May 4, 2015) (denying intervention motion but permitting amicus brief to be filed); *Shank v. E. Hempfield Twp.*, No. 09-CV-02240, 2010 WL 2854136, at *3 (E.D. Pa. July 20, 2010); *Perry v. Novartis Pharma. Corp.*, 456 F. Supp. 2d 678, 687 (E.D. Pa. 2006); *Liberty Res., Inc. v.*, 395 F. Supp. 2d at 209. Ultimately, the inquiry is whether the proposed amicus has "a sufficient 'interest' in the case" and whether its proposed brief will be helpful and relevant. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 129 (3d Cir. 2002) (quoting Fed. R. App. P. 29(b)).

The Court should similarly permit the filing of the attached amicus brief in this case. As noted, the U.S. Chamber and Pennsylvania Chamber have numerous members across the country who conduct business in Philadelphia and routinely inquire about wage history of potential employees for legitimate business reasons. Furthermore, even members of the U.S. Chamber and Pennsylvania Chamber who do not do business in Philadelphia are potentially affected by this litigation, because they do business in other jurisdictions that are considering whether to follow in Philadelphia's footsteps.

The amicus brief both supplements arguments made by Plaintiff and provides distinct arguments relevant to Plaintiff's Motion for Preliminary Injunction. In particular, the amicus brief makes additional argument to show that the Ordinance is not narrowly tailored to its stated purpose and that the Ordinance will have a broad impact on businesses outside of Philadelphia. It provides additional information about the hiring processes of businesses, the effects that the Ordinance will have on employers, and the alternatives to the Ordinance that were available for

the City to address pay equity, all of which demonstrate that the Ordinance is far more restrictive than necessary to serve its stated goal. "Even when a party is very well represented, an *amicus* may provide important assistance to the court" by ensuring the court understands how its ruling could affect entities not before the court. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) The arguments in the attached brief of amici curiae will be helpful to the Court in deciding Plaintiff's Motion.

Finally, the attached amicus brief does not prejudice the City. Thus Motion is timely because, as of its filing, the docket does not reflect that a response date or hearing date has been set on Plaintiff's Motion for a Preliminary Injunction. In addition, the amicus brief is less than half the Court's page limit for motions, and thus under the maximum length contemplated by the analogous appellate rule. *See* Fed. R. App. P. 29(a)(5).

The U.S. Chamber and Pennsylvania Chamber respectfully request that the Court grant their motion for leave to file the attached brief as amici curiae.

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April 13, 2017

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| THE CHAMBER OF COMMERCE FOR GREATER PHILADELPHIA, on behalf of its members,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF PHILADELPHIA and PHILADELPHIA COMMISSION ON HUMAN RELATIONS,<br><br>Defendants. | No. 17-1548<br><br>Hon. Mitchell Goldberg |

**BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Absent an injunction, Philadelphia will become the first jurisdiction in the United States to prohibit employers from inquiring about information that has been central to non-discriminatory hiring processes for decades. By prohibiting any employer that does business in Philadelphia from inquiring about, and 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 cannot stand up to either strict or intermediate scrutiny because it sweeps far more broadly than is necessary to serve the City's stated purpose.

The Ordinance will have a significant effect on the way that members of the Chamber of Commerce of the United States of America ("U.S. Chamber") and the Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber") do business. It will make hiring harder and more expensive, and will harm many of the workers it is intended to benefit. In return for those

costs, the Ordinance will not even serve its stated interests. As a result, the Ordinance is not just terrible policy, it is unconstitutional.

## 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 its members' interests 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.

The City's unprecedented Ordinance will directly affect the hiring practices and business of members of the U.S. Chamber and the Pennsylvania Chamber. Many of these members do business in Philadelphia and routinely inquire about and rely on wage history of potential employees for legitimate business reasons. The Ordinance will also indirectly affect the interests of the U.S. Chamber's members in other cities and states that are considering whether to follow in Philadelphia's footsteps.

No Party's counsel authored this brief in whole or in part. No person, aside from amici curiae, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

## ARGUMENT

### I. The Ordinance is not narrowly tailored to achieve pay equity because it restricts significant amounts of legitimate speech that is essential to hiring processes.

The Ordinance states that employer inquiries and reliance on wage history "only serves to perpetuate gender wage inequalities."[1] That is simply not true. The Ordinance makes illegal 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 changes effected by the Ordinance, and to see why those changes are unnecessary, one need only consider how wage history is 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 the Ordinance is 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]

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[1] Phila. Code § 9-1131(1)(d).

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

[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).

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

Inquiring about the 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 affects small businesses

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

disproportionately. 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. A corporate job opening attracts an average of 250 resumes, although only four to six applicants will be interviewed for a single opening. For 27% of employers, the top obstacle to increasing headcount is lengthy hiring practices.[5] Employers therefore 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. And 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. Not only does this make the process lengthier, it 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. By depriving employers of past salary information, the Ordinance will often cause employers to find out much later—during the interview and negotiation process—that the prospective applicants they have attracted are not a good fit. In that case, they will have to start the process over again, at significant expense.

[5] Glassdoor.com, Top HR Statistics, available at https://www.glassdoor.com/employers/popular-topics/hr-stats.htm.

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. But 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 the wage history.[6] That effect is one of many potential unintended consequence of the Ordinance. Such consequences are unpredictable and likely to hurt the people the Ordinance is intended to help.

### C. Wage history conveys legitimate information about an applicant and prohibiting inquiries about 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 legitimate information about the applicant's performance and qualifications. 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 Plaintiff points out, "the Ordinance does not serve the City's interest in eliminating *discriminatory* pay disparities." (Emphasis in original).[7]

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[6] 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/.

[7] Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction ("Pl. Br.") (ECF No. 3-1, Filed April 6, 2017) at 9.

That is not to suggest that wage discrimination does not exist. But the City's unsubstantiated supposition that wage history may be affected by discrimination 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 what their reasonable salary expectations are. Many aspects of an applicant's resume may theoretically be tainted by the effect of discrimination, including their college grades, job titles, or gaps in employment. The law does not prevent employers from inquiring about 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.[8]

The Ordinance also makes interviewing and negotiating riskier for employers. Applicants are allowed to disclose their salary "knowingly and willingly," but that term is not defined.[9] The uncertainty surrounding when a disclosure is "knowing and willing" is likely to chill even legitimate discussions of salary expectations. For instance, if an applicant volunteers his or her salary information, an employer is left to wonder whether the Ordinance precludes follow up questions about whether the applicant's past salary is consistent with his or her current salary

[8] 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/#S7Ofq4pObpLCdH7r.99.

[9] *See* Phila. Code § 9-1131(2)(a)(ii).

expectations. Likewise, is a disclosure "knowing" and "willing" if an applicant suspects and employer would find the information useful, but the employer never asks for it?

The Ordinance's restriction on "rely[ing] on the wage history of a prospective employee . . . in determining the wages for such individual" creates even more uncertainty.[10] 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 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.[11]

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[10] *See id.*

[11] 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).

The unprecedented, vague, and hard-to-police nature of the Ordinance creates significant litigation risks for employers.[12] 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 that this would assure more equitable wages."[13] 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. Plaintiff made such a proposal during the legislative process.[14] Employer self-evaluations have been used "to great effect."[15] 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.[16] Similarly, "Minnesota requires public-sector employers to conduct a pay equity study ever few years and eliminate pay disparities between female-

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

[13] 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.

[14] Compl. Ex. B at 2.

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

[16] *Id.*

dominated and male-dominated jobs that require comparable levels of expertise."[17] The result is that "Minnesota has virtually eliminated the pay gap in public-sector jobs of comparable value."[18]

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."[19] As of December 2016, over 70 companies have signed the pledge, including Accenture, AT&T, Amazon, Dow Chemical, L'Oreal, PwC, and Yahoo.[20] 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."[21]

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

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[17] *Id*. at 23.

[18] *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.

[19] 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.

[20] *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.

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

education campaign to educate employers on their obligations and employees on their rights."[22] 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. Plaintiff 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."[23] 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.

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

[23] Compl. Ex. B at 2.

## CONCLUSION

The Court should grant Plaintiff's motion for preliminary injunction.

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April 13, 2017

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**ORDER**

The Motion for Leave to File Amici Curiae Brief of the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry in Support of Plaintiff's Motion for a Preliminary Injunction ("Motion") is GRANTED. The Clerk shall file of record the brief of amici curiae attached to the Motion.

Date: _____

BY THE COURT:

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**CERTIFICATE OF SERVICE**

I certify that I served the foregoing Motion for Leave to File Amici Curiae Brief today on the following persons by ECF:

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