No. 14-13482

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Appellant,

v.

CATASTROPHE MANAGEMENT SOLUTIONS,
Defendant/Appellee.

On Appeal from the United States District Court
for the Southern District of Alabama
No. 1:13-cv-00476-CB-M
Hon. Charles R. Butler, Jr.

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.; LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER; PROFESSOR D. WENDY GREENE; AND PROFESSOR ANGELA ONWUACHI-WILLIG IN SUPPORT OF PLAINTIFF/APPELLANT'S PETITION FOR REHEARING *EN BANC*

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Dated: November 10, 2016

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *amici curiae* are non-profit organizations that have not issued shares of stock or debt securities to the public and have no parent corporations, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public.

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STATEMENT REGARDING REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)

Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether the panel failed to recognize that Title VII prohibits policies based on racial stereotyping and those that impose an undue burden on a protected class. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998).

Whether the panel mistakenly understood race to be a biological concept and employed an unnecessarily restrictive analysis to determine whether a racial trait should be categorized as mutable or immutable. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Dated: November 10, 2016

/s/ Christina Swarns
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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit legal organization that has fought to achieve racial justice and ensure that America fulfills its promise of equality for all. Since 1964, LDF has worked to enforce Title VII of the Civil Rights Act ("Title VII") by representing individual plaintiffs and plaintiff classes in challenges to discriminatory employment practices engaged in by employers in such cases as *Griggs v. Duke Power Co*., 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Phillips v. Martin Marietta Corp*., 400 U.S. 542 (1971). LDF's victories in these cases were ultimately codified in the Civil Rights Act of 1991.

The Legal Aid Society – Employment Law Center ("LAS-ELC") is a nonprofit public interest law firm dedicated to protecting and expanding the employment rights of underrepresented worker communities. LAS-ELC's litigation has long focused on practices which deny equal employment opportunity to members of racial and national origin minority groups. *See, e.g., Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

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[1] *Amici* certify that no Party or Party's counsel authored this brief in whole or in part, or contributed money that was intended to fund the brief's preparation or submission, and further certify that no person, other than *amici* and their members, contributed money intended to prepare or submit this brief. Fed. R. App. P. 29(c)(5). Both Parties have consented to the filing of this brief.

D. Wendy Greene is a Professor at the Cumberland School of Law. Professor Greene has developed an international reputation for her scholarship on grooming codes and Title VII.

Angela Onwuachi-Willig is a Professor at Berkeley Law School. She is a leading scholar of law and inequality and writes in a variety of areas, including employment discrimination.

RULE 35(b) STATEMENT OF ISSUES ASSERTED TO MERIT *EN BANC* CONSIDERATION

Amici write in support of Appellant's petition for rehearing *en banc*. The central mandate of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 429-30. Put simply, the broad remedial purpose of Title VII is to guarantee that employment decisions are made on the basis of merit rather than membership in a protected class.

Thus, the question at the heart of this case is whether Title VII's broad mandate to purge the workplace of racial discrimination reaches a policy that is purely aesthetic in nature (*i.e.*, not job related), is inextricably bound to race, and disproportionately excludes Black job applicants and employees from employment. The answer to this question must be, yes. In the half-century since Title VII was enacted, the forms of racial discrimination most commonly seen in the workplace have evolved. It is now vanishingly rare to find a policy that explicitly excludes

potential employees based on skin color. However, racial discrimination in employment has not been eradicated. Hard-and-fast color-line barriers have been replaced by subtle rules and restrictions that trade on racial stereotypes and proxies but, ultimately, have the same force and effect: denying employment to qualified applicants based on their race. Therefore, in order to fulfill Title VII's mandate, courts must be vigilant in identifying and rooting out racially discriminatory employment policies and practices.

In this case, the *en banc* Court should grant review because the panel made a number of errors that demonstrate its failure to adhere to Title VII's central mandate. First, the panel did not recognize that Catastrophe Management Solutions's ("CMS") dreadlocks[2] ban reflects impermissible racial stereotyping. Second, the panel failed to recognize that an undue burden disparate treatment claim, like a disparate impact claim, involves examination of the challenged policy's effects. As a result, the panel improperly disregarded relevant allegations of the impact of CMS's policy that were proffered by Appellant. Third, the panel's analysis was

[2] Many prefer the term "loc" or "lock" to the term "dreadlock," as "the term dreadful was used by English slave traders to refer to Africans' hair, which had probably loc'd naturally on its own during the Middle Passage." Brown White, *Releasing the Pursuit of Bouncin' and Behavin' Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty*, 1 Int'l J. Media & Cultural Pol. 295, 296 n.3 (2005). However, for ease of reference, and consistent with the language used in the Complaint, for purposes of this brief we have chosen to refer to this hair formation as "dreadlocks."

grounded in the legal fallacy that racial traits can be neatly categorized as mutable or immutable. Because this dichotomy is a product of the improper and antiquated notion that race is a biological concept, as opposed to a social construct, its application to the facts of this case yielded a perverse result. Finally, because the issues in this case are important to the development of Title VII jurisprudence, the panel's binding decision should not rest on a complaint for which the panel denied Appellant leave to amend. Because each error flows from an unnecessarily constrained reading of Title VII that subverts its broad remedial purpose, *en banc* review is appropriate.

STATEMENT OF FACTS

It is undisputed that CMS rescinded an offer of employment to Ms. Chastity C. Jones solely because she wore her hair in "dreadlocks." As Ms. Jones stated in her complaint, dreadlocks are a hairstyle "used by Black people to wear, style and groom their natural hair [that] has always been and remains generally very different from the method and manner used by White people to wear, style and groom their natural hair." Proposed First Am. Compl. ("Am. Compl.") ¶¶ 19, 24. CMS has a written grooming policy that requires all employees to have a hairstyle that "reflect[s] a business/professional image" and bans any hairstyles that are "excessive." *Id.* at ¶ 17.

CMS interpreted its own policy to prohibit dreadlocks, based on its belief that this hairstyle had a tendency to become "messy." *Id.* at ¶ 18.

The HR employee who originally hired Ms. Jones did *not* perceive her hairstyle to be messy or extreme. *Id.* at ¶ 16. To the contrary, she offered Ms. Jones—who, at all times during the interview process, had dreadlocks—a job. *Id.* at ¶¶ 12-14. It was not until after she asked Ms. Jones if she was wearing dreadlocks and Ms. Jones answered in the affirmative that the HR representative declared that dreadlocks "tend" to get messy but noted, "I'm not saying yours are" (and then retracted the job offer when Ms. Jones stated she would not cut off her hair). *Id.* at ¶ 16. Thus, it was not Ms. Jones's hairstyle that disqualified her from employment with CMS. Instead, a deeply rooted, race-based, negative and false stereotype about dreadlocks in general—even when that perception conflicted with reality—served as the impenetrable bar to employment for Ms. Jones.

ARGUMENT

I. Title VII's Broad Mandate Requires Courts to Invalidate Policies that are Premised on Racial Stereotypes and Impose Undue Burdens on a Protected Class.

Given that racial discrimination in the modern workforce tends to manifest itself in subtle forms, Title VII can only achieve its purpose of eradicating discrimination if it reaches employment policies and decisions that promote or codify racial stereotypes and racial proxies. That mandate is certainly applicable to

CMS's policy because it excludes people with dreadlocks from employment even though this hairstyle is intimately tied to race and wholly unrelated to job necessity. Put another way, CMS's policy is nothing more than an internal grooming code that reflects the company's bias toward hairstyles that are more consistent with white hair texture than Black hair texture. The application of this policy means, of course, that CMS will exclude qualified Black applicants and employees that are, aside from their hairstyle, equal to, or better than, the white applicants and employees that CMS accepts. Notwithstanding the fact that this is exactly what happened to Ms. Jones, the panel improperly held that Appellant failed to plead a colorable claim of disparate treatment, essentially reasoning that hair does not equal race. Additionally, the panel erroneously asserted that Appellant's allegations regarding the impact of CMS's policy on Black people overall was only relevant to support a disparate impact theory of liability, even though disparate treatment can and should focus on the effect a policy has on a protected class.

A. CMS's Grooming Code is Improperly Premised Upon a Racial Stereotype.

Courts have long recognized that Title VII reaches employment policies that are based on stereotypes, in the context of racial discrimination and elsewhere. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 997, 990 (1988) (discussing employer's reliance on "subconscious stereotypes and prejudices" relating to race and describing the conduct as the type of harm "that Title VII was enacted to

combat"); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("[I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."); *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1284 (11th Cir. 2000) ("Title VII prohibits 'the entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . even where the stereotypes are benign or not grounded in group animus.'"); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, No. 1:16 cv 00054, 2016 WL 3440601, at *7 (N.D. Fla. June 20, 2016) ("[C]ourts have long understood both Title VII and anti-discrimination laws in general to be aimed at least in part at preventing and curing the problem of decisions (employment and otherwise) based on stereotypes."). Employer reliance on such reductive generalizations about categories of people in the making of employment decisions is inappropriate because such stereotypes improperly obscure legitimate, individual ability, deny human dignity, and unfairly deprive qualified individuals of important economic opportunities. Title VII can and should be read to prohibit practices like the policy at issue here, which force many African Americans to conform to demeaning racial preferences in order to secure gainful employment, even where the discriminatory grooming standard is irrelevant to genuine business considerations. Because, as explained by Appellant, CMS's policy relies on stereotyped notions of how Black people should and should not wear

their hair, it is covered by Title VII and Appellant was entitled to relief. Am. Compl. ¶ 30.

Despite the ample precedent allowing courts to find disparate treatment under Title VII for harm caused by stereotypes, the panel failed to address Appellant's argument that CMS's dreadlocks ban was an impermissible form of racial stereotyping. *See E.E.O.C. v. Catastrophe Mgmt. Sols.*, No. 14-13482, 2016 WL 4916851, at *4 (11th Cir. Sept. 15, 2016). Instead, the panel held that in adjudicating Appellant's claim, it was bound by precedent that distinguished between mutable characteristics, like grooming or hair length, and immutable characteristics, which are "beyond the victim's power to alter." *Catastrophe Mgmt. Sols.*, 2016 WL 4916851, at *8-9 (citing *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. Feb. 12, 1975); *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980)). Applying that dichotomy to CMS's dreadlocks policy, the panel ruled that, although dreadlocks may be a "natural outgrowth" of the texture of Black hair, they are not "an immutable characteristic of race." *Id.* at *9. The panel also declared that it would not take a stand on any side of the debate on the question of the meaning of "race." *Id.* at *12.

If, however, the panel had given CMS's dreadlocks policy the scrutiny required by Title VII, it would have recognized that the ban was based on an impermissible race-based stereotype, the presumption that the innate texture of an

individual's hair—typically a Black person's hair—is extreme or messy when it takes on a specific formation, as Appellant properly alleged. Am. Compl. ¶ 30. As described above, CMS's denial of employment to Ms. Jones was wholly unrelated to (a) her undisputed qualification for the position or (b) her actual appearance. These facts expose not only the fallacy of CMS's assumptions about dreadlocks but also how the policy constitutes an arbitrary, institutional preference for employees whose hair is styled in a manner that simulates white (European) hair. Racial stereotype is plainly at the heart of this preference.

The panel's observation that CMS's policy would also exclude white people with dreadlocks, *Catastrophe Mgmt. Sols.*, 2016 WL 4916851, at *11, does not change the fact that CMS's policy is improperly based on a false and racially-biased stereotype about Black hair formation/texture. The denial of employment to *any* employee, based solely on the application of such a biased policy that falls squarely within Title VII's mandate to root out policies resulting from race-based stereotypes, violates Title VII. Accordingly, the *en banc* Court should grant review of this case.

B. The EEOC Pled Facts Sufficient to Support a Claim of Undue Burden Disparate Treatment Under Title VII.

There are two ways to demonstrate disparate treatment in Title VII grooming code cases. First, a plaintiff may make out a *prima facie* case of discrimination by establishing that the challenged employment action was intended to target the plaintiff because of his/her membership in a protected class. Second, a plaintiff may

prove disparate treatment by demonstrating that the challenged provision(s) imposed an undue burden on the basis of a protected category. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1114 (9th Cir. 2006) (*en banc*); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir. 1980). In other words, a plaintiff may prove intentional discrimination if she can show that "[a]n appearance standard . . . imposes different [and] [un]equal burdens" on different protected groups, such as men and women. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000); *see also Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1389 (11th Cir. 1998) (same).

CMS's unjustified policy imposes a unique burden on Black people. Many actual and potential Black CMS employees—but not most white employees—must dedicate substantial time and financial resources to comply with the policy: Black employees must pay for harsh and expensive treatments to straighten their hair or wear wigs, hair pieces, or extensions to simulate white hair texture. *See* Am. Compl., ¶¶ 20, 22, 26-30. This is discrimination, pure and simple.

Here, the panel affirmed the district court's decision in part because it concluded that the EEOC conflated disparate impact theory and disparate treatment theory in its Complaint. In reaching this conclusion, the panel ignored the fact that an undue burden analysis can properly focus on how the different grooming standards affect different groups. Therefore, an undue burden disparate treatment

test can *resemble* a disparate impact analysis but it is a separate avenue for proving disparate treatment or intentional discrimination.[3] As such, Appellant properly plead a Title VII disparate treatment claim, especially when the Complaint is properly read in the light most favorable to the Plaintiff, and *en banc* review is appropriate.

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[3] It bears emphasis that while Appellant has expressly forgone any argument that it has pled a disparate impact cause of action in the instant case, such a cause of action is available to employees who are victims of dreadlock bans and other similar policies. Title VII prohibits race-neutral employment practices which, while non-discriminatory on their face, visit an adverse, disproportionate impact on a statutorily-protected group. *See Griggs*, 401 U.S. at 431 (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see also In re Emp't Discrimination Litig.*, 198 F.3d 1305, 1311 (11th Cir. 1999); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993). Disparate impact theory requires the removal of employment obstacles, not required by business necessity, which create "'built-in headwinds'" and freeze out protected groups from job opportunities and advancement. *Griffin v. Carlin*, 755 F.2d 1516, 1524 (11th Cir. 1985) (quoting *Griggs*, 401 U.S. at 431-32). In support of its undue burden disparate treatment claim, Appellant's proposed First Amended Complaint did allege that CMS applies its grooming code to favor "Caucasian hair and style standards" and that conforming to such standards would require Black candidates for employment to "submit[] to expensive and harsh treatments that straighten their hair . . . or . . . wear wigs, hair pieces, or extensions," Am. Compl. ¶ 27, a burden not shared by white candidates or employees. These allegations also support a claim for disparate impact since it is entirely plausible that a statistical inquiry would lead to the conclusion that a ban on dreadlocks would disproportionally burden Black job applicants forced to style their hair to comply with white norms. Moreover, it is unlikely that CMS would be able to articulate a plausible business necessity for the ban. *See Catastrophe Mgmt. Sols.*, 2016 WL 4916851, at *1.

II. The Panel Failed to Acknowledge That Race is a Social Construct and Applied an Inappropriately Restrictive Immutability Test.

A. Because the Panel's Decision Rests on Erroneous Conclusions About the Social Construction of Race, Its Immutability Analysis is Unnecessarily Restrictive and Unworkable.

As Appellant has compellingly argued, "race" is a social construct with fluid delineations. Scientists long ago refuted the notion that race is a biological phenomenon. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WISC. L. REV. 1283 (2005) (discussing the social construction of race and the use of proxies for race to discriminate). This now-debunked biological conception of race provided the basis for American slavery, miscegenation laws, and segregation. *See, e.g.*, Lisa C. Ikemoto, *Race to Health: Racialized Discourses in a Transhuman World*, 9 DEPAUL J. HEALTH CARE L. 1101, 1101 (2005) (discussing how "[n]otions of biological race or inherent race-based biological differences have been used to justify war, slavery . . . segregation . . . eugenics, and population control.").

The panel's rigid immutability analysis wholly embraces the anachronistic notion that race is a static category defined by fixed physical characteristics, and completely fails to acknowledge the fluid nature of race as social construct. This

obsolete and dangerous fiction must be abandoned, as must the version of immutable/mutable distinction it undergirds.

The panel held that it was bound by precedent to find that Title VII only protects immutable characteristics, which it defined restrictively to mean those matters that are "beyond the victim's power to alter." *Catastrophe Mgmt. Sols.*, 2016 WL 4916851, at *8-9 (*citing Willingham*, 507 F.2d at 1084 (considering hair length in the context of sex discrimination), and *Garcia*, 618 F.2d at 264 (applying immutable characteristic limitation to national origin). Because the panel relied on a biological understanding of race, and then attempted to map certain characteristics onto that analysis, it produced an incongruent result. Specifically, although the panel noted that Black hair texture is an immutable characteristic protected by Title VII *and* acknowledged that "dreadlocks are a natural outgrowth of the immutable trait of black hair texture," it concluded that dreadlocks are not immutable. *Id.* at *4. It is unsurprising that such a contrived immutability analysis fails to establish a coherent framework for employers, employees, and courts to determine whether a characteristic is the product of nature or "artifice." *See Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

Moreover, the Court's immutability analysis is contrary to the moral imperatives of Title VII. For example, the Supreme Court articulated a more inclusive and accurate understanding of immutability in *Obergefell v. Hodges*, where

it affirmed that the Fourteenth Amendment protects "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." 135 S. Ct. 2584, 2597 (2015). The lower courts have also adopted this more inclusive and accurate understanding of immutability. *See Pedersen v. Off. of Pers. Mgmt.*, 881 F. Supp. 2d 294, 326 (D. Conn. 2012) ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it. To hold otherwise would penalize individuals for being unable or unwilling to change a fundamental aspect of their identity; an aspect which has been recognized as an integral part of human freedom."); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014) ("Rather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should be required* to change because it is central to a person's identity.") (emphasis in original). The concurrence in *Watkins v. United States Army* expresses this expansive view of immutability especially well. 875 F.2d 699 (9th Cir. 1989) (Norris, J.). Judge Norris concluded that "by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change

their sex . . . . Lighter skinned blacks can sometimes 'pass' for white . . . and some people can even change their racial appearance with pigment injections." *Id*. at 726.

The capacious understanding of the interplay between appearance and identity embraced by this line of cases should inform the immutable characteristics analysis under Title VII. Only then can Title VII properly reach all of the dimensions of race.

Here, Appellant's proposed First Amended Complaint alleged that dreadlocks are central to her Black identity and, thus, are too important to her to be forced to relinquish them. *See* Am. Compl. ¶ 28 ("A prohibition of dreadlocks in the workplace constitutes race discrimination because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."). The panel failed to apply the correct, expansive construction of the immutability test. Had the panel done so, and had it read the Complaint in the light most favorable to the Plaintiff, it would have determined that the EEOC properly stated a claim for relief under Title VII. Thus, this Court should grant *en banc* review.

CONCLUSION

For these reasons, Appellant's petition for rehearing *en banc* should be granted.

Dated: November 10, 2016

Respectfully submitted,

/s/Christina Swarns

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B)(i) and 11th Cir. R. 35-6 because the brief, exclusive of the Cover Page, Certificate of Interested Persons, Corporate Disclosure Statement, Statement Regarding Rehearing *En Banc*, Table of Contents, Table of Authorities, Certificate of Service, and this Certificate, is no longer than 15 pages and is printed in 14 point Times New Roman proportionally spaced typeface.

/s/ Christina Swarns
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CERTIFICATE OF SERVICE

I, Christina Swarns, hereby certify that I electronically filed the foregoing amicus brief supporting Appellant's petition for rehearing *en banc* with the Court via the appellate CM/ECF system and filed 15 copies of the foregoing brief with the Court by next business day delivery, postage pre-paid, this 10th day of November, 2016. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system:

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