Nos. 23-1535, 23-1645

United States Court of Appeals for the First Circuit

L.M., a minor by and through his father and stepmother and natural guardians, Christopher and Susan Morrison,
Plaintiff-Appellant,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS; MIDDLEBOROUGH SCHOOL COMMITTEE; CAROLYN J. LYONS, Superintendent, Middleborough Public Schools, in her official capacity; HEATHER TUCKER, Acting Principal, Nichols Middle School, in her official capacity,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Massachusetts, Eastern Division,
Hon. Indira Talwani, U.S. District Judge
Case No. 1:23-cv-11111-IT

BRIEF OF *AMICUS CURIAE*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF DEFENDANTS-APPELLEES IN FAVOR OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the *amicus curiae,* NAACP Legal Defense and Educational Fund, Inc., certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

/s/ Charles E. McLaurin
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What We Know Project, *What does the scholarly research say about the effects of discrimination on the health of LGBT people?* 20-24, Ctr. for the Study of Inequality at Cornell Univ. (Dec. 13,

2019), https://whatweknow.inequality.cornell.edu/wp-content/uploads/2019/12/LGBT-Discrimination-Printable-Findings-121319.pdf 7

INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all, including all students in public educational systems. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

LDF recognizes that defending the rights and dignity of all Black people includes advocacy for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, to which many Black people proudly belong. As such, LDF has participated as amicus curiae in several cases addressing the rights of LGBTQ people. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v.*

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Further, no person, other than *amicus*, its members, or its counsel contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5). Amicus submits this brief with the consent of counsel for all parties. Fed. R. App. P. 29(a)(2).

Evans, 517 U.S. 620 (1996). Among these cases are ones pertaining to the rights of transgender students in their public schools. *See Adams v. Sch. Bd. Of St. Johns Cnty., Fla.*, 3 F.4th 1299 (11th Cir. 2021); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

INTRODUCTION

Public schools serve the particular and critical purpose of educating young people and preparing them to become citizens in our increasingly diverse, multiracial democracy. As the Supreme Court has observed, this important role of public schools implicates special circumstances that contextualize the in-school rights of students. The exact contours of an individual student's rights are delineated by several school-specific considerations, including that children of all races, genders, sexual orientations, religions, and nationalities are often required by law to attend school until a certain age, and under state and federal law, schools must cultivate an environment that does not perpetuate discrimination against students in protected classes.

The District Court properly acknowledged and weighed the unique considerations of the school environment in concluding that Nichols Middle School and other Defendant-Appellees (collectively "NMS") acted reasonably in prohibiting L.M. from wearing clothing that exacerbated preexisting concerns about the school climate for LGBTQ students. The District Court correctly applied *Tinker*

v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), and faithfully interpreted the Supreme Court's command that schools respect the free speech of students without abdicating the duty to protect the rights of all members of the student body. When considering controlling precedent, in conjunction with the factual circumstances in this case, the District Court was correct to rule that L.M. did not have a substantial likelihood of success on the merits of his First Amendment claim to warrant a preliminary injunction. Nor does the balance of hardships or the public interest support the preliminary relief sought by L.M.[2]

Appellant now asks this Court to ignore the real and severe costs his desired expression imposes on his transgender and nonbinary classmates—as well as NMS, which has the responsibility to ensure their welfare in school—and hold that students from this marginalized group must endure a hostile environment that diminishes their own academic well-being. Such an outcome finds no support in the First Amendment and is contrary to settled anti-discrimination law from this Court's

[2] For the reasons stated in this brief, the evidence in the record does not support Appellant's request for a preliminary injunction, thereby requiring affirmance of the District Court's ruling below. On July 19, 2023, the District Court granted the parties' joint motion to convert the order denying the preliminary injunction into a final judgment, and issued a final judgment in Appellees' favor. In the event that this Court concludes that the record is insufficient to support affirming a final judgment, the Court should remand for an evidentiary hearing so the record can be more fully developed.

precedent. Accordingly, this Court should affirm the District Court's order denying Appellant's request for an injunction.

ARGUMENT

I. NMS's Concerns About School Climate for LGBTQ Students Was Reasonable Pursuant to State and Federal Law.

Based on documented complaints about anti-LGBTQ discrimination, and reports of bullying and harm to LGBTQ students at Nichols Middle School, NMS was rightly concerned about school climate for its LGBTQ students. Public schools in Massachusetts are required by state and federal law to prevent and address hostile learning environments created by discrimination aimed at protected classes, which includes LGBTQ people.[3] Equal protection under the Massachusetts Constitution, which includes protections against discrimination based on sexual orientation, establishes a constitutional obligation for public schools to distribute wisdom and knowledge "among the different orders of the people." Mass. Const., Part II, ch. 5, § 2; *See, e.g., Commonwealth v. Carter*, 488 Mass. 191, 200-04 (2021). In addition, Massachusetts laws prohibit discrimination, bullying, or harassment in schools based on gender identity. M.G.L. c. 76 § 5; M.G.L. c. 71 § 37O; 603 C.M.R. § 26.05.

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[3] To be sure, school administrators' compliance with these laws do not obviate consideration of the First Amendment. But, as described in the next section, these laws prohibiting bullying and harassment are fully consistent with the First Amendment, which permits school officials to regulate speech that invades the rights of other students to receive compulsory education in a non-hostile environment.

Pursuant to federal law, schools may be liable under Title VI of the Civil Rights Act and/or Title IX of the Education Amendments of 1972 for student-on-student harassment if the harassment creates a hostile environment at the school. *See, e.g.*, U.S. Dep't of Educ. Off. for C. R., *Dear Colleague Letter: Harassment and Bullying* 1 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf. According to the U.S. Department of Education, "a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence" whenever harassment has occurred.[4] Letter from the Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R., *First Amendment: "Dear Colleague,"* (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

This Court recently held that Title IX prohibits discrimination based on gender identity as unlawful sex-based discrimination, and that a school district faces liability under Title IX for "student-on-student harassment" creating a hostile environment. *Grace v. Bd. of Trustees, Brooke E. Bos.*, No. 22-1742, 2023 WL 6889721, at *7–8 (1st Cir. Oct. 19, 2023). To establish a hostile school environment in the First Circuit,

[4] In addition, schools are obligated to take these actions following incidents of harassment "even if the misconduct also is covered by an anti-bullying policy and regardless of whether the student makes a complaint, asks the school to take action, or identifies the harassment as a form of discrimination." Letter from the Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R., *First Amendment: "Dear Colleague,"* (July 28, 2003), http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

the "harassment need only be severe enough to "undermine[ ] and detract[ ] from the victim's educational experience" such that the victim is "effectively denied equal access to an institution's resources and opportunities." *Doe v. Pawtucket Sch. Dep't*, 969 F.3d 1, 10 (1st Cir. 2020).

As the District Court correctly concluded in its denial of a preliminary injunction, NMS had good reason to be concerned about a hostile climate for LGBTQ students at the time Appellant attempted to wear the shirt at issue, thereby diminishing the likelihood of L.M. successfully establishing a First Amendment violation. Student survey data from the prior year uncovered specific concerns about how LGBTQ students are treated at Nichols Middle School, including reports of LGBTQ students being bullied and made to feel unwelcome at school. App. 0102.[5]

Appellant's shirt, which stated that "there are only two genders," denies the existence of transgender and nonbinary students. Thus, NMS took a reasonable measure to meet its legal obligations to mitigate a hostile school climate by preventing student-on-student harassment through discriminatory speech. Being subjected to harassing and discriminatory speech, like the text on Appellant's shirt, in a school with preexisting problems with school climate harms transgender and nonbinary students and makes school a threatening and unsafe space for them.

[5] Citations to "App." Refer to the Appendix to the Brief for the Appellant filed on September 28, 2023, and located on the public docket as Doc No. 00118057119.

Joseph G. Kosciw, Nhan L. Truong, & Adrian D. Zongrone, *Erasure and Resilience: The Experiences of LGBTQ Students of Color* ("*Erasure and Resilience*") 17, 20, The Gay, Lesbian, & Straight Education Network (June 2020), https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Black-2020.pdf. The negative effects on LGBTQ students can be dire and include a higher risk of depression and anxiety, a higher risk of suicide and suicide attempts, and a higher risk of absence from school.[6]

The risk of these harms is magnified and more severe for Black LGBTQ youth because of the likelihood that they will encounter discriminatory and demeaning speech aimed at multiple aspects of their intersecting identities. In fact, one national survey found that "Black LGBTQ students experience higher levels of victimization based on sexual identity and/or race at school and are more than twice as likely to skip school for that reason." *Id.* at xvi.[7] Another national survey found that "44% of Black LGBTQ youth seriously considered suicide in the past 12 months, including

[6] What We Know Project, *What does the scholarly research say about the effects of discrimination on the health of LGBT people?* 20-24, Ctr. for the Study of Inequality at Cornell Univ. (Dec. 13, 2019), https://whatweknow.inequality.cornell.edu/wp-content/uploads/2019/12/LGBT-Discrimination-Printable-Findings-121319.pdf.

[7] This same survey also found that Black LGBTQ students who encountered harassment based on both their race and their sexual orientation experience the lowest levels of school belonging, have the highest levels of depression, and are the most likely to skip school because they felt unsafe. Kosciw et al., *supra* page 7 at xvii.

59% of Black transgender and non-binary youth." The Trevor Project, *All Black Lives Matter: Mental Health of Black LGBTQ Youth* (Oct. 6, 2020), https://www.thetrevorproject.org/research-briefs/all-black-lives-matter-mental-health-of-black-lgbtq-youth/.

In sum, school officials were not only permitted—but were obligated—to take measures to prevent student-on-student bullying and harassment based on gender identity. NMS acted more than reasonably in meeting its legal obligations by prohibiting Appellant from wearing a shirt that would reasonably cause transgender and nonbinary students to feel demeaned and unwelcome within the context of a school climate that was already unwelcoming for LGBTQ students. This is not a situation where controversial speech might lead to a productive academic conversation among students and faculty. Rather, the speech at issue directly called into question transgender and nonbinary students' very existence—the same type of sentiments that too often lead to physical harm, psychological distress, and negative educational consequences for this category of students.

II. Appellant Did Not Establish a Substantial Likelihood of Success That NMS's Prohibition Against His T-Shirt's Discriminatory Text Violated His First Amendment Rights.

Tinker struck the balance between the First Amendment rights of students against school districts' imperative to maintain a productive and safe learning environment for all students by establishing two independent reasons whereby a

school district may proscribe student speech. Under *Tinker*, school districts may prohibit student speech that would "materially and substantially disrupt the work and discipline of the school," *Tinker*, 393 U.S. at 513, and/or speech that "impinge[s] upon the rights of other students," *id.* at 509. When a federal court evaluates the reasonableness of a school administrator's actions, it must consider and recognize the "special characteristics of the school environment." *Id.* at 506. With that in mind, school administrators may restrict "speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school[,]" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). Thus, schools can allow—and should even encourage—students to express their beliefs and views in a civil manner, but administrators must have the discretion to regulate student speech that subordinates or dehumanizes other students.

A. NMS Lawfully Restricted Appellant's In-School Discriminatory Speech Under *Tinker*'s "Invasion of Rights of Others" Prong.

A proper analysis under *Tinker's* "invasion of rights of others" prong makes clear that NMS acted reasonably. Appellant is incorrect in his contention that the invasion of the rights of others prong under *Tinker* does not apply because the discriminatory speech on his shirt did not target a specific person. Suppl. PI Mem. 7, 8; Appellant's Br., 33–35. Critically, the case upon which Appellant relies, *Norris ex rel. A.M. v. Cape Elizabeth School District*, does *not* stand for the proposition that

students may engage in overtly discriminatory speech targeting other students based on their gender identity—or membership in other protected classes—so long as the speech does not target an individual student.

In *Norris*, the school prohibited a student's statement that "There is a rapist in our school and you know who it is" as "bullying" under the school's policy. *Norris*, 969 F.3d at 25. Construing the Massachusetts anti-bullying statute, this Court concluded that the school was required to demonstrate that it had a reasonable basis to determine that the speech targeted a specific student, and invaded that specific student's rights, as required under the Massachusetts anti-bullying statute. *Norris*, 969 F.3d 25, 29. Here, unlike the speech at issue in *Norris*, NMS's justifications for promulgating and enforcing the school dress code were not limited to bullying as it is specifically defined in the Massachusetts anti-bullying statute. NMS's justification was principally rooted in a concern that Appellant's shirt would disrupt the learning environment. App. 0056. Likewise, *Norris* did not involve discriminatory speech against members of a protected class. Unlike the speech at issue in *Norris*, Appellant's t-shirt did not refer to an unidentified individual, but instead challenged the very existence of every individual who is transgender or nonbinary and nothing in this Court's opinion in *Norris* suggests that a shirt that targets all members of that class is exempt from analysis under *Tinker*'s invasion of the rights of others prong.

Even putting aside Appellant's conflation of the student behavior proscribed by federal antidiscrimination law and the Massachusetts anti-bullying statute, there is no need to identify a particular student who is targeted in this case because all students falling within the protected class were necessarily targeted by Appellant's t-shirt. Moreover, there is no free-speech right to discriminate against one's peers at school. Discriminatory speech that targets and seeks to devalue or demean members of a protected class goes beyond what Appellant argues as merely "offensive." Rather, discriminatory speech categorically invades the rights of K-12 students in the targeted class to fully enjoy the opportunities and resources offered by the school. As this Court noted in *Norris*, "school administrators must be permitted to exercise discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment." *See Norris*, 969 F.3d at 29 n.18. The *Tinker* standard enables schools to examine the facts of a given situation and take action when necessary to protect the rights of a protected class. *See Doe v. Hopkinton Pub. Schs*., 19 F.4th 493, 505 (1st Cir. 2021) ("*Tinker* holds that schools have a special interest in regulating speech that involves the 'invasion of the rights of others.'").

Under Appellant's logic, a school district would be powerless under *Tinker* to prohibit students from wearing shirts with any epithet targeting a protected class—

no matter how vile or demeaning and regardless of the impact it creates on other students' access to educational opportunities—so long as the shirt does not refer to an individual student. Taking Appellant's argument to its logical conclusion, NMS could not, for example, prohibit students from wearing t-shirts with a racial slur if that t-shirt did not target a specific student. That is not—and cannot be—the law.

B. *Tinker's* Disruption Prong Applies to Student Speech that Creates a Hostile Educational Environment for Other Students.

In *Tinker*, the Supreme Court held that school officials can regulate speech where there is a finding that student in-school speech materially and substantially interferes with the educational environment and school operations. *Tinker*, 393 U.S. at 509. While the classroom might be a "microcosm of American life," Appellant Br. 4, "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Hazelwood*, 484 U.S. at 266 (citing *Bethel Sch. Dist. No. 403*, 478 U.S. at 682). Therefore, when a student's speech denies their peers equal access to a school's educational resources and disrupts the learning environment, school officials have greater authority and responsibility to intervene before speech leads to physical or psychological harm to students. This authority is heightened when school officials seek to prevent or mitigate a school climate that is hostile to marginalized students.

Speech that creates a hostile learning environment that substantially interferes with a student's educational opportunities satisfies *Tinker's* material disruption

prong because the creation of a hostile learning environment disrupts students' education. *See Saxe v. State College Area School District*, 240 F.3d 200, 217 (3rd Cir. 2001) ("[S]peech that would 'substantially interfer[e] with a student's educational performance,' may satisfy the *Tinker* standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.").

Appellant asserts that the classroom is a space created to encourage students to engage in a variety of discussions, including "who belongs," but wore a shirt that decidedly announced to his peers that those who are not cisgender women and men do not exist—and therefore do not belong. Appellant Br. 4. Such a message, in and of itself, communicates to transgender and nonbinary students that they are not only unwelcome members of their educational community but that their existence is worthy of inquiry rooted in animosity.

Tinker's material disruption prong allows school administrators to regulate speech that disrupts the educational process for students who may withdraw and become less visible; interfere with school operations, including student retention; and create animus and hostility that may contribute to depression and other detrimental mental health conditions. *See, e.g.*, Appellee Br. 8. In fact, school officials documented evidence that LGBTQ students had either attempted to commit suicide or suffered from suicidal ideation, citing LBGTQ status and treatment as a

major factor. App. 0103. Additionally, student survey data confirmed these accounts by highlighting how portions of the student population felt bullied and expressed concern about the treatment of the LGBTQ population at the school. App. 0103. This type of educational environment is not conducive to learning and would substantially interfere with the operation of the school, thus contradicting the fundamental mission of an educational space and warranting intervention by school officials. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000) (school district's application of its "Racial Harassment and Intimidation" policy to suspend a middle school student who drew a Confederate flag in math class was upheld because it was reasonable for school officials to anticipate disruption and interference with the rights other students due to past incidents at the school).

Given that Appellant's shirt demeaned and harassed LGBTQ students, the District Court correctly concluded that Appellant did not establish a likelihood of success on his constitutional claims in light of the school's established authority to prevent and mitigate a hostile school climate that might harm marginalized students, like transgender and nonbinary students.

III. The Balance of Hardships and Public Interest Weigh in Favor of NMS.

The third and fourth requirements for issuance of a preliminary injunction—the balance of harms and whether the requested injunction will serve the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556

U.S. 418, 435 (2009). Appellant does not attempt to substantively argue it meets either of these requirements. Rather, he relies on his own assumption that he has established a likelihood of success on the merits of his flawed constitutional claims.

In seeking to fulfill its "basic educational mission," *Hazelwood Sch. Dist.*, 484 U.S. at 266, the government, by way of the public school, has a compelling interest to ensure a school environment free of harassment and discrimination. "Speech that rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing." *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001).

The purported hardships proffered by Appellant pale in comparison to the serious harms faced by NMS and the vulnerable students in its charge. Appellant asks this Court to focus on his intellectual growth and educational opportunity and asserts that wearing his t-shirt with the discriminatory text at school would provide him and other students with an opportunity to "think critically," "appreciate diversity," and "problem solv[e]." Appellant Br. 9. Appellant further argues that his inability to engage in this speech at school, which targets and denies the existence of his transgender and nonbinary peers, is censorship of his "counterspeech," which comes at "a cost" to him. App. 0113.

Appellant, however, ignores the significant hardship that his desired speech would impose on NMS to ensure the academic engagement and educational well-being of his LGBTQ classmates, who were already suffering from a negative school climate. In so arguing, Appellant asks this Court to ignore the very real, very severe harms to Appellant's LGBTQ peers from a hostile environment that detracts from and diminishes their own academic well-being and performance for the purported educational benefit to Appellant arising out of a speculative "learning experience" from his shirt. Were Appellant to prevail on this appeal, the rights of vulnerable students experiencing a discriminatory hostile climate would be severely at risk, as would NMS' ability to enforce policies required under state and federal laws. Indeed, an injunction may embolden other students to wear clothing that not only demeans transgender and nonbinary students but other marginalized students as well, all while NMS remains helpless to take any action to prevent it.

Appellant's desired outcome is also contrary to the public interest in maintaining a public-school environment that is free of race and sex-based discrimination and would make it impossible for a school district to provide an equally safe learning environment for all students. Educational equity and the public interest require that a school district is able to respond to the kind of documented discrimination evidenced by the student complaints and climate surveys in the factual record. App. 0028, 0055–56, 0096. Tellingly, Appellant makes no argument

why the requested relief would be required by the public interest. Instead, Appellant focuses on his right to expression and entitlement to engage in discriminatory speech with his peers while assuming—and asking that this Court find—that an injunction would not produce any relevant negative costs. But a decision that leaves transgender and nonbinary students vulnerable to in-school discrimination from their classmates within the context of a preexisting hostile environment—and prevents school officials from prohibiting sex-based discrimination—comes at a grievous cost to the public interest because it deprioritizes the educational experiences of marginalized students and undermines the importance of protecting the constitutional rights of all students.

The public interest requires that schools prohibit a student's in-school discriminatory speech that targets other students based on their membership in a protected class when students in that protected class are already suffering from a hostile environment. Students from marginalized groups that have been subjected to past discrimination deserve to go to school in a learning environment where they can be free from race and sex-based discrimination. One critical aspect of a school's obligation to provide education to students on an equal basis is to ensure that the learning environment is equally safe and welcoming for students regardless of their membership in protected classes.

In light of the public interest in maintaining a public-school learning environment that is equally accessible and safe for students from all backgrounds, including those who are members of protected classes under federal and state law, the District Court correctly reasoned that granting a preliminary injunction was not in the public interest.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's holding that Appellant failed to establish a likelihood of success on his First Amendment Claim.

Date: November 29, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Charles E. McLaurin
Charles E. McLaurin

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of this Court.

In compliance with Fed. R. App. P. 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word.

In compliance with Fed. R. App. P. 32(a)(7)(B), this brief contains 4,113 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f) and First Circuit Rule 29. As permitted by Fed. R. App. P. 32(g), I have relied upon the word count feature of Microsoft Word.

/s/ Charles E. McLaurin
Charles E. McLaurin