No. 18-30148

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

TERESA BUCHANAN,

Plaintiff-Appellant,

v.

F. KING ALEXANDER, DAMON ANDREW, A.G. MONACO, and GASTON REINOSO,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF LOUISIANA, NO. 3:16-CV-00041-SDD-EWD,
THE HONORABLE SHELLY D. DICK, PRESIDING
OPINION FILED MARCH 22, 2019
WIENER, SOUTHWICK, COSTA

PETITION FOR REHEARING *EN BANC* BY PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellant Teresa Buchanan certifies that the following listed persons and entities as described in Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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GROUNDS FOR REHEARING *EN BANC*

Rehearing *en banc* is warranted for both reasons stated in F.RA.P. 35(a), in that it is necessary to maintain uniformity of this Court's decisions and to address two issues of exceptional significance:

(1) The panel's ruling that officials responsible for enforcing Louisiana State University's ("LSU's") sexual harassment rules are not proper parties in a facial challenge conflicts with established Circuit law and effectively fore-closes a federal forum to challenge facially invalid speech regulations. The conclusion that "when professors or students challenge a university's policies, the proper defendant party is the university or university board," slip op. 9, contradicts numerous Circuit rulings that state universities and their governing boards are arms of the state immune from suit in federal court under the Eleventh Amendment. *E.g.*, *Raj v. LSU*, 714 F.3d 322, 328-29 (5th Cir. 2013); *Pastorek v. Trail*, 248 F.3d 1140, *2-3 (5th Cir. 2001) (unpublished); *Richardson v. Southern Univ.*, 118 F.3d 450, 452-56 (5th Cir. 1997); *Laxey v. Louisiana Bd. of Trs.*, 22 F.3d 621 (5th Cir. 1994); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991).

The district court applied this body of law and observed that suit against either LSU or the Board would have been preempted, but "Plaintiff is not barred by the Eleventh Amendment from bringing suit, as she has, for prospective, injunctive relief against individual state officials." ROA.1314. On this basis, the district

court considered Appellant's facial challenge, under this Court's decision in *Esfeller v. O'Keefe*, 391 F. App'x 337 (5th Cir. 2010), but decided the policies survived First Amendment scrutiny. ROA.1337-1344. The panel vacated this part of the ruling and declined to reach the merits of the facial challenge, on grounds that Appellant had not sued the proper parties. Slip op. at 8-10.

The panel decision creates a "heads the University wins; tails the Appellant loses" situation wherein no one may bring a facial challenge in federal court. Its conclusion that *only* LSU and the Board of Supervisors may be sued conflicts with numerous Fifth Circuit decisions, and its holding that LSU officials are not proper parties is inconsistent with *Esfeller*, 391 F. App'x at 340-42. The panel inappropriately relied on inapposite out-of-circuit law, while ignoring relevant decisions where such facial challenges to university policies were permitted. *E.g.*, *Hays Cty. Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992).

(2) Contrary to established First Amendment standards, the panel decision permitted speech to be punished through application of a facially defective regulation. Without ruling on the facial validity of LSU's policies, the panel upheld Appellant's termination under vague and overly broad speech regulations that lack a requirement that speech be severe, pervasive and objectively offensive. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999). Although the panel held the policy was constitutional as applied based on finding

some of Appellant's speech not constitutionally protected, slip op. 6-8, this was only a small part of the speech for which Appellant was inappropriately targeted, and no LSU decision-maker could say what speech was the ultimate reason for termination. This result is inconsistent with this Court's decision in *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995), that sexual harassment claims "founded solely on verbal insults, pictorial or literary matter" are "content-based, viewpoint-discriminatory restrictions on speech."

Punishing speech under a policy that fails to distinguish protected from unprotected expression violates long-established First Amendment standards. *Street v. New York*, 394 U.S. 576, 585-87 (1969); *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). This is true even for speech by public employees. *E.g.*, *Salge v. Edna Ind. Sch. Dist.*, 411 F.3d 178, 184-97 (5th Cir. 2005); *Cutler v. Stephen F. Austin State Univ.*, 767 F.3d 462, 472-73 (5th Cir. 2014). A number of this Court's judges have cautioned with respect to application of anti-harassment regulations at public universities that liability based on "offending speech alone" will "dramatically curtail free speech on campus." *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 476 n.3 (5th Cir. 2013) (Jones, J., dissenting).

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ISSUES MERITING *EN BANC* CONSIDERATION

En banc review is necessary to address two issues of exceptional importance and to maintain uniformity of decisions in this Circuit.

First, this Court must clarify that university officials who exercise a role in enforcing speech regulations are proper defendants for facial First Amendment challenges to those policies based on overbreadth and vagueness.

The panel's conclusion that only LSU or its Board of Supervisors are proper defendants for facial challenges conflicts with numerous Circuit decisions that these entities are arms of the state immune from suit in federal court under the Eleventh Amendment. The Court must clarify that officials who have interpreted and enforced university speech regulations are proper defendants for facial challenges. The panel acknowledged "[t]he proper defendants to a facial challenge are the parties responsible for creating ***or enforcing*** the challenged … policy," slip op. 8 (emphasis added), but misread *Esfeller*, 391 F. App'x at 339-42, as applying only to those with "ultimate authority," an elusive distinction at best. Slip op. 9 n.31.

Second, this Court must clarify that application of sexual harassment policies that fail to distinguish protected from unprotected speech using constitutionally accepted standards violates the First Amendment.

The panel vacated the district court's decision to uphold LSU's sexual harassment policies, but affirmed their application to Appellant even though they

fail to distinguish protected from unprotected speech, much like policies other circuits have invalidated. *E.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008). *See Boh Bros.*, 731 F.3d at 476 n.3 (Jones, J., dissenting) (citing *DeJohn* and suggesting such policies "dramatically curtail free speech on campus in the name of alleviating sex discrimination"). The panel's holding that LSU's policy was constitutional as applied failed to consider that the charges against Appellant did not separate protected from unprotected speech, and even the decisionmakers could not identify what speech motivated their decision.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff-Appellant filed this civil rights action asserting an as-applied First Amendment challenge to LSU's sexual harassment policies; an as-applied due process challenge; and a facial First Amendment challenge. ROA.11-49. On cross-motions for summary judgment, the district court granted judgment for Appellees on all counts. ROA.1296-1374, 1375.

On appeal, Plaintiff-Appellant asked this Court to hold that LSU's sexual harassment policies violate the First Amendment on their face, that they are unconstitutional as applied to Appellant, and that Appellees are not protected by qualified immunity. The panel affirmed the decision below on the as-applied challenge, holding that speech alleged in some complaints against Dr. Buchanan did not relate to matters of public concern. It vacated the district court's holding that LSU's sexual harassment policies are facially constitutional, but denied Appellant's facial challenge on grounds that she sued the wrong parties. The panel also held Appellees were entitled to qualified immunity.

STATEMENT OF FACTS

LSU's sexual harassment policies challenged in this case were adopted pursuant to a federal "blueprint for colleges and universities throughout the country" that downplayed constitutional concerns over freedom of expression. ROA.1337. LSU's PS-73 defines "sexual harassment" as "unwelcome verbal or physical con-

duct of a sexual nature or gender-based conduct … [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." ROA.484. PS-95 defines "sexual harassment" similarly as "unwelcome verbal, visual, or physical behavior of a sexual nature" or "unwelcome gender-based conduct." ROA.487.

Appellant Dr. Teresa Buchanan had been LSU faculty since 1995, and was promoted to Associate Professor with tenure in 2001. She was investigated for potential violations of PS-73 and PS-95 after a superintendent of a local school district complained to LSU officials based on his perception that Appellant had been critical of him as a supervisor and of the educational attainments of his district during site-visits evaluating LSU student-teachers. ROA.1298. Asked for details, the superintendent said Appellant "talked awful about our schools," and it was reported to him she said "pussy three times." ROA.1298. He did not perceive use of this term as a sexual reference and never complained about sexual harassment. ROA.1299. Rather, he was upset by the perceived criticism, and indicated the word "pussy" (referring to a weak or ineffectual person) was used to instruct Appellant's student-teacher how to cope with parents who may employ different vocabulary from their own. ROA.955, 1299.

Based on this complaint, and making the false assumption Appellant had used a sexual term, LSU investigated to determine whether she violated PS-73 or

PS-95. The resulting report catalogued a number of criticisms that spanned a period of years, including occasional use of profanity as well as disagreements that had occurred with personnel in other school districts. ROA.862-75. It included claims by three former students dating to 2012, when Appellant was going through a difficult divorce, that she had made "inappropriate statements" during teaching, including allegedly making references to her sex life and that she had encouraged students to use birth control. *Id.* The report listed all allegations made, concluded the "reported behavior violates PS-73 & PS-95," but failed to explain that most of the allegations—including the superintendent's complaint—did not relate to the conclusion that LSU's policies had been violated. *Id.*

LSU convened a faculty committee under its policy for Dismissal for Cause for Faculty, PS-104, to determine if Appellant should be terminated. The committee was presented all of the complaints, whether or not they contributed to the report's findings, and committee members evaluated the evidence based on a belief that, under PS-73 and PS-95, any "unwelcome" or "inappropriate" language qualified as sexual harassment. ROA.1308. The committee did not recommend dismissal, but instead proposed censure and an agreement from Appellant to modify her teaching to reduce any use of "potentially offens[ive] language and jokes." ROA.1308-1309.

Despite this recommendation, Defendant-Appellees, including Dean Damon Andrew, A.G. Monaco, Associate Vice Chancellor of Human Resource Management Gaston Reinoso, and President F. King Alexander advocated termination, each citing the superintendent's complaint about non-sexual use of the word "pussy" as evidence of sexual harassment. Appellees Alexander and Monaco both mistakenly believed the complaint was based on a reference to female genitalia, ROA.441 (Tr. 147:20-148:25), 338-339 (Tr. 151:11-154:15), and Andrew testified it was proof Appellant used "inappropriate" language, regardless of context. ROA.357-359. LSU never investigated whether examples such as the three student complaints from 2012 alleging in-class references to sex were severe, pervasive, and objectively offensive. ROA.873-75.

ARGUMENT AND AUTHORITIES

I. THE PANEL DISMISSAL OF BUCHANAN'S FACIAL CHALLENGE CONFLICTS WITH FIFTH CIRCUIT PRECEDENT AND EFFECTIVELY SHUTS THE FEDERAL COURTHOUSE DOOR TO SUCH CLAIMS

The panel did not address the facial validity of LSU's sexual harassment policies and held Appellant "sued the wrong parties" in "fail[ing] to sue the Board of Supervisors." Slip op. 9. The district court had decided the facial challenge against the defendant LSU officials by holding (erroneously) that the policies are not unconstitutionally broad or vague. ROA.1346-1360. The panel vacated that decision, but did not review LSU's policies. Slip op. 9. It held instead that

"proper defendants to a facial challenge are the parties responsible for creating or enforcing the challenged … policy," which, in the panel's categorical view, meant: "The Board [] is the only proper [] defendant to a facial challenge to LSU's policies." *Id*. 8, 9. The panel's dismissal of the facial challenge on this basis conflicts with Circuit law and leaves plaintiffs like Buchanan with no federal forum to facially challenge such unconstitutional policies.

A. The panel's holding offers but one option for Appellant's facial challenge, but it is an impossibility under Fifth Circuit law. State agencies cannot be sued in federal court, as Eleventh Amendment immunity bars claims for both money damages and injunctive relief unless the state waived its immunity. *E.g.*, *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 280-81 (5th Cir. 2002). Louisiana has expressly declined to waive its immunity, La. R.S. 13:5106(A), and this Court has explicitly held LSU's Board of Supervisors is an arm of the state protected from suit in federal court. *Raj*, 714 F.3d at 328-29. Dismissal of Appellant's facial challenge because she should have made the LSU Board the defendant is thus a non-starter, and is inconsistent with Circuit law.

B. The panel cited a single case for its conclusion that Appellant sued "the wrong parties" because the Board was the only proper defendant: *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 199 n.6 (4th Cir. 1997). Slip op. 8. Not only is this out-of-circuit law, it is inapposite. *Jordahl* involved a facial challenge

to a state law, but named a private organization as defendant. The panel relies on a brief footnote suggesting only that private entities are not proper defendants to constitutional claims. *See* 122 F.3d at 199 n.6. *Jordahl* thus has no bearing on *which* ***state-actors*** are proper defendants to facial constitutional challenges.

C. For in-circuit precedent, the lone case the panel cites is *Esfeller v. O'Keefe*, 391 F. App'x 337, but only in an unsuccessful attempt to distinguish it in a footnote. Slip op. 9 n.31. In *Esfeller*, this Court ruled on a facial challenge to a prior LSU policy similar to those here. *Id.* Notably, Esfeller *had* sued the Board, but the district court dismissed all claims against it, citing Circuit law under the Eleventh Amendment. *Esfeller*, 2008 WL 2234056, at *5 (M.D. La. May 30, 2008). Thus, on appeal, the defendant was LSU's Chancellor, who had enforced the challenged policy, yet that did not stop this Court from reviewing the policy's facial constitutionality. *See Esfeller*, 391 F. App'x at 340-42.

The panel tries to distinguish *Esfeller* by noting "the [] president had ultimate authority to enforce the Code," Slip op. 9 n.31, but that merely highlights the internal inconsistency in the panel's insistence that "[t]he Board [] is the only proper [] defendant to a facial challenge to LSU's policies." *Id*. 9 The panel does not explain how the question of whom to sue changes depending on which LSU office or functionary has final review power for a given policy or sanction, nor

does it cite any case to support its conclusion that the only proper defendant is the one with "ultimate authority."

The panel's reasoning suggests that if the process does not result in termination or other disciplinary action requiring a Board vote, a facial challenge can never be brought because there is no Board involvement. *See* ROA.49 (PS-104 § H). But stopping short of imposing an ultimate sanction cannot immunize a policy from a facial constitutional challenge. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014); *DeJohn*, 537 F.3d at 305. If Appellant had only been denied promotion or censured—neither of which require Board action—she should nevertheless be able to bring a facial challenge.

Esfeller illustrates that LSU officials besides the Board are proper defendants for facial challenges, and that includes the president due to his enforcement role. To similar effect is *Sonnier v. Crain*, 613 F.3d 436 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011) (*per curiam*). That case likewise involved a facial constitutional challenge to a speech code at a state university in Louisiana that had as defendants on appeal its interim president, a vice president, and a university police officer, but not the Board, which had been dismissed under the Eleventh Amendment. *Sonnier v. Crain*, 649 F. Supp. 2d 484, 494 (E.D. La. 2009) (citing *Laxey*, 22 F.3d 621). This Court nonetheless not only reviewed the facial challenge, but preliminarily enjoined part of

the code. *Sonnier*, 613 F.3d at 447-48; *see* 634 F.3d at 779. *See also Supple*, 969 F.2d at 114 n.1, 116-21, 125 (dismissing claims against university board members from federal court challenge, but deciding facial challenge to policy with remaining university-official defendants).

This highlights another internal inconsistency involving the panel's acknowledgment that the "proper defendants to a facial challenge are the parties responsible for creating *or enforcing* the … policy," while holding the Board is "the only proper [] defendant." Slip op. 8-9 (emphasis added). Andrew, Reinoso, Monaco, and Alexander all were "responsible for … enforcing" PS-73 and PS-95, but the panel held they were not proper defendants. No explanation is offered, nor does the panel opinion comport with the Circuit precedent outlined above.

C. The panel instead supported its ruling by noting out-of-circuit cases involving facial constitutional challenges to university speech codes that named their boards or the institution itself as defendants. *See* slip op. 9 n.29. Such cases are inapt comparisons for *Louisiana* state universities, because the question of Eleventh Amendment immunity requires analysis of state-specific law. *See*, *e.g.*, *Delahoussaye*, 937 F.2d at 147-48. More importantly, reference to these cases does not address the fact that in *this* Circuit, LSU's Board members are immune

from suit. Accordingly, the out-of-circuit cases do not support the panel's holding that ***only*** the Board is a proper defendant for facial constitutional challenges.[1]

D. The panel's decision leaves a significant gap in constitutional protections. Regulation of campus speech and intolerance of "views [considered] socially harmful or destructive" is described by First Amendment experts as "the single greatest threat to free speech in the nation." Free Speech 101: The Assault on the First Amendment on College Campuses: Hearing Before the Sen. Comm. on the Judiciary, 115th Cong. (2017) (statement of Floyd Abrams). "Hardly a week goes by without new tensions," Erwin Chemerinsky and Howard Gillman, FREE SPEECH ON CAMPUS 1 (2017), especially where "many universities use the concept of harassment to justify punishing one-time utterances that could be construed as offensive but don't really look anything like harassment." Greg Lukianoff and Jonathan Haidt, THE CODDLING OF THE AMERICAN MIND 207 (2018).

Six judges of this Circuit joined a decision advocating vigilance against speech codes like those at bar. Judge Jones' dissent in *Boh Brothers* observed that federal guidance regarding campus speech regulations, which led to adoption of

[1] Also, in each university case cited, other administrators and/or officials, like those named here, were defendants. *See DeJohn*, 537 F.3d at 303 (former president, professors were defendants); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006) (various defendant administrators); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1180 n.2 (6th Cir. 1995) (president, vice president, athletic director defendants).

LSU's challenged harassment policies, threatens to "dramatically curtail free speech on campus in the name of alleviating sex discrimination." 731 F.3d at 476 n.3 (Jones, J., dissenting). The opinion also observed how that guidance tracked the speech code that the Third Circuit invalidated in *DeJohn*. *Id*. (citing *DeJohn*, 537 F.3d at 313-20). The panel's decision denies a federal forum for challenges to the constitutionality of such policies in *this* Circuit, and should be corrected on rehearing.

II. THE PANEL'S REFUSAL TO REVIEW THE FACIAL CHALLENGE SHORT-CIRCUITED THE AS-APPLIED CLAIM AND PRESERVED AN UNCONSTITUTIONAL SPEECH REGULATION

Erroneous dismissal of the facial challenge carries significant ramifications for Buchanan's as-applied challenge and for free speech at LSU. As this Court observed, "[w]here pure expression is involved," and "sexual harassment" can be "founded solely on verbal insults, pictorial or literary matter," as here, the enforcing policy "imposes content-based, viewpoint-discriminatory restrictions." *DeAngelis*, 51 F.3d at 596-97. The vagueness and overbreadth of PS-73 and PS-95 enable LSU to punish both protected and unprotected speech, in violation of the First Amendment. *See, e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn*, 537 F.3d at 316; *Dambrot*, 55 F.3d at 1183-84; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210-11 (3d Cir. 2001).

The policies' broad terms conceivably "'cover any speech' of a 'gender-motivated' nature [whose] 'content … offends,'" *DeJohn*, 537 F.3d 317-18 (quoting *Saxe*, 240 F.3d at 217), and prohibit merely "suggestive" or "offensive" speech in a manner that is "entirely subjective [with] no shelter for core protected speech." *McCauley*, 618 F.3d at 250. Further, LSU's policies violate the requirement that anti-harassment regulations governing offensive expression must restrict only that which is "so severe, pervasive, and objectively offensive … the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651-52 (1999); *DeAngelis*, 51 F.3d at 596; *Esfeller*, 391 F. App'x at 341. Avoidance of the facial challenge leaves LSU teachers and students subject to unconstitutional regulation and is inconsistent with *DeAngelis*, *Esfeller* and other Circuit precedent.

A. This case vividly illustrates the perils of imprecise sexual harassment policies and, in particular, their ability to indiscriminately punish protected and unprotected speech. The panel upheld PS-73 and PS-95 as applied upon finding some of Appellant's speech constitutionally unprotected. Slip. op. 6-8. However, LSU's case for terminating Appellant started with a district superintendent's complaint that Appellant criticized him and his schools based on educational quality and proper administration, *see supra* 4, issues this Court has long held are protected as matters of public concern. *E.g.*, *Goudeau v. E. Baton Rouge Parish Sch.*

Bd., 540 F. App'x 429, 434-35 (5th Cir. 2013); *Salge*, 411 F.3d at 184-97. The subsequent investigation and PS-104 process lumped this beef together with other complaints and undifferentiated findings, with no constitutional guidance for what speech may be sanctionable. *See supra* 4-6. Regardless of whether the panel correctly concluded *some* of Appellant's speech did not relate to matters of public concern, the record is clear LSU terminated her, at least in part, based on constitutionally protected speech.

B. Affirmance of Appellant's termination without a ruling on the facial validity of PS-73 and PS-95 thus approved LSU's application of unconstitutional policies. It is settled law that imposing sanctions under a regulation that does not distinguish protected from unprotected speech violates the First Amendment. *Street*, 394 U.S. at 585-87. Where a penalty implicates constitutional rights, it "cannot be upheld" if it is "impossible to say" what the specific grounds were for taking action. *Id*. at 585-86 (quoting *Stromberg*, 283 U.S. at 367-68). This is true even for speech of public employees. *E.g.*, *Cutler*, 767 F.3d at 472-73; *Salge*, 411 F.3d at 186 ("[I]n mixed speech cases we proceed to analyze the form, content, and context of the employee's speech."). And imposing penalties under facially unconstitutional statutes, regulations, or policies itself violates the First Amendment. *E.g.*, *U.S. v. Alvarez*, 567 U.S. 709, 714, 729-30 (2012) (affirming reversal of conviction under unconstitutional Stolen Valor Act); *U.S. v. Stevens*, 559 U.S. 460,

467, 481-82 (2010) (same under "animal crush videos" statute). Because the panel avoided the merits of the facial challenge, it overlooked this facet of Appellant's as-applied claim.

C. The Court should order rehearing to require review of the district court judgment that PS-73 and PS-95 are constitutional, and to consider the consequences to Appellant's as-applied challenge. The threat of public university speech codes "dramatically curtail[ing] free speech on campus" based on "offending speech" is a problem of exceptional importance. *See supra* 11-12 (citing *Boh Bros.*, 731 F.3d at 476 n.3). This Court should grant rehearing *en banc* because LSU cannot constitutionally apply a defective policy, the facial validity of LSU's polices has been left in limbo, and the panel's decision regarding "proper defendants" threatens to prevent future challenges in federal court.

CONCLUSION

For the foregoing reasons, this case should be reviewed *en banc*.

RESPECTFULLY SUBMITTED this 5th day of April, 2019.

By s/ Robert Corn-Revere

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Federal Rules of Civil Procedure 32(c)(2)(B) and 35(b)(2)(a). The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, Microsoft Word, the word count of the brief is 3,869, not including the certificate of interested persons, table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 5th day of April, 2019.

DAVIS WRIGHT TREMAINE LLP

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 5, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Robert Corn-Revere
Robert Corn-Revere