

Nos. 23-10008, 23-10536, and 23-10836
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLENE CARTER,
Plaintiff-Appellee/Cross-Appellant,

v.

LOCAL 556, TRANSPORT WORKERS UNION OF AMERICA; SOUTHWEST
AIRLINES Co.,

Defendants-Appellants/Cross-Appellees,

CHARLENE CARTER,
Plaintiff-Appellee,

v.

SOUTHWEST AIRLINES Co.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, Case No. 3:17-cv-02278

**BRIEF OF ALLIANCE DEFENDING FREEDOM AS AMICUS
CURIAE IN SUPPORT OF NEITHER PARTY**

JAMES A. CAMPBELL
GREGORY CHAFUEN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
jcampbell@adflegal.org
gchafuen@adflegal.org

JOHN J. BURSCH
RYAN L. BANGERT
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org
rbangert@adflegal.org

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

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

Amicus Curiae

Alliance Defending Freedom

Counsel for Amicus Curiae

John J. Bursch
Ryan L. Bangert
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001

James A. Campbell
Gregory Chafuen
Alliance Defending Freedom
44180 Riverside Pkwy
Lansdowne, VA 20176

Under Fed. R. App. P. 26.1 and 5th Cir. R. 26.1, Amicus Curiae Alliance Defending Freedom states that it is a nonprofit organization, has no parent corporation, and does not issue stock.

Under 5th Cir. R. 28.2.1, Amicus is unaware of any additional parties not listed in the Appellants' and Appellees' statements of interested parties.

/s/ John J. Bursch

John J. Bursch

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE¹

Alliance Defending Freedom (ADF) is a nonprofit, public-interest legal organization that provides litigation services, funding, and training to protect First Amendment freedoms and other fundamental rights. ADF has contributed to 74 Supreme Court victories and played a role in representing parties that prevailed in 15 Supreme Court cases in the last 12 years.² In 2018, *Empirical SCOTUS* ranked ADF first among “top performing firms” litigating First Amendment cases.³

ADF represents clients who seek to exercise their religious liberty rights and to challenge government policies that seek to curtail these rights. It has often filed amicus briefs in this Court.⁴

As part of its religious liberty advocacy, ADF frequently provides legal training on religious liberty matters in venues across the nation to lawyers, lawmakers, and members of the public.

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² See *infra*. note 9.

³ Adam Feldman, *Empirical SCOTUS: Supreme Court all-stars 2013-2017 (Corrected)*, SCOTUSblog.com (Sept. 13, 2018), <https://perma.cc/C57N-RM99>.

⁴ *E.g.* Br. of All. Defending Freedom as Amicus Curiae in Supp. of Appellee, *Deanda v. Becerra*, No. 23-10159 (5th Cir. Aug. 24, 2023), <https://perma.cc/3TE8-DHVQ>; Br. of All. Defending Freedom as Amicus Curiae in Supp. of Pet’rs, *Nat’l Ctr. for Pub. Pol’y Rsch. v. SEC*, No. 23-60230 (5th Cir. July 21, 2023), <https://perma.cc/S2DY-HN9K>; and Br. of Young America’s Found. as Amicus Curiae in Supp. of Appellant, *Villarreal v. City of Laredo*, No. 20-40359 (5th Cir. Dec. 12, 2022), <https://perma.cc/S5BE-R67D>.

SUMMARY OF ARGUMENT

Alliance Defending Freedom is a nationally recognized and respected law firm that is well-qualified to provide Title VII religious liberty legal training. ADF attorneys have a long history of litigating matters involving religious liberty rights that specifically involve Title VII of the Civil Rights Act of 1964 (Title VII).⁵

Prominent public officials have recognized ADF's legal accomplishments and expressed their respect for the professionalism and respectful candor of ADF attorneys.

ADF attorneys have specific experience providing legal training on religious liberty and Title VII compliance. Their legal training in various venues has been approved for continuing legal education (CLE) credit, and they have provided legal training as part of the resolution of litigation in other First Amendment cases.

The training provided by ADF attorneys in response to the district court's order in this case would address legal issues surrounding enforcement of Title VII, developments in judicial interpretations of Title VII, the history and context of religious liberty protections found in Title VII, and best practices to ensure compliance with Title VII's

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (as amended by Civil Rights Act of 1991, Pub. L. 102-166, and Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2).

prohibition on religious discrimination and its religious-accommodation requirement.

ARGUMENT

I. ADF is a nationally respected law firm that is well-qualified to provide Title VII legal training about religious discrimination in the workplace.

ADF is a nonprofit public-interest law firm dedicated to protecting every American's fundamental right to freely exercise their religion. ADF attorneys have often litigated matters involving Title VII, as well as constitutional claims involving clients' religious liberty rights.⁶ ADF attorneys have also provided hundreds of hours of professional legal education on the First Amendment, religious discrimination, and compliance with federal religious accommodation laws, many of which have been approved for CLE credit. Based on their experience and qualifications, ADF attorneys are well-qualified to provide Title VII religious liberty legal training.

A. ADF is a national civil rights law firm engaged in legal advocacy and public education.

Launched in 1994, ADF has grown into the world's largest law firm dedicated to protecting religious liberty, free speech, the sanctity of life, parental rights, and marriage and family. ADF maintains a robust practice of litigating matters involving religious liberty rights, including

⁶ See *infra* Part I(c).

the application of Title VII's protections against religious discrimination in the workplace.

ADF's litigation is handled by a dedicated team of over 80 full-time attorneys committed to protecting Americans' fundamental rights. Many ADF employees have worked at the highest levels of government, including the White House, the Department of Justice, U.S. Attorney offices, state Attorney General offices, and for Members of Congress. Others were part of prominent law firms like Kirkland & Ellis, Latham & Watkins, Jones Day, Cravath, Swaine & Moore, and Baker Botts. And over 40% of ADF's attorneys have held federal clerkships—including at the U.S. Supreme Court and nine of the 12 U.S. Courts of Appeals—or clerkships at state supreme courts. ADF has more former clerks as a percentage of total attorneys than some of the largest and most respected law firms in the country.

In addition to public interest litigation, ADF engages in expansive public education campaigns. As part of this effort, "ADF provides information to the public about the importance of proper laws concerning freedom of religion, freedom of speech, the sanctity of every human life, parental rights, and the values of marriage and family in the United States and throughout the world."⁷ As part of this outreach, ADF attorneys have lectured and taught in venues across the country.

⁷ Alliance Defending Freedom, Internal Revenue Service Form 990: Return of Organization Exempt from Income Tax 2 (2022).

Lawyers and members of the public attend these educational events, and the topics covered range from complying with federal laws like Title VII to constitutional rights and legal ethics.

B. ADF has defended the civil rights of every American for nearly 30 years.

ADF is one of the nation’s most respected and successful advocacy organizations before the Supreme Court. Since 2011, ADF has been involved in representing parties in 15 victories at the Supreme Court over the last 12 years.⁸

These victories have secured the rights of nonprofit and for-profit organizations, including churches, religious organizations, family-owned businesses, and many others. And these victories benefit not only the represented party but every American.

In 2018, SCOTUSblog analyzed which law firms were the “Supreme Court all-stars” during the 5-year period of 2013 through

⁸ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (served on the legal team representing Petitioner); *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (representing Thomas More Law Center); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019); *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Zubik v. Burwell*, 578 U.S. 403 (2016) (representing Southern Nazarene University and Geneva College); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (representing Conestoga Wood Specialties Corporation); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

2017.⁹ ADF was the leading law firm in terms of wins in First Amendment decisions, with four victories during that time.¹⁰ Even more impressively, ADF was the only law firm with a perfect 100 percent win rate at the High Court during that period.¹¹

ADF's work extends beyond the Supreme Court, representing clients in federal and state jurisdictions around the country. It has prevailed in more than three-fourths of all cases litigated to conclusion.

Of ADF's Supreme Court victories, many have involved defending clients' religious liberty rights.¹² For example, in *Trinity Lutheran Church of Columbia v. Comer*, ADF defended a church's freedom to participate equally in neutral government programs without discrimination based on the church's religious identity.¹³ And in *Reed v. Town of Gilbert*, ADF defended a pastor's right to place small signs pointing people to his worship services—a decision that has become the

⁹ Feldman, *supra* note 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017); *Zubik v. Burwell*, 578 U.S. 403 (2016) (representing Southern Nazarene University and Geneva College); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (representing Conestoga Wood Specialties Corporation); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

¹³ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 454 (2017).

leading precedent on the impermissibility of content-based discrimination.¹⁴

ADF's victories at the Supreme Court and in lower courts have helped protect every American's right to freely live out his or her faith. And while many ADF clients have been Christians, ADF has also defended the rights of Jews, Buddhists, Muslims, Mormons, Jehovah's Witnesses, and people of no faith.¹⁵

C. ADF attorneys have experience litigating claims of Title VII anti-religious discrimination.

ADF attorneys are well-suited to provide Title VII religious accommodation training because they have litigated cases under that statute involving anti-religious discrimination.

For example, in *Kluge v. Brownsburg Community School Corporation*, ADF attorneys are representing a music and orchestra teacher, John Kluge, asserting that a school violated Title VII's

¹⁴ *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), which has been cited by lower courts over 1,300 times.

¹⁵ *E.g.*, Compl., *Schwartz v. City of New York*, 19-CV-463 (E.D.N.Y Jan. 23, 2019) (representing Dr. David Schwartz); Br. of Amicus Curiae Jewish Coal. for Religious Liberty Supporting Appellants, *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, No. 22-11674 (11th Cir. Sept. 15, 2022), <https://perma.cc/VZ2U-C7HM> (filing an amicus brief in support of Buddhist association); Br. of Amicus Curiae All. Defending Freedom in Supp. of Pet'r, *Holt v. Hobbs*, 574 U.S. 352 (2015) (No. 13-6827), <https://perma.cc/HPW4-292V> (filing an amicus brief in support of Muslim prisoner); and Br. of Young America's Found. as Amicus Curiae in Supp. of Appellant, *Villarreal v. City of Laredo*, No. 20-40359 (5th Cir. Dec. 12, 2022), <https://perma.cc/S5BE-R67D> (filing an amicus brief in support of journalist's right to gather and publish truthful news).

religious accommodation requirement.¹⁶ ADF attorneys also recently settled *Queen of Angels Catholic Bookstore v. City of Jacksonville*, relying in part on Title VII.¹⁷ The city of Jacksonville agreed that Queen of Angels Catholic Bookstore is an exempt religious organization under Title VII and city law. Similarly, ADF attorneys recently relied on Title VII's religious organization exemption to defend a homeless shelter in Wyoming.¹⁸ ADF defended that religious nonprofit from state and federal officials who threatened to punish it for hiring employees who share the ministry's religious beliefs.

ADF attorneys have also filed amicus briefs in cases involving Title VII claims. ADF submitted amicus briefs to the U.S. Supreme Court in *Groff v. DeJoy*, arguing that the more-than-a-de-minimis-cost standard established by *Trans World Airlines, Inc. v. Hardison* doomed all manner of religious accommodations in the workplace, including those that cost nothing and have no material effect on an employer's business.¹⁹ The Court agreed with the views advanced by ADF on the

¹⁶ *Kluge v. Brownsburg Cmty. Sch. Corp.*, No. 21-2475, 2023 WL 4842324 (7th Cir. July 28, 2023) (challenging the legality of the school district's decision to revoke his religious accommodation over students' pronoun usage).

¹⁷ *Cath. Bookstore, Inc. v. City of Jacksonville*, No. 3:23-CV-192, 2023 WL 3931839 (M.D. Fla. June 7, 2023).

¹⁸ *Wyo. Rescue Mission v. EEOC*, No. 1:22-cv-00206, 2022 WL 18636352 (D.Wyo. Nov. 21, 2022).

¹⁹ *Brs. of John Kluge as Amicus Curiae in Supp. of Pet'r, Groff v. DeJoy*, 600 U.S. 447 (2023) (No. 22-174), <https://perma.cc/ETR8-VG59> and <https://perma.cc/J79X-JUDL>; *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

proper interpretation of Title VII, holding that Title VII requires employers to grant religious accommodations in the absence of *substantial* additional costs in relation to the business.²⁰

ADF attorneys also filed amicus briefs at the Seventh and Fourth Circuits in *Garrick v. Moody Bible Institute* and *Billard v. Charlotte Catholic High School*, arguing that Title VII protects religious employers when they make hiring decisions in line with their faith.²¹

ADF attorneys are well-qualified, by practice specialty and experience, to provide legal training on Title VII's prohibition of anti-religious discrimination.

II. ADF has a strong reputation as a civil rights law firm.

A. Prominent public officials have praised ADF's legal accomplishments.

Prominent lawmakers, judges, leaders in the U.S. Justice Department, and litigators respect ADF's work to protect Americans' fundamental rights.

For example, U.S. Senator James Lankford wrote that “[t]he Alliance Defending Freedom is a national and reputable law firm that works to advocate for the rights of people to peacefully and freely speak,

²⁰ *Groff v. DeJoy*, 600 U.S. 447, 471 (2023).

²¹ Br. of All. Defending Freedom as Amicus Curiae in Supp. of Appellant, *Garrick v. Moody Bible Inst.*, No. 21-2683 (7th Cir. Aug. 7, 2023), <https://perma.cc/F7S3-NKU2>, the 7th Circuit has not yet issued its opinion regarding this appeal; Br. of Cardinal Newman Soc’y, et al. as Amici Curiae in Supp. of Appellants, *Billard v. Charlotte Cath. High Sch.*, No. 22-1440 (4th Cir. Sept. 29, 2022).

live and work according to their faith and conscience without threat of government punishment.”²² In 2018, the late Senator Orrin Hatch praised ADF: “ADF’s legal work is widely respected. ADF has been an effective advocate for its views on religious liberty and free speech cases.”²³ Moreover, based on its record of victories at the Supreme Court, he concluded, “that’s a pretty good indication to me that they are defending mainstream views.”²⁴ That view was echoed in 2017 by Senator Charles Grassley, who said that ADF “is an advocacy organization that litigates religious liberty cases. They’ve won seven cases in front of the Supreme Court the past 7 years. They’re not outside the mainstream.”²⁵

Various U.S. Attorneys General have also lauded ADF’s accomplishments. Former Attorney General Ed Meese said: “ADF and its leaders advocate their views without needlessly dividing. They respectfully make their case in the courts. Every group should follow

²² Letter from James Lankford, U.S. Senator from Oklahoma, to James Goldston, President of ABC News (July 31, 2017), <https://perma.cc/3GXW-TXHC>.

²³ *Confirmation Hearing on Fourth Circuit Court of Appeals Nominee Allison Jones Rushing Before the Senate Committee on the Judiciary* at 26:06, 115th Cong. (Oct. 17, 2018) (statement of Orrin Hatch, U.S. Senator from Utah), <https://perma.cc/9GQZ-6WRL>.

²⁴ *Id.* at 26:47.

²⁵ *Executive Business Meeting before Senate Committee on the Judiciary*, 115th Cong. (Oct. 5, 2017) (statement of Charles Grassley, U.S. Senator from Iowa), <https://perma.cc/6LUC-UHDQ>.

their example, no matter where they fall on the political spectrum.”²⁶ And former Attorney General Jeff Sessions praised ADF’s record in 2018: “You have a 9-0 record at the Supreme Court over the past seven years—and that includes two of the most important cases of the last term. . . . In the lower courts, you’ve won hundreds of free speech cases. That’s an impressive record. These are not fringe beliefs that you’re defending. You endeavor to affirm the Constitution and American values.”²⁷

These public officials and others have recognized ADF’s ability to defend mainstream principles of religious liberty. Their vote of confidence affirms the national reputation held by ADF and its attorneys.

III. ADF is well-equipped to provide court-ordered training on religious liberty and compliance with Title VII’s requirement for religious accommodations.

A. ADF attorneys have provided many hours of professional legal training approved for CLE credit.

ADF attorneys regularly provide professional legal training that has been approved for CLE credit in states across the country. Over the past ten years, ADF attorneys have provided over 100 hours of CLE-approved courses covering a range of First Amendment issues,

²⁶ Edwin Meese III, *The Latest ‘Hate’ Smear Target is a Civil-Rights Group*, Wall St. J. (July 19, 2017), <https://perma.cc/W43P-6DV7>.

²⁷ *Attorney General Jeff Sessions Delivers Remarks at the Alliance Defending Freedom’s Summit on Religious Liberty*, U.S. Dep’t of Justice (Aug. 8, 2018), <https://perma.cc/M4BJ-Z2KT>.

including religious liberty and free speech rights. ADF attorneys have also provided CLE-approved courses on many other topics, such as ethics and the contours and application of various federal laws. For example, as recently as September 2023, an ADF attorney presented as part of a course on the United States and Virginia Constitutions, Title VI, and Title IX in K-12 Education.²⁸

ADF's history of providing legal training that has been reviewed and approved for CLE credit by state bars shows that neutral third parties recognize ADF's capability to provide effective legal training.

B. ADF attorneys have provided legal training as part of the resolution of litigation.

This case would not be the first in which ADF attorneys provided legal training as part of the resolution of a lawsuit. In at least two other cases, ADF attorneys provided training to government officials on First Amendment rights as part of a court-approved settlement.

In a recently settled case, *DeJong v. Pembroke*, ADF attorneys conducted a First Amendment free speech training session with three professors at Southern Illinois University Edwardsville.²⁹ The lawsuit involved school officials who violated the constitutional rights of a

²⁸ Virginia Law Foundation, *The U.S. and Virginia Constitutions, Title VI, and Title IX in K-12 Education* 7-8, Virginia CLE 2023 Seminar Written Materials, <https://perma.cc/6UVN-9KCC>.

²⁹ *DeJong v. Pembroke*, No. 3:22-CV-01124-NJR, 2023 WL 2572617 (S.D. Ill. Mar. 20, 2023).

former art therapy graduate student because she expressed views that differed from many of her classmates. As part of that training, ADF attorneys discussed the history of free speech protections in the First Amendment and explained how free speech rights protect students on college campuses, especially those with minority views.

In addition, ADF attorneys also provided legal training following the litigation in *Fresno State Students for Life v. Thatcher*.³⁰ That case also involved the violation of student free speech rights when a Fresno State University professor instructed students to join him in defacing and erasing a pro-life student group's sidewalk chalk messages. As part of the settlement, the professor was required "[t]o complete a training session on First Amendment rights" taught by ADF attorneys.³¹ Much like the training in *DeJong*, ADF attorneys discussed free speech rights and practices protecting those rights.

C. Legal training by ADF attorneys in this case would cover Title VII's protections for religious freedom.

ADF attorneys are prepared to provide legal training on the religious liberty protections in Title VII pursuant to the district court's order. The training would cover recent Supreme Court cases interpreting Title VII, current trends involving conflicts between

³⁰ Settlement Agreement and Release, *Fresno State Students For Life et al. v. Thatcher*, No. 1:17-CV-00657-DAD-SKO, (E.D. Cal. Mar. 19, 2018), ECF No. 37-1.

³¹ *Id.* at 3.

religious employees and employers, and best practices to avoid violating employees' religious liberty rights.

The training would analyze cases enforcing Title VII, including *Groff v. DeJoy* and other notable federal appellate decisions.³² It would also discuss legal scholarship addressing the implications and significance of *Groff*. And it would explain the history of religious liberty protections found in Title VII.

CONCLUSION

ADF is well suited to provide comprehensive and professional legal training about the religious liberty requirements of Title VII. Over the last 30 years, ADF has emerged as a nationally recognized civil rights law firm. It has a strong reputation for winning its cases before courts across the country, including 15 at the U.S. Supreme Court in the last 12 years. ADF attorneys have experience litigating matters that implicate Title VII's religious exemptions and have a long history of providing professional legal training that has been approved for CLE credit by state bars across the nation. These facts about ADF's qualifications to provide legal training on Title VII and religious liberty should aid the Court in deciding whether to uphold the district court's decision to impose legal training as a sanction.

³² *Groff v. DeJoy*, 600 U.S. 447 (2023).

Respectfully submitted,

By: /s/ John J. Bursch

JAMES A. CAMPBELL
GREGORY CHAFUEN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
jcampbell@adflegal.org
gchafuen@adflegal.org

JOHN J. BURSCH
RYAN L. BANGERT
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org
rbangert@adflegal.org

Counsel for Amicus Curiae

October 19, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because it contains 3,358 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(b), as determined by the word counting feature of Microsoft Office 365.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Century Schoolbook.

Dated: October 19, 2023

/s/ John J. Bursch
John J. Bursch
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
John J. Bursch
Counsel for Amicus Curiae