

Case No. 15-60205
**United States Court of Appeals
for the
Fifth Circuit**

GOOGLE, INC.,
Plaintiff/Appellee,

v.

JAMES HOOD III, ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI,
IN HIS OFFICIAL CAPACITY,
Defendant/Appellant

On Appeal from Order of the United States District Court,
Southern District of Mississippi, Northern Division,
Civil Action No. 3:14-CV-981-HTW-LRA

**AMICI CURIAE BRIEF IN SUPPORT OF
MISSISSIPPI'S INTERLOCUTORY APPEAL**

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Pursuant to Federal Rule of Appellate Procedure 29(a), the duly elected or appointed Attorneys General for the Commonwealths of Kentucky, Massachusetts, and Pennsylvania, the States of Arizona, Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the District of Columbia respectfully submit the following amici curiae brief in support of Mississippi Attorney General James Hood III's appeal from the District Court's Order granting Plaintiff/Appellee Google, Inc., a preliminary injunction.

I. Amici Curiae's Statement of Interest

This is a case about the authority of state Attorneys General to exercise one of their fundamental powers: the ability to investigate potential violations of state law. What should be a routine discovery dispute in Mississippi state courts, resolved under established state procedures (*see, e.g.*, Miss. Code Ann. § 75-24-17), has instead evolved into a contrivance for a company doing business in the state of Mississippi to invoke federal jurisdiction by asserting potential affirmative defenses to claims that have never been filed.

If allowed to stand, the District Court’s March 27, 2015 order (the “Order”) enjoining the Mississippi Attorney General’s enforcement of his own subpoena would provide a roadmap for any potential wrongdoer subject to a legitimate state law enforcement investigation to attempt to thwart such an inquiry. With the Order as a guide, any target of a state investigation would be invited to conjure up potential federal defenses to yet-to-be filed civil claims and file a preemptive lawsuit in federal court against state law enforcement authorities. Such an outcome would undermine Attorneys General’s powers, granted to them by state constitutions and state statutes, to protect the general citizenry from violations of state law. It would also flood the federal courts with what amount to state-law discovery disputes. And it should not be countenanced by this Court.

As constitutional officers and the chief law enforcement officers of our respective states, the amici have an over-riding interest in preserving the ability of state Attorneys General to carry out their duties—an ability threatened by the Order, especially if other courts choose to follow the District Court’s unprecedented decision in this case. Without taking any position on the likely outcome of the Mississippi Attorney General’s investigation into Google’s practices, the amici join this brief in strong support of the public interest in preserving the ability of state Attorneys General to investigate potentially unlawful and harmful conduct. Amici thus respectfully urge this Court to vacate the Order

and uphold the authority of the Mississippi Attorney General to investigate potential violations of state law.

II. Discussion

A. **The Court may review the issues of standing and subject matter jurisdiction raised in Mississippi’s motion to dismiss in the context of reviewing the District Court’s preliminary injunction order.**

Generally, the Courts of Appeal have jurisdiction to review only final decisions of the federal district courts. 28 U.S.C. § 1291. By virtue of 28 U.S.C. § 1292, however, the Courts of Appeal have jurisdiction to review certain listed interlocutory orders, including orders granting preliminary injunctions. 28 U.S.C. § 1292(a)(1). Hence, the instant appeal.

Once an interlocutory order listed in § 1292 “is properly before an appellate court[,] other issues such as the jurisdiction of the trial court may also be reviewed.” *Connell v. Dullen Steel Products, Inc.*, 240 F.2d 414, 417 (5th Cir. 1957) (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940)); *see also Myers v. Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977) (“It is settled that an appellate court that has jurisdiction over an interlocutory order containing injunctive relief may reach and decide other aspects of that order even though the others would not be reviewable independently by interlocutory appeal.”) (citing *Deckert*, 311 U.S. at 287); *Pang-Tsu Mow v. Republic of China*, 201 F.2d 195, 198 (D.C. Cir. 1953) (“In reviewing this preliminary injunction we may inquire as to

both the jurisdiction of the District Court and the adequacy of the complaint, for no preliminary injunction may stand if the complaint itself cannot stand.”) (internal citation omitted); *Mayflower Industries v. Thor Corp.*, 184 F.2d 537, 538 (3d Cir. 1950) (“Although the denial of a motion to remand itself would not support an interlocutory appeal, the question of removability is jurisdictional and therefore it is before us for consideration once it appears that the case is properly here for review of an appealable order.”) (citations omitted); *but cf. Association of Co-op. Members, Inc. v. Farmland Industries, Inc.*, 684 F.2d 1134, 1138 (5th Cir. 1982) (not deciding whether the restriction of appellate review to the injunctive aspects of a district court’s order is a jurisdictional limitation or a rule of judicial administration, and declining to exercise any power to consider issues not pertaining directly to the interlocutory injunctive relief granted in the case). This is especially the case where “any otherwise non-appealable ruling . . . is ‘inextricably intertwined’ with or ‘necessary to ensure meaningful review of’ the order properly before [the appellate court] on interlocutory appeal.” *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 998 (9th Cir. 2005) (citations and internal quotation marks omitted). *See also Associated Business Telephone Systems Corp. v. Greater Capital Corp.*, 861 F.2d 793, 796 (3d Cir. 1988) (“The denial of a motion to dismiss for lack of in personam jurisdiction is a classic example of an interlocutory

ruling. Such rulings should be reviewed on a section 1292(a)(1) appeal only if they bear upon the propriety of the preliminary injunction.”).

Here, the Mississippi Attorney General’s motion to dismiss raised important issues of subject matter jurisdiction and standing. Further, in his opposition to Google’s motion for preliminary injunction, the Attorney General largely relied on his motion to dismiss and the arguments presented within that motion. The District Court granted Google its requested preliminary injunction and denied the Attorney General’s motion to dismiss in the same order. Accordingly, any review of the District Court’s Order granting Google a preliminary injunction, and in particular any review of Google’s likelihood of success on the merits, necessarily implicates review of Mississippi’s motion to dismiss and the District Court’s denial of same. Indeed, the District Court’s resolution of the motion to dismiss bears upon the propriety of and is necessary to ensure meaningful review of the preliminary injunction ruling. *See Associated Business Telephone Systems Corp.*, 861 F.2d at 796; *Smith*, 421 F.3d at 998. Moreover, in general “[r]esolution of subject matter jurisdiction . . . is necessary to ensure meaningful review of the district court’s interlocutory rulings because if appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings.” *Smith*, 421 F.3d at 998 (citation and internal quotation marks omitted).

B. Google is unlikely to succeed on the merits of its arguments.

1. Attorneys General have broad authority to investigate potential violations of state consumer protection laws and to use civil investigation demands or subpoenas in so doing.

Attorneys General are the chief law enforcement officers of their states and have considerable common law and statutory authority to investigate matters affecting the public interest. Carried to the United States from England as part of the common law, the office of Attorney General has existed in this country since its founding. *See, e.g., Johnson v. Com. ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 826 (Ky. 1942) (“The office of Attorney General existed in England from an early date. Most of the American colonies established an office of the same name, and it was carried into the succeeding state governments.”). In England, “the duty of the Attorney General was to represent the king, he being the embodiment of the state.” *Com. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974) (citation omitted). In the United States, however, “under the democratic form of government now prevailing[,] the people are king[.]” *Id.* (citation omitted). Thus, today’s Attorneys General represent the people. *See id.*

“It is generally recognized that unless denied by statute the attorney general of any state is clothed with all the powers incident to and traditionally belonging to his office.” *Johnson*, 165 S.W.2d at 826. Stated otherwise, Attorneys General “ha[ve] all common law powers and duties except as modified by the constitution

or statutes,” *id.* (citation omitted), as well as duties supplied by state statutes and constitutions. The common law and/or statutory and constitutional duties of Attorneys General are “many.” *State v. Culp*, 823 So. 2d 510, 514 (Miss. 2002). Among all of the duties of Attorneys General, however, “paramount . . . is his duty to protect the interests of the general public.” *Id.* (citation and internal quotation marks omitted).

In furtherance of this paramount duty, Attorneys General have broad authority under the common law and/or state statutes¹ to investigate potential violations of state laws within their jurisdiction, particularly state consumer protection laws. *See, e.g., Schneiderman v. Rillen*, 930 N.Y.S.2d 855, 855-56 (N.Y. Sup. Ct. 2011) (“The Attorney General is permitted broad authority to conduct investigations, based on the complaint of others or on his own information, with respect to fraudulent or illegal business practices.”) (citation omitted); *Harmon Law Offices, P.C. v. Attorney General*, 991 N.E.2d 1098, 1103 (Mass. App. Ct. 2013) (finding that the Massachusetts consumer protection statute “gives the Attorney General broad investigatory powers to conduct investigations whenever she believes a person has engaged in or is engaging in any conduct in violation of the statute”); *Commonwealth v. Pineur*, 533 S.W.2d 527, 529 (Ky. 1976) (“Even if one were to regard the request for information in this case as

¹ In some states, Attorneys General now possess no or limited common law authority.

caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). In the words of the United States Supreme Court, an administrative agency that is charged with seeing that the laws are enforced, like an Attorney General’s office, has and may “exercise powers of original inquiry.” *Morton Salt Co.*, 338 U.S. at 642. Indeed, unlike the judicial function, which “depend[s] on a case or controversy for power to get evidence[,]” an Attorney General’s office “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *Id.* at 642-43.

The authority to investigate has been recognized to be among the “most common and important functions identified with the office of Attorney General” Emily Myers and Lynne Ross, eds., National Association of Attorneys General, *State Attorneys General Powers and Responsibilities*, 2d ed., pp. 12-14 (2007). Many investigations initiated by an Attorney General’s office involve important policy issues and efforts to reform widespread fraud and abuse for a state and its consumers. Further, Attorneys General frequently cooperate in multistate investigations, and this cooperation is instrumental in a state’s efforts to advocate on behalf of its citizen-consumers and hold potential wrong-doers responsible for any unfair, false, or deceptive acts committed on state citizens. Investigations and

resulting litigation involving such cooperation have helped to improve the quality of life and health of citizens in states across the nation.

In carrying out these investigations, administrative subpoenas, also referred to as civil investigative demands or “CIDs,” are a vital tool. *See Ports Petroleum Co., Inc., of Ohio v. Nixon*, 37 S.W.3d 237, 243 (Mo. 2001) (Wolffe, J. dissenting) (“The civil investigative demand is an investigative tool provided to the attorney general by statutes that give broad authority to ensure that commerce in this state is beneficial to consumers.”). Absent use of “the civil investigative demand, the attorney general may be in the position of having to sue first and ask questions later.” *Id.* “The civil investigative demand authorizes him to ask questions first, and then, if the investigation shows there is a basis for suit, to bring an action under the relevant statute.” *Id.*

Recognizing the value of CIDs as investigative devices, many state statutes and state courts grant Attorneys General considerable latitude and discretion in issuing them. *See Roemer v. Cuomo*, 888 N.Y.S.2d 669, 670-71 (N.Y. App. Div. 2009) (noting that the New York Attorney General has “broad authority” to issue subpoenas in connection with investigations into fraudulent or illegal business activities). In Mississippi, where General Hood issued the Subpoena relevant to this case, for example, Miss. Code Ann. § 75-24-27 broadly provides that the Attorney General may issue subpoenas and subpoenas duces tecum “[t]o

accomplish the objectives and to carry out the duties prescribed” by the MCPA. In Kentucky, the Attorney General has authority to issue a civil investigative demand whenever he has “reason to believe that a violation of the Consumer Protection Act is being committed, *or* that the public interest requires his investigation into potential violations of the Act.” *Ward v. Commonwealth*, 566 S.W.2d 426, 428 (Ky. App. 1978) (emphasis added); *see also* Ky. Rev. Stat. § 367.240(1). Further, in Indiana, as in other states, the Attorney General may issue a CID even to a person who is not a target of the investigation, so long as “a reasonable basis exists to believe the non-violator possesses information relevant to the investigation.” *Everdry Marketing and Management, Inc. v. Carter*, 885 N.E.2d 6, 10 (Ind. Ct. App. 2008); *see also* *Harmon Law Offices*, 991 N.E.2d at 1103 (“[T]he Attorney General's power to issue a CID extends beyond the person being investigated.”).²

2. Google’s lawsuit is a premature attempt to short-circuit Mississippi’s valid administrative subpoena enforcement process; further, the Court lacks subject matter jurisdiction over Google’s claims as there is no case or controversy.

Although the power of Attorneys General to issue investigative subpoenas is expansive, there are procedural protections in place that can serve as limitations on an Attorney General’s authority. For example, there are mechanisms for

² *See also* Ky. Rev. Stat. § 367.240 (authorizing the Kentucky Attorney General to issue a civil investigative demand to “any person who is believed to have information . . . relevant to the alleged or suspected violation”) (emphasis added).

challenging improper and unduly burdensome subpoenas in the various state courts.³ Most relevant here, in Mississippi the MCPA provides that the Attorney General may seek relief in state court if a person “knowingly and willfully . . . fails or refuses to obey any subpoena or investigative demand” he issues. Miss. Code Ann. § 75-24-17. The court, however, may not order compliance and/or sanctions resulting from failure to comply with a subpoena unless and until the target has been provided with notice and a hearing. *See id.* At this hearing, of course, the target has the opportunity to raise any objection or challenge to the subpoena’s demands.

Here, Google is attempting to short-circuit Mississippi’s valid administrative enforcement process by filing suit in federal court. In fact, Google filed suit even before the parties’ agreed-upon Subpoena response deadline, much less any action by the Attorney General to compel compliance with the Subpoena under the terms of § 75-24-17. Moreover, Google’s suit does not merely challenge the Subpoena’s requests for documents and information, it challenges the claims Google imagines the Attorney General *may* file against it at some unknown point in the future. Correspondingly, the preliminary injunction issued by the District Court enjoins both enforcement of the Subpoena and the bringing of any civil or criminal

³ *See, e.g.*, Ky. Rev. Stat. § 367.240(2) (“At any time before the return date specified in an investigative demand, or within twenty (20) days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, may be filed in the Circuit Court where the person served with the demand resides or has his principal place of business or in the Franklin Circuit Court.”).

proceedings against Google for making third-party content accessible to internet users.

Upholding the District Court’s preliminary injunction order would have broad and unwelcome consequences. Obviously, it would thwart General Hood’s ability to investigate and enforce, as necessary, violations of Mississippi’s consumer protection laws. Significantly, it also would invite federal-court challenges to scores of civil investigative demands issued every year by state Attorneys General across the country—slowing investigations, consuming resources needlessly, and making it harder for Attorneys General to investigate violations of state law. This Court should not endorse a holding that would limit states’ authority to advance the public interest and protect the public from false, misleading, and deceptive business practices.

Google has admitted that the Communications Decency Act (“CDA”) does not bar a subpoena to investigate unlawful conduct. (*See* Google’s Memorandum of Law in Support of Temporary Restraining Order and Preliminary Injunction, ROA.95) (“A subpoena limited to seeking the facts necessary to determine whether immunity exists would be a different matter.”). Google, however, objects to the breadth of the subpoena. This is exactly the type of dispute that is routinely resolved, if necessary, in state courts in accordance with state statutes. A target of an investigation should not be permitted to conjure up federal defenses to

hypothetical claims for the purpose of forestalling or impeding a legitimate investigation. And a target of an investigation should not be entitled to the extraordinary equitable remedy of a preliminary injunction to forestall or impede that investigation. At the very least, Google's admission that the CDA does not categorically bar a subpoena investigating unlawful conduct means there is no basis for enjoining enforcement of the Subpoena in its entirety. Further, Section 230 of the CDA expressly states that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). As it stands, the District Court's preliminary injunction order prevents the Attorney General from fulfilling his responsibility to investigate and protect Mississippi's public from violations of state law.

Google's lawsuit is premature. At this time, there exists no order from any Mississippi court requiring Google's obedience to or sanctioning Google's failure to obey the subject Subpoena. *See* Miss. Code Ann. § 75-24-17. The Mississippi Attorney General also has yet to make any decision to move forward with consumer protection litigation against Google. Under these circumstances, there is no case or controversy ripe for adjudication. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.") (citation omitted); *id.* ("To invoke the jurisdiction of a federal court, a litigant must have suffered, or be

threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision[.]” (citation omitted). To the extent the Attorney General’s investigation into the practices and procedures of a corporation doing business in his state results in the filing of civil or criminal proceedings, Google would then have all the defenses it raises in this action available to it.

Further, this Court lacks subject matter jurisdiction over Google’s complaint. Google bases its complaint for declaratory and injunctive relief on consumer protection claims it predicts or anticipates the Attorney General *may* file against Google at some later date. In this way, Google’s federal “claims” actually are federal defenses to an imagined state cause of action. But a federal defense is not a proper basis for federal jurisdiction. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (“[I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption[.]”) (emphasis omitted). In the absence of subject matter jurisdiction, Google’s case should be dismissed.

Google attempts to avoid this jurisdictional bar by arguing, in part, that it is entitled to immunity under the Communications Decency Act for any state law consumer protection claims the Attorney General may bring against it. Notably, however, the immunity the CDA affords internet service providers is not absolute. Although the CDA immunizes an interactive computer service from liability for

content posted by a third party, it does not provide immunity for content or speech properly attributable to the service provider itself. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (“Section 230 of the CDA immunizes providers of interactive computer services against liability arising from content *created by third parties*[.]”) (emphasis added); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (“[T]hese provisions [of the CDA] bar plaintiffs from holding ISPs legally responsible for information that third parties created and developed. Congress thus established a general rule that providers of interactive computer services are liable only for speech that is properly attributable to them.”) (emphasis added) (citations and internal quotation marks omitted); *Jones v. Dirty World Entertainment Recordings, LLC*, 766 F. Supp. 2d 828, 836 (E.D. Ky. 2011) (“The immunity afforded by the CDA is not absolute and may be forfeited if the site owner invites the posting of illegal materials or makes actionable postings itself.”) (citing *Roommates.com*, 521 F.3d 1157). Accordingly, the Mississippi Attorney General is entitled to investigate Google’s activity to determine whether Google may be responsible for web content violative of Mississippi’s Consumer Protection Act. Indeed, it is unfair to ask the Attorney General to respond to Google’s contention that the CDA cloaks it with immunity when Google is withholding, and now has a preliminary

injunction permitting it to withhold, the very materials that will allow the Attorney General to evaluate whether the CDA applies to Google's acts and practices.

In finding the presence of a case or controversy and federal jurisdiction, the District Court likened the Attorney General's Subpoena to governmental coercion, forcing Google to choose between abandoning its rights or risking prosecution. ROA.2094. Citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007), the District Court stated that "[t]he law 'do[es] not require a plaintiff to expose himself to liability before bringing suit to challenge the bases for the threat.'" ROA.2094. *MedImmune*, however, discussed whether federal jurisdiction exists in declaratory judgment actions where the plaintiff has "eliminated the imminent threat of harm by simply not doing what he claimed the right to do" *MedImmune*, 549 U.S. at 129. The Court held that subject matter jurisdiction exists in such cases "because the threat-eliminating behavior was effectively coerced." *Id.* Yet, here the Attorney General's Subpoena merely represents an investigation. Responding to the Subpoena itself would not force or coerce Google to change its practices and procedures or otherwise abandon its rights. And, in fact, Google has not changed its behavior based on the Subpoena in order to eliminate the threat of potential prosecution--instead, it seeks to eliminate that threat through its lawsuit and the preliminary injunction. Under these circumstances, *MedImmune* is inapposite.

Because Google filed its lawsuit prematurely, in the absence of a case or controversy and without a federal claim, the District Court's decision to deny General Hood's motion to dismiss was in error, and Google cannot demonstrate a likelihood of success on the merits of its arguments. Thus, this Court should overrule the District Court's preliminary injunction order.

C. Mississippi and the public interest will suffer significant harm if the preliminary injunction is allowed to stand, and that harm will not be outweighed by any harm or prejudice to Google.

Mississippi will suffer significant harm if the preliminary injunction is allowed to stand and the Attorney General is not permitted to continue to investigate potential violations of state consumer protection laws by internet service providers. Further, a decision upholding the preliminary injunction could significantly undermine the authority and ability of other state Attorneys General to investigate potential violations of state consumer protection laws by entities such as Google. This runs to the detriment of the public whom the consumer protection laws are designed and each Attorney General is sworn to protect.

In comparison, the harm to Google if the preliminary injunction is set aside would be minimal. Google, for example, *may* then have to produce documents responsive to the Subpoena, or it *may* face administrative enforcement or other proceedings in state court. In the course of any such proceedings, Google would have the opportunity to present any and all defenses, receiving all the due process

protections that a neutral tribunal offers. Under these circumstances, the potential harm to Google if the injunction is not in place certainly does not outweigh the harm to the Attorney General caused by its enforcement.

As is evident from the letters of record signed by multiple Attorneys General, Mississippi is not the only state with concerns about Google's consumer practices. (*See* ROA.1199-1200, ROA.1243-1244, ROA.1245-1246). Mississippi, like every state, is entitled to address these concerns through further investigation utilizing proper tools, including administrative subpoenas. Mississippi, like every state, also is entitled to review information gathered pursuant to its investigation and make decisions about actions to take—or not take—to enforce its consumer protection laws for its citizens. Google may challenge Mississippi's Subpoena consistent with state law. But Google should not be allowed to bypass state subpoena review processes and derail a legitimate state consumer protection investigation by filing premature declaratory judgment lawsuits and obtaining sweeping preliminary injunctions in federal court. Both the law and public policy counsel against it.

III. Conclusion

For the reasons set forth above, the Attorneys General of the Commonwealths of Kentucky, Massachusetts, and Pennsylvania, the States of Arizona, Alabama, Alaska, Arkansas, Colorado, Connecticut, Florida, Georgia,

Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wisconsin, and the District of Columbia urge the Court to set aside the District Court's Order granting Google a preliminary injunction.

Respectfully submitted,

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/s/ Stacie Lambert Deblieux
Stacie Lambert Deblieux

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On June 29, 2015, the foregoing amici curiae brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system. As all participants in the case are registered CM/ECF users, service will be accomplished via the appellate CM/ECF system.

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