No. 22-20463

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BMC SOFTWARE, INC.,
Plaintiff-Appellee/Cross-Appellant,

v.

INTERNATIONAL BUSINESS MACHINES CORP.,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas 4:17-cv-02254 (Miller, J.)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

William R. Levi
Counsel of Record
Aaron P. Haviland
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
Tel: (202) 736-8000
william.levi@sidley.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Chamber of Commerce of the United States of America certifies that it does not have a parent corporation and that no publicly held company has 10 percent or greater ownership in the Chamber.

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1.1, 28.2.1, and 29.2, 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.

Dated: January 17, 2023

/s/ William R. Levi
William R. Levi

Amicus Curiae:

The Chamber of Commerce of the United States of America

Counsel for *Amicus Curiae*:

William R. Levi and Aaron P. Haviland of Sidley Austin LLP

Tara S. Morrissey and Jordan L. Von Bokern of the U.S. Chamber Litigation Center

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.[1]

Although the Chamber typically does not participate in business-on-business disputes over alleged breaches of commercial contracts, this appeal raises a concern of broad interest to the Chamber's members: the so-called "tortification" of contract law. Businesses depend upon the predictability of contract law—*i.e.*, the expectation that contracts will be interpreted and enforced according to their express terms. Transforming contract disputes into tort actions with the potential for unpredictable damages is, and should continue to be, disfavored. The Chamber is uniquely situated

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

to assist the Court in understanding the negative impact that blurring the line between contracts and torts will have on the business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues raised in this appeal implicate the boundary between contract and tort law. In the proceedings below, the district court concluded that the International Business Machines Corporation was liable for both breach of contract under New York law and fraudulent inducement under Texas law. The plaintiff, BMC Software, elected to recover under the fraudulent-inducement claim. The district court then ruled that, under New York law, BMC Software's success on the fraudulent-inducement claim rendered unenforceable a waiver of punitive damages.

The Chamber takes no position on whether these rulings were correct, including on whether the facts here give rise to fraudulent inducement. The Chamber is filing this amicus brief because of its commitment to preserving the line between contracts and torts and its interest in encouraging courts to resist the application of principles of tort law to contract disputes. Businesses depend upon the predictability of contracts, where risks are allocated in advance by the parties and damages are normally limited to making the contracting parties whole. Moreover, contract law allows parties in privity to minimize their exposure to uncertainty and risk by agreeing to limitations on liability and opting out of certain remedies altogether. Relatedly, unlike tort law, contract law is not based on fault but instead prizes the

optimal use of resources. This means that parties in privity are not penalized with punitive damages for breaching their contracts, which permits them instead to find the most efficient ways to allocate their resources.

For these reasons, courts generally prohibit plaintiffs from recovering in tort for breaches of contract. This prohibition is subject to certain exceptions, but courts must apply these exceptions with care. If the line between contracts and torts becomes too blurred—if predictable contract disputes routinely morph into unpredictable tort actions with windfall recoveries—the results will be a chilling of commercial activity and a gradual erosion of the legal norms underpinning contract law.

ARGUMENT

Courts Should Preserve the Important Distinction Between Contract Law and Tort Law.

Fraudulent inducement claims, like any other tort claim arising out of a contract dispute, should be thoroughly scrutinized. Courts apply a strong presumption against allowing a plaintiff in a contract dispute to recover in tort. *See, e.g.*, *Ibe v. Jones*, 836 F.3d 516, 526 (5th Cir. 2016); *Kevin M. Ehringer Enters., Inc. v. McData Servs. Corp.*, 646 F.3d 321, 325 (5th Cir. 2011); *Autochoice Unlimited, Inc. v. Avangard Auto Fin., Inc.*, 9 A.3d 1207, 1212 (Pa. Super. Ct. 2010); *Mem'l Hermann Healthcare Sys. Inc. v. Eurocopter Deutschland, GMBH*, 524 F.3d 676, 678 (5th Cir. 2008); *Strum v. Exxon Co., U.S.A.*, 15 F.3d 327, 330 (4th Cir. 1994);

Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460 (Cal. 1994). That presumption allows for exceptions, such as fraudulent inducement, *see Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998), tortious interference with contract, *see Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 711–12 (5th Cir. 1999) (citing *Am. Nat'l Petrol. Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274 (Tex. 1990)), and professional malpractice, *see LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 243–44 (Tex. 2014). But courts must be careful not to permit those exceptions to swallow the rule.

A. Longstanding and Fundamental Distinctions Between Contract and Tort Law Exist Because Contracts and Torts Serve Different Purposes.

"In general, courts are cautious about permitting tort recovery based on contractual breaches." 74 Am. Jur. 2d *Torts* § 21 (2022); *see also Ehringer Enters.*, 646 F.3d at 325 ("Texas courts have long been reluctant to hold a party liable in tort if the action should only be characterized as a breach of a contract."). Texas courts in particular "recognize the need to keep tort law from overwhelming contract law, so that private agreements are not subject to readjustment by judges and juries." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 306 (Tex. 2006).

This caution stems from the fact that contracts and torts have different objectives. Contractual obligations are based on "promises" and reflect the

"intention of the parties." *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (quoting W. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 92 at 655 (5th ed. 1984)). Contract law thus "arises out of the attempt by private individuals to order relationships among themselves" through contracts. *Strum*, 15 F.3d at 330; *see also Applied Equip.*, 869 P.2d at 459–60 ("Contract law exists to enforce legally binding agreements between parties[.]"); *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980) (explaining that contract actions "are created to protect the interest in having promises performed" and that the duties of conduct that give rise to them are based "upon the will or intention of the parties" (quoting William L. Prosser, *Law of Torts* 613 (4th ed. 1971))). Tort obligations, by contrast, are "obligations that are imposed by law . . . to avoid injury to others." *DeLanney*, 809 S.W.2d at 494 (quoting Keeton, *supra*, § 92 at 655). Tort law "emerges from duties individuals owe generally to other members of society." *Strum*, 15 F.3d at 330; *see also Applied Equip.*, 869 P.2d at 460 ("[T]ort law is designed to vindicate social policy."); *Tameny*, 610 P.2d at 1335 (explaining that tort actions "are created to protect the interest in freedom from various kinds of harm" and that the duties of conduct that give rise to them "are imposed by law" (quoting Prosser, *supra*, at 613)).

One of the most significant differences between the two fields of law is that tort law is based on fault whereas contract law is not. *See Strum*, 15 F.3d at 330. "[A]n intentional tort is seen as reprehensible" because it involves "the deliberate or

reckless harming of another." *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (Mosk, J., concurring & dissenting). An intentional breach of contract, on the other hand, is viewed as "a morally neutral act." *Id.* As Justice Holmes once remarked, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it[]—and nothing else." Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1897). In other words, a contract is "simply a set of alternative promises either to perform or to pay damages for nonperformance." *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985).

This distinction between contracts and torts is reflected in the different types of remedies available in the two fields of law. Because contract law is concerned with enforcing the expectations of the parties, it "has long recognized that compensating the individual only for actual loss will suffice." *Strum*, 15 F.3d at 330; *accord CQ, Inc. v. TXU Mining Co., L.P.*, 565 F.3d 268, 278 (5th Cir. 2009) ("The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage *actually sustained*." (quoting *Abraxas Petrol. Corp. v. Hornburg*, 20 S.W.3d 741, 760 (Tex. Ct. App. 2000))). Tort law, on the other hand, "seeks both to compensate the victim and punish the wrongdoer." *Strum*, 15 F.3d at 330. Accordingly, punitive damages may be an appropriate remedy in a tort action "where the requisite standards of culpability under state law have been

met." *Id.* But punitive damages are generally not recoverable for a breach of contract. *See Restatement (Second) of Contracts* § 355 (1981); *accord Barnes v. Gorman*, 536 U.S. 181, 187 (2002); *Roger Lee, Inc. v. Trend Mills, Inc.*, 410 F.2d 928, 929 (5th Cir. 1969) (per curiam); *Tex. Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986) (per curiam); *Thyssen*, 777 F.2d at 63; *Applied Equip.*, 869 P.2d at 460; *L.L. Cole & Son, Inc. v. Hickman*, 665 S.W.2d 278, 280 (Ark. 1984).

The fundamental differences between contracts and torts are further reflected in how contract law permits parties in privity to minimize their exposure to risk by expressly limiting their liability and opting out of certain remedies. *See* 22 N.Y. Jur. 2d *Contracts* § 265 (2d ed. 2022) ("It is well settled that contractual terms limiting liability are enforceable."). Courts generally respect these limitations because they "represent the parties' agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed." *Id.*; *see also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 (1986) ("Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk." (citation omitted)). Moreover, the ability to minimize risks through contracts serves as an incentive for parties to enter into contracts in the first place. *See Strum*, 15 F.3d at 330 ("Parties contract partly to minimize their future risk."). And, in commercial transactions, the decreased risk allows the contracting parties to reduce costs, which

in turn benefits consumers. *See E. River*, 476 U.S. at 873 ("The manufacturer can restrict its liability, within limits, by disclaiming warranties or limiting remedies. In exchange, the purchaser pays less for the product." (citation omitted)).

B. Blurring the Line Between Contracts and Torts Risks Chilling Vital Commercial Activities and Eroding Fundamental Legal Norms.

Both courts and legal scholars have repeatedly warned of the consequences of imposing principles of tort law onto private contracts. *See, e.g.*, *Splitt v. Deltona Corp.*, 662 F.2d 1142, 1147 (5th Cir. Unit B Dec. 1981) ("Under plaintiffs' theory every breach of contract would be an act of negligence and the general rule of punitive damages distinguishing tort and contract would be meaningless."); *Tony Gullo Motors*, 212 S.W.3d at 306 ("We recognize the need to keep tort law from overwhelming contract law, so that private agreements are not subject to readjustment by judges and juries."); *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring) (per curiam) (describing "the tendency of contract disputes to metastasize into torts" as the "tortification of contract law"); *Paulson v. State Farm Mut. Auto. Ins. Co.*, 867 F. Supp. 911, 913 (C.D. Cal. 1994) (describing the parties' dispute as a "prime example" of the "tortification of contract law"); Walter Olsen, *Tortification of Contract Law: Displacing Consent and Agreement*, 77 Cornell L. Rev. 1043, 1044 (1992) ("The machinery and weaponry of tort law, including notions of punishment and open-

ended damage calculations, are displacing the notion of consent and agreement."). If the line between contracts and torts becomes too blurred, the effects will be most clearly felt in their negative impact on commercial activity, but they will also contribute to the erosion of important legal norms.

With respect to commercial activities, the tortification of contract law will have several deleterious effects. First, it will create uncertainty in the marketplace by raising the stakes in contract disputes. Punitive damages are more difficult to quantify than compensatory damages in commercial disputes because punitive damages "depend heavily" on a judge's or jury's "perception of the degree of fault involved." *Strum*, 15 F.3d at 330. Introducing punitive damages into contractual disputes will "turn every potential contractual relationship into a riskier proposition" because the parties will be exposing themselves to "openended jury award[s]." *Id.* Moreover, introducing claims for emotional distress and other personal injuries into contract disputes will further complicate damages calculations because such injuries "are more difficult to value" than standard commercial transactions. *Thyssen*, 777 F.2d at 63; *see also Paulson*, 867 F. Supp. at 913–14 ("Tort damages . . . depend on case-by-case jury determinations that often turn on nebulous standards[.]").

Second, imposing tort concepts onto contract law will increase the costs of litigation. When contract disputes have the potential to result in windfall damages, plaintiffs will be incentivized to take the chance of litigating their claims and will

therefore be less likely to settle. *See* Mark Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 Tex. L. Rev. 1235, 1236 (1994) ("Opening the door to tort claims in contract, with their lure of emotional and exemplary damages, creates a crush of claims as plaintiffs and their lawyers attempt to cash in."); Mark Pennington, *Punitive Damages for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 Ark. L. Rev. 31, 101 (1989) ("[B]ecause the standards are vague and the stakes are high, an incentive to litigate may pervade all stages of the process."). The increased probability of litigation will be accompanied by expensive discovery efforts and larger attorney's fees. *See* Pennington, *supra*, at 100 ("A typical contract case is a good candidate for summary judgment or for a brief trial . . . . On the other hand, tort cases . . . are frequently involved and burdensome."). Conversely, the defendants in these disputes will be more likely to agree to larger settlements for non-meritorious claims just to avoid the risk of incurring inordinate verdicts for punitive damages.

Third, tortification will undermine the utility of contracts for allocating business risks. The limitation in contract law on available damages—and, in particular, the prohibition on punitive damages—"serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise." *Applied Equip.*, 869 P.2d at 460. It fosters "predictability about the cost of contractual relationships," which "plays an

important role in our commercial system." *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1998); *see also A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 671 (4th Cir. 1986) ("It would skew the predictability necessary for stable contractual relations if a breaching party were suddenly subject to the more open and unanticipated duties and damages imposed by the law of tort."). In addition, the ability of contracting parties to "set the terms of their own agreements," including by limiting their potential liability and opting out of certain remedies, provides added incentives for commercial entities to regulate their interactions through contracts. *E. River*, 476 U.S. at 872–73. Applying tort principles to contracts will weaken this incentive structure and discourage commerce.

Fourth, the tortification of contract law will likely increase the up-front costs of entering into contracts, particularly in the context of disclosures. For example, under Texas law, there generally is no duty to disclose information during arm's length negotiations preceding the formation of a contract. *See Coburn Supply Co. v. Kohler Co.*, 342 F.3d 372, 377 (5th Cir. 2003). But importing tort concepts such as negligent misrepresentation into contract law will impose on contracting parties a duty of disclosing all potentially negative financial information, as well as the parties' confidential view of the contract's potential risks and rewards, during negotiations. Besides adding costs for attorneys' and accountants' fees, these disclosure requirements can chill contract negotiations and will likely have a

disproportionate impact on businesses that are just starting up and struggling to attract clients or customers.

Fifth, applying tort principles to contracts will deter "efficient" breaches of contract. An efficient breach "occurs when the gain on the breaching party exceeds the loss to the party suffering the breach, allowing the movement of resources to their more optimal use." *Freeman*, 900 P.2d at 682 (concurrence & dissent). "The breach frees the [breaching party's] resources to be used in a more efficient manner elsewhere." *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1217 (8th Cir. 1981), *superseded by statute*, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 302(a)(2), 96 Stat. 25, 55–56, *on other grounds as recognized in Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322 (8th Cir. 1995); *accord Francis v. Lee Enters., Inc.*, 971 P.2d 707, 716 (Haw. 1999) (citing Richard Posner, *Economic Analysis of Law* 55–57 (1972)); *see also Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 232 (5th Cir. 1986) ("A contract party is permitted, or even encouraged when economically efficient, to 'buy out' a contract by paying the plaintiff's actual damages."). Applying punitive damages to a breach of contract upsets market efficiency by imposing added costs on the breaching party. And these costs are then transferred to the rest of society, which is no longer able to benefit from the most efficient allocation of resources.

Taken together, these consequences of blurring the line between contracts and torts will undercut the certainty that contract law requires and discourage businesses from entering into contracts and making economically efficient decisions, thereby chilling vital commercial activities. *See Freeman*, 900 P.2d at 684 (concurrence & dissent) (cautioning that "courts should be careful" when applying tort remedies to contract disputes because doing so will "discourage commerce"). No business can "be expected to flourish in a legal atmosphere where every move, every innovation, every business decision must be hedged against the risk of exotic new causes of action and incalculable damages." *Oki*, 872 F.2d at 316 (concurrence). Maintaining the barrier between contracts and torts is necessary for a functioning and thriving economy.

The consequences of imposing tort principles onto contract law will not be limited to economics but will also contribute to the erosion of important norms that undergird our legal system. Contract law enshrines a "basic norm that individuals should be able to agree between and among themselves how to allocate resources." William Powers Jr., *Border Wars*, 72 Tex. L. Rev. 1209, 1211 (1994). It "embodies the ideology of autonomy and consent," *id.* at 1224, and "establishes a structure within which individuals can voluntarily bargain and reach their own agreements," *id.* at 1211. This structure is necessary to the growth and vitality of a free society because it "arises from man's realization that natural liberty, if unaccompanied by

binding cooperation, will result in a self-sufficient life that is 'solitary, nasty, brutish and short.'" Michael I. Krauss, *Tort Law and Private Ordering*, 35 St. Louis U. L.J. 623, 625 (1991) (footnotes omitted) (quoting Thomas Hobbes, *Leviathan* ch. XIV (M. Oakeshott rev. ed. 1946) (1651)). "Contract law is thus all about voluntary obligations, or limits on liberty, which are necessary if liberty is to be satisfactorily consummated." *Id.* at 626; *cf.* Charles Fried, *Contract As Promise: A Theory of Contractual Obligation* 2 (2d ed. 2015) ("The regime of contract law, which respects the dispositions individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights.").

This philosophical justification for contract law is more than just academic. "The right to enter into contracts—to adjust one's legal relationships by mutual agreement with other free individuals—was unknown through much of history and is unknown even today in many parts of the world." *Oki*, 872 F.2d at 316 (concurrence). In our country, the Framers recognized the importance of contracts and enshrined a protection for them in the Constitution—one of the few provisions that directly restricted the States before the ratification of the Fourteenth Amendment. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"); *see also* The Federalist No. 44 (James Madison) ("[L]aws impairing the obligation of contracts[] are contrary to the first principles of the social compact[] and to every principle of sound legislation.").

During the Reconstruction era, the right to make and enforce contracts was one of the rights granted to newly freed slaves. *See* Civil Rights Act of 1866, 14 Stat. 27 ("[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts[.]"). Similarly, the social and political advancement of women was intertwined with their legal rights to enter into contracts. *See* Henry Sumner Maine, *Ancient Law* 169 (11th ed. 1887) ("The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband, has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract."); Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, Yale J.L. & Feminism 545, 566 (2006) (book review) ("[W]omen's rights to contract laid the foundation for women's political rights[.]").

Applying principles of tort law to contracts will erode the fundamental norms of contract law because it will take this most basic decision of how to dispose of rights and resources out of the hands of the contracting parties. When courts "insinuate tort causes of action into relationships traditionally governed by contract," they "subordinate voluntary contractual arrangements to their own sense of public policy and proper business decorum," thereby "depriv[ing] individuals of an important measure of freedom." *Oki*, 872 F.2d at 316 (concurrence). Similarly,

applying standards of reasonableness to all the terms of a contract will "eat up all of contract law" by substituting a judge's or jury's preferences and business instincts for those of the contracting parties. Powers, *supra*, at 1218; *see also id.* at 1217 ("If contracting parties were required *pervasively* to act reasonably, every contract term would be up for grabs. Courts could ask whether the price was reasonable, whether the delivery date was reasonable, and so on.").

Both market economics and the philosophical foundations of contract law weigh against blurring the line between contracts and torts. The barrier between the two fields of law exists for a reason, and the consequences of allowing breaches of that barrier are clear. Applying principles of tort law to contract disputes both carries significant risk for businesses that depend on the predictability of contracts to engage in commercial activity and will do violence to basic norms that undergird the American legal system. To preserve the distinction between these two categories, courts should carefully enforce the limitations of legal doctrines that convert contract claims into tort claims.

CONCLUSION

For the foregoing reasons, this Court should give due consideration to the important distinction between contract law and tort law when deciding this case.

January 17, 2023 Respectfully submitted,

/s/ William R. Levi

William R. Levi
Counsel of Record
Aaron P. Haviland
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000
william.levi@sidley.com

Tara S. Morrissey
Jordan L. Von Bokern
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2023, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ William R. Levi
William R. Levi

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, this document contains 3,949 words.

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Dated: January 17, 2023

/s/ William R. Levi
William R. Levi