No. 385PA19 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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| RALEIGH HOUSING AUTHORITY, Plaintiff, | ) | From Wake County |
| v. | ) | |
| PATRICIA WINSTON, Defendant. | ) | |

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***AMICI CURIAE* BRIEF**
**(DISABILITY RIGHTS NORTH CAROLINA, NORTH CAROLINA JUSTICE CENTER, NORTH CAROLINA HOUSING COALITION, NORTH CAROLINA COALITION TO END HOMELESSNESS, NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE)**

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, Disability Rights North Carolina, the North Carolina Justice Center, North Carolina Housing Coalition, North Carolina Coalition to End Homelessness, and the North Carolina Coalition Against Domestic Violence submit this brief as *amici curiae* in support of Defendant.[1] The decision of the Court of Appeals – that landlords may (1) evict tenants without providing notice of the specific alleged conduct resulting in eviction other than referencing general lease provisions; and (2) use anonymous hearsay statements as grounds for eviction – contravenes federal

[1]Pursuant to Rule 28(i)(2), no one other than the *amici* and their members either directly or indirectly wrote this brief or contributed money to its preparation.

law and denies tenants their constitutional right to due process. The decision will impact thousands of low-income families in North Carolina who rely on federally subsidized housing and who, after this decision, are vulnerable to eviction on mere pretext. To preserve those tenants' constitutional rights, this Court should reverse the decision below.

## ARGUMENT

This case presents an important opportunity for the Court to uphold key due process protections for vulnerable tenants. Specifically, this Court should reiterate (1) that the business record exception does not allow anonymous hearsay complaints to be raised to the status of factual evidence; (2) that antidiscrimination laws are circumvented when landlords accept anonymous complaints as the basis for an eviction; and (3) that landlords must detail the specific conduct upon which an eviction action is based; otherwise notice requirements are meaningless.

### I. Elevating Anonymous Complaints to Factual Evidence Under the Business Records Exception Violates Due Process and Disempowers Marginalized Tenants

Due process for tenants in eviction proceedings requires the opportunity for the tenant to confront and cross-examine adverse witnesses. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1004 (4th Cir. 1970). Elevating anonymous complaints made to housing providers to "business record" status, admissible as a hearsay exception, denies tenants the opportunity to cross-examine the individuals who

make complaints against them. *See Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 862 (2nd Cir. 1970) ("[D]enying the tenant the opportunity to confront and cross-examine persons who supplied information … upon which [Housing Authority] action is grounded is improper.").

The business records exception to the hearsay rule allows the court to admit into evidence records kept in the normal course of business under certain proscribed circumstances. N.C. Gen. Stat. § 8C-1, Rule 803(6).

For the business records exception to apply, the record must be made by a person with knowledge and the record must be: "(i) kept in the course of a regularly conducted business activity *and* (ii) it was the regular practice *of that business activity to make the [record].*" N.C. Gen. Stat. § 8C-1, Rule 803(6) (emphasis added). Further, business records are only admissible "when a proper foundation … is laid by the testimony of a witness who is familiar with the … records and the methods under which they were made so as to satisfy the court that the methods, *the sources of information*, and the time of preparation render such evidence trustworthy." *In re C.R.B.*, 245 N.C. App. 65, 70 (2016) (citing *In re S.D.J.*, 192 N.C. App. 478, 482 (2008)) (emphasis added). Anonymous, uninvestigated complaints do not meet this standard.

The lower courts did not determine the reliability of the anonymous complaints in this case, nor whether the Raleigh Housing Authority (RHA) appropriately investigated the trustworthiness of the complaints. Instead, the Court of Appeals erroneously determined that "Plaintiff kept records of such complaints submitted by its tenants in the course of Plaintiff's regularly conducted business activity" and therefore they were admissible as evidence. *Raleigh Hous. Auth. v. Winston*, 833 S.E.2d 234, 239, n. 3 (N.C. Ct. App. 2019), *review allowed, writ allowed*, 840 S.E.2d 783 (N.C. 2020).

Moreover, the Court of Appeals' expansion of the exception creates the conditions for landlords to violate the rights of tenants protected by two critical federal laws: the Violence Against Women Act and the Fair Housing Act.

The Violence Against Women Act (VAWA), 34 U.S.C. § 12491 (2017), prohibits terminating assistance to tenants that have been victims of actual or threatened domestic violence based on their status or based on lease violations related to their status. 24 C.F.R. § 5.2002. North Carolina law similarly prohibits a landlord from taking adverse action against a tenant based on the tenant's status as a victim of domestic violence. N.C. Gen. Stat. § 42-42.2. The federal Fair Housing Act (FHA) prohibits adverse actions against tenants based on their disabilities, and

also based on other protected categories such as race. 42 U.S.C. § 3604(f). North Carolina law also ensures that tenants with disabilities are protected from adverse decisions based on their disabilities. N.C. Gen. Stat. § 41A-4(a), (f).

Allowing anonymous, uninvestigated complaints to be raised to the status of established facts under the business records exception creates a system where tenants who bear animus, fear, or prejudice may circumvent the protections afforded other tenants through antidiscrimination laws. Tenant-on-tenant harassment based on race, gender, disability, and other protected characteristics is all too common[2] and allowing such a backdoor method for some tenants to facilitate the eviction of other tenants for discriminatory reasons contravenes the purposes of antidiscrimination laws. Decreasing due process protections (including the right to confront witnesses) facilitates the "evils of discriminatory and arbitrary eviction procedures prevalent in federal subsidized housing." *Maxton Hous. Auth. v. McLean,* 313 N.C. 277, 280–81 (1985).

Tenants with disabilities are protected precisely because of the unfounded fear, animus, and discrimination they have historically faced. *See People Helpers, Inc. v.*

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[2] Robert G. Schwemm, *Neighbor-on-Neighbor Harassment: Does the Fair Housing Act Make a Federal Case Out of It?*, 61 CASE W. RES. L. REV. 865 (2011).

*City of Richmond*, 789 F. Supp. 725, 731 (E.D. Va. 1992) (noting that the purpose of FHA was to ensure that people who have historically been subject to discrimination in housing would have an equal opportunity to housing). Despite progress in some areas of civic life, tenants with disabilities "still suffer from stigmatization and discrimination" and "are viewed as unwelcome intruders in most communities…."[3]

Similarly, domestic violence survivors frequently experience housing discrimination and are entitled to legal protections in that sphere, including under VAWA and the FHA. *See* Rasheedah Phillips, *Addressing Barriers to Housing For Women Survivors of Domestic Violence & Sexual Assault*, 24 TEMP. POL. & CIV. RTS. L. REV. 323, 323–24 (2015).

Permitting unsigned complaints, that may or may not be motivated by prejudice or animosity, to be the factual basis for an eviction, completely undercuts the purpose of these federal protections. It would permit pretext couched as "complaints" to mask racism, stereotyping, prejudice, and other improper motives. Such disregard for due process protections renders the anti-discrimination policies of the FHA and VAWA almost meaningless.

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[3] Meghan P. Carter, *How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness*, 5 NW. J. L. & SOC. POL'Y 118 (2010).

## II. RHA's Failure to Comply with VAWA is Fatal to the Eviction Action

Under VAWA, a "tenant of housing assisted under a covered housing program may not be … evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence …." 34 U.S.C. § 12491(b)(1)*; see also* 24 C.F.R. § 5.2005(b). VAWA enacted specific notice provisions to ensure that people experiencing domestic violence would be aware of the protections VAWA grants them. Housing providers that receive federal funding (such as RHA) must provide their tenants with a "Notice of Occupancy Rights under the Violence Against Women Act," that outlines these protections and a certification form to report domestic violence. 24 C.F.R. § 5.2005(a) (2016). This notice must accompany any notice of termination, regardless of the grounds of termination. *See DHI Cherry Glen Associates, L.P. v. Gutierrez*, 259 Cal. Rptr. 3d 410, 416 (Cal. App. Dep't Super. Ct. 2019) ("There is no language in the statute that would support a meaning that the VAWA notices only need to be served with notices of termination that are premised on domestic violence.").

RHA failed to give Ms. Winston this VAWA notice.[4] *See* Rule 9(d) Exhibit 8 (Doc Ex. 18). The notice given to Ms. Winston was thus legally inadequate because it did not comply with VAWA. Ms. Winston was entitled to notice of her right not to be evicted for even serious or repeated lease violations if those violations were related to incidents of domestic violence. *See* 34 U.S.C. § 12491(b)(2)(A); 24 C.F.R. § 5.2005; Consent Decree at 2 . Thus, the Court of Appeals fundamentally erred by affirming the trial court's holding that Ms. Winston received the notice to which she was entitled under law. *See Raleigh Hous. Auth. v. Winston*, 833 S.E.2d at 238 (N.C. Ct. App. 2019).

Congress has clearly stated that incidents related to domestic violence should not be considered to create a pattern of lease violations. 34 U.S.C. § 12491(b)(2)(A). Not only did RHA fail to provide Ms. Winston with the required notice, but the ambiguity of the notice they did provide allowed the lower courts to improperly consider a "pattern" of noise disturbances related to domestic violence as a basis for lease termination. *Compare Raleigh Hous. Auth.*, 833 S.E.2d at 239 (presuming

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[4] In fact, RHA has entered into a consent decree addressing its alleged systemic failure to provide such VAWA notices to its tenants. June 28, 2019 Consent Decree ("Consent Decree"), E.D.N.C. No 5:18-CV-429-LF, *McCullers v. Housing Auth. of the City of Raleigh*, *available at* https://www.fairhousingnc.org/wp-content/uploads/2020/06/Federal-Consent-Decree-5-18-CV-429-LF.pdf (last visited June 30, 2020).

previous incidents were not related to domestic violence) *with* U.S. Dep't of Housing and Urban Dev., Violence Against Women Reauthorization Act of 2013 Guidance, 7.2 (May 19, 2017) ("On the surface, adverse factors may appear unrelated to domestic violence .... However, the presence of an adverse factor may be due to an underlying experience of domestic violence.").

By itself, the allegations regarding the February incident[5] would not have constituted a "[s]erious or repeated violation of material terms of the lease," 24 C.F.R. § 966.4(l)(2)(i), and therefore would not have warranted Ms. Winston's lease termination and eviction.[6] But because the notice did not specify the incidents that formed the basis of the lease termination, the Court of Appeals improperly considered not only an incident from February 2018, but also incidents in fall and winter 2017 for which Ms. Winston had previously asserted a VAWA defense. *Raleigh Hous. Auth.*, 833 S.E.2d at 239. RHA's failure to provide the required notice thus violated Ms. Winston's due process rights and also denied her the opportunity to prepare an adequate VAWA defense.

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[5] Additionally, it appears Ms. Winston may have also had a VAWA defense regarding the February incident. *See* (R p 8–9).

[6] HUD has defined disruptive behavior such as disturbing one's neighbors as a minor–rather than a serious–violation of the lease, so that a pattern of such disruptive behavior must have persisted before an eviction could be warranted. 24 C.F.R. § 247.3.

### III. Failure to Provide Notice of the Specific Conduct or Incident at Issue Undermines Crucial Tenant Protections under the FHA

Lack of notice as to the factual basis for a lease termination violates due process and prevents tenants from exercising their rights under the Fair Housing Act.

Due process requires an eviction notice to be specific enough to enable the tenant to prepare a defense. *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1003–04 (4th Cir. 1970) (finding nature of children's alleged immoral conduct and dates of activities must be specified); *see also* U.S. Dep't of Housing and Urban Development, Public Housing Occupancy Guidebook, at 203 (June 2003) ("The PHA's notice of lease termination must inform the tenant of the specific grounds for lease termination (citing the specific lease provision violated *and the manner in which the tenant violated it*).") (emphasis added). Unless tenants are provided adequate notice as to the *actual* grounds for termination, landlords could evict public housing tenants by referring to general lease provisions that fail to advise tenants of the specific behavior or event for which they face eviction. The failure to provide notice of the specific conduct at issue is contrary to procedural due process protections. *See, e.g., Lincoln Terrace Assocs., Ltd. v. Kelly*, 635 S.E.2d 434 (2006); *Timber Ridge v. Caldwell,* 672 S.E.2d 735 (2009).

Citing to a general lease provision, as RHA did here, (*see* Rule 9(d) Exhibit 5 (Doc. Ex. 14)), is insufficient to provide meaningful notice.

> The purpose of requiring that notice be given to the tenant before the hearing is to insure [sic] that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence …. [If the landlord's decision to terminate the lease] can rest

> on items … of which [the tenant] has no knowledge and hence has had no opportunity to challenge … then these items may not be relied on.

*Escalera v. New York City Hous. Auth.*, 425 F.2d 853, 862 (2d Cir. 1970); *see also Maxton Hous. Auth. v. McLean*, 313 N.C. 277, 280 (1985).

Because the notice at issue here did not provide the specific conduct of which Ms. Winston was accused as a basis for lease termination, Ms. Winston was denied an opportunity to prepare an adequate defense, including the opportunity to assert her rights under the FHA.

Tenants with disabilities are entitled to reasonable accommodations that make housing and services provided by PHAs accessible to them. 42 U.S.C. § 3604(f)(3)(B); N.C. Gen. Stat. § 41A-4(f)(2); *see also United States v. Calif. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994) ("As the language of § 3604(f)(3)(B) makes clear, the FHAA [the Fair Housing Amendments Act of 1988] imposes an affirmative duty upon landlords reasonably to accommodate the needs of handicapped persons."). Reasonable accommodations are changes, exceptions, or adjustments to rules, policies, practices, or services that may be necessary for a person with a disability to have an equal opportunity to use and enjoy their home. *Id.*; *see also* 42 U.S.C. § 3604(f)(3)(B). Because rules or policies may have a different effect on persons with disabilities than on nondisabled persons, reasonable

accommodations may be necessary to provide equal opportunity and enjoyment for tenants with disabilities.

Ambiguity of the termination notice content is particularly problematic for tenants with intellectual disabilities or mental illness, whose disabilities may impede their decision-making abilities or make it difficult to draw the connection between a general lease provision and the conduct of which they are accused. Because a tenant may request a reasonable accommodation at any point, *including during summary ejectment proceedings*, details about the conduct of which the tenant is accused are particularly important to ensure the notice is accessible. A tenant who is threatened with eviction based on behaviors related to her disability may raise a reasonable accommodation request as a defense to eviction. *See Radecki v. Joura*, 114 F.3d 115 (8th Cir. 1997).

As a person with disabilities,[7] Ms. Winston could be entitled to reasonable accommodations for any of the incident(s) that RHA later claimed gave rise to the notice of lease termination. The notice was insufficient to explain the specific basis of the eviction action against her, let alone afford Ms. Winston the opportunity to

[7] Def. Pet. For Writ of Supersedeas, *Raleigh Hous. Auth. v. Winston*, 2019 WL 5431292, at *2 (N.C. Sup. Ct. 2019).

raise a reasonable accommodation defense. If only citing to a general lease provision is deemed to be sufficient to provide tenants with meaningful notice, any tenants with (or without) disabilities would be left to guess at the conduct that gave rise to a notice of lease termination. Such an ambiguous notice deprives tenants with disabilities an equal opportunity to prepare a proper defense to an eviction under the Fair Housing Act.

## IV. The Unjust Impact of Evictions on Marginalized Populations in North Carolina

North Carolina suffers from a housing shortage, affordability issues, and high rates of homelessness. Our eviction rate is over twice the national average[8] and we have a 200,000 unit shortage for extremely low-income families.[9] Eight North Carolina cities (Greensboro, Winston-Salem, Fayetteville, Charlotte, High Point, Durham, Wilmington, and Raleigh) rank among the 100 American cities with the highest eviction rates.[10] Five of those eight cities rank in the top 25 cities on that list, and those numbers are only increasing. From 2018 to 2019, the number of

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[8] The Eviction Lab at Princeton University, *Understanding Eviction in North Carolina* (Feb. 2019), https://evictionlab.org/map/#/2016?geography=states&type=er&locations=37,-79.354,35.534 (last visited June 30, 2020).

[9] National Low Income Housing Coalition, *Housing Needs by State: North Carolina* (2019), *available at* https://nlihc.org/housing-needs-by-state/north-carolina (last visited June 29, 2020).

[10] *See* Eviction Rankings, Eviction Lab at Princeton University, https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRath&lang=en (last visited June 29, 2020).

summary ejectment actions filed statewide jumped from 165,943 to 172,510 (an increase of 6,567).[11]

Losing stable, affordable housing is particularly devastating for low-income families, due to lack of available units. Housing is considered affordable when a person pays no more than 30% of her annual income toward rent and utilities.[12] According to the HUD Office of Policy Development and Research, the fair market rent for a one-bedroom apartment in Wake County is $949.00 per month.[13] Ms. Winston, like many individuals who rely on government benefits as their sole source of income, receives a monthly sum of $760.00,[14] and thus cannot afford to pay for housing at the fair market rate. Tenants such as Ms. Winston therefore often must rely on housing programs – such as those offered by PHAs – to find affordable and accessible housing. PHAs primarily serve low income individuals, many of whom may be at risk of homelessness if they are unable to live in housing made affordable for them.

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[11] *See* Civil Issue Filings/Order Results for FY 2017-2018, FY 2018-2019, https://www.nccourts.gov/documents/publications/civil-issue-filingsorder-results (last visited June 29, 2020).

[12] 42 U.S.C. § 1437a(a)(1)(A) [Exhibit H, App. pp. 24-53]; *see also* HUD, Affordable Housing, HUD.GOV, https://www.hud.gov/program_offices/comm_planning/affordablehousing/ (last visited Jun. 29, 2020) ("Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation and medical care.").

[13] *See* FY 2020 Fair Market Rent Documentation System, HUD USER, https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2019_code/2019summary.odn (last visited Jun. 26, 2020).

[14] Def.'s Aff. in Supp. of Pet. for Writ of Supersedeas and Mot. for Temporary Stay at 1, *Raleigh Hous. Auth. v. Winston*, No. 385PA19 (N.C. Sup. Ct. 2019).

Evictions, particularly for low-income individuals and families, are devastating. Those who are evicted have increased physical and mental health problems, children experience educational disruption, parents lose jobs, and families become homeless.[15] Because of the significant housing shortage in our state, an eviction can often become a sentence of homelessness for extremely low-income families. *See* Bos. Bar Ass'n Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Appendix A 1-3 (Mar. 2012). "The damage done by eviction and homelessness is psychological and physical, as well as economic. Eviction imposes long-term costs on the individuals and families affected and also taxes the social service, child welfare, and criminal justice systems."[16]

For individuals who belong to historically disfavored populations, evictions can result in future struggles to maintain stable housing. People with disabilities are the most likely to experience housing discrimination in North Carolina.[17] Women, and particularly women of color, are more likely to face eviction

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[15] Matthew Desmond, Evicted: Poverty and Profit in the American City, pp 296–99 (2016).

[16] Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 702 (2006); *see also* Gerald S. Dickinson, *Towards A New Eviction Jurisprudence,* 23 GEO. J. ON POVERTY L. & POL'Y 1, 12–14 (2015).

[17] Legal Aid of North Carolina, Fair Housing Project, *The State of Fair Housing in North Carolina* (2019), *available at* https://www.fairhousingnc.org/wp-content/uploads/2019/12/2019-State-of-Fair-Housing-in-North-Carolina-Final-12-18-19.pdf (last visited June 30, 2020).

proceedings than men.[18] Individuals with a history of domestic violence are "discriminated against, denied access to, and even evicted from public and subsidized housing because of their status as victims of domestic violence." 34 U.S.C. § 12471(1), (3); *Johnson v. Palumbo*, 60 N.Y.S.3d 472, 478 (N.Y. App. Div. 2017).[19]

To safeguard against the devastating consequences of eviction, important procedural protections are afforded to individuals in subsidized housing who are at risk of eviction.[20] Congress enacted the Fair Housing Act to prevent housing discrimination and expanded VAWA protections to include public housing. PHAs have a heightened duty to follow procedural protections.[21] Diminishing the value of

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[18] Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 91, 98 (2012); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 467 (2003).

[19] *See also* Lauren Brasil, *Shut Out of Housing: Legal Protections for Domestic Violence Survivors*, Fair Housing Project, Legal Aid of NC (Dec. 3, 2019), *available at* https://www.fairhousingnc.org/newsletter/shut-out-of-housing-legal-protections-for-domestic-violence-survivors/ (last visited June 29, 2020).

[20] *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Caulder v. Durham Hous. Auth.*, 433 F.2d 998, 1003 (4th Cir. 1970) ("The 'privilege' or the 'right' to occupy publicly subsidized low rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or other rights and privileges referred to in *Goldberg*.").

[21] *Joy v. Daniels*, 479 F.2d 1236, 1242 (4th Cir. 1973) (observing "the entitlement of plaintiff to continue occupancy of public housing … is, we think, of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause") (internal citations omitted); *see also Thorpe v. Hous. Auth. Of Durham*, 393 U.S. 268, 281 (1969) (stating "one of the specific purposes of the federal housing acts is to provide 'a decent home and a suitable living environment for every American family' that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal." (internal citation omitted)).

any due process protections for tenants or creating loopholes for landlords around these vital protections only serves to make it easier to evict tenants, thereby increasing rates of homelessness. This case presents an important opportunity for the Court to uphold vital due process protections for thousands of North Carolina tenants.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the Court of Appeals.

Respectfully submitted, this 1st day of July, 2020.

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**CERTIFICATE OF COMPLIANCE**

N.C. R. App. P. Rule 28(j) Certification: I certify that the foregoing brief contains no more than the 3,750 words permitted by this rule.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing BRIEF OF *AMICI CURIAE* was served upon the parties in this matter by electronic mail, with their consent and addressed to:

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