No. 22-60481

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR DOE; BRENDA DOE; CAROL DOE; DIANA DOE; ELIZABETH DOE,
Plaintiffs-Appellees
v.
LYNN FITCH; SEAN TINDELL, COMMISSIONER OF THE MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY; MEGAN COSTILOW, DIRECTOR OF THE MISSISSIPPI SEX OFFENDER REGISTRY; COLONEL RANDY GINN, DIRECTOR OF THE MISSISSIPPI HIGHWAY PATROL; LIEUTENANT COLONEL CHARLES HAYNES, DIRECTOR OF THE MISSISSIPPI BUREAU OF INVESTIGATION,
Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:16 cv 789-CWR-FKB

BRIEF OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

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STATEMENT REGARDING ORAL ARGUMENT

This case involves an important question regarding the propriety of a large award of attorney's fees when plaintiffs achieve only modest success. Oral argument would aid the Court's resolution of this appeal.

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INTRODUCTION

Five plaintiffs, each a registered sex offender, sought sweeping relief in this case: class-wide declaratory and injunctive relief invalidating Mississippi laws requiring people with certain convictions to register as sex offenders. Plaintiffs' attorneys devoted hundreds of hours to summary-judgment and class-certification motions, and class-related discovery. Yet when the case ended, plaintiffs got little of what they set out for. The district court never granted summary judgment to any plaintiff, never granted class certification, never granted declaratory relief, never granted injunctive relief, and never ruled unconstitutional any Mississippi statute. Four plaintiffs and some other non-parties were removed from Mississippi's sex-offender registry due to a settlement agreement; another was granted relief in state court—not in this case. Yet plaintiffs then sought over $400,000 in attorney's fees and costs, proceeding as if they had gained the lion's share of what they struck out for. The district court recognized that $400,000 was too much given plaintiffs' limited success. Yet that court still awarded plaintiffs nearly $363,000.

That award was a manifest abuse of discretion.

First, plaintiffs' success was limited and the district court failed to soundly account for that when it slightly reduced the fee award that

plaintiffs requested. Plaintiffs' success was very modest given what they set out to do and the substantial amount of time their counsel devoted to doing it. The district court was thus required to dramatically pare down the award to account for their lack of success. The district court failed to do so. According to that court, plaintiffs were entitled to recover attorney's fees for nearly all the time expended on the case because their successful and unsuccessful claims were based on related legal theories.

But that was wrong. Plaintiffs brought a due-process claim and an equal-protection claim. The due-process claim sought broad, facial relief. It urged the facial invalidation of Mississippi's unnatural-intercourse statute and corresponding provisions requiring those convicted of unnatural intercourse or sodomy to register as sex offenders. Plaintiffs did not succeed on this claim. Plaintiffs' equal-protection claim was much narrower. It focused on securing much narrower relief for four plaintiffs who had been convicted under Louisiana's crime-against-nature-by-solicitation (CANS) statute. (The fifth plaintiff was convicted under Mississippi's unnatural-intercourse statute.) The four CANS plaintiffs argued that there was no legitimate reason for requiring them to register as sex offenders when prostitution is not a registrable offense in Mississippi. Those plaintiffs prevailed on this claim when the State agreed to remove them (and several non-parties) from the registry.

The due-process claim was separate and distinct from the equal-protection claim on which plaintiffs succeeded. The due-process claim involved a purely legal analysis of whether *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidated Mississippi's unnatural-intercourse statute. The equal-protection claim challenged the fact that the Louisiana CANS statute and the Mississippi prostitution statute criminalize identical conduct, yet only people with CANS convictions were required to register. The significant number of hours spent by plaintiffs' attorneys developing the due-process claim could not have soundly contributed to the success on the equal-protection claim. The district court abused its discretion in ruling that the claims were interrelated, such that plaintiffs' attorneys were entitled to fees for the vast majority of their work on the case.

Second, the award is otherwise erroneous for two additional, independent reasons. The first reason: The district court improperly ruled that it was necessary for the CANS plaintiffs to retain counsel from New York and Los Angeles and that their five out-of-state attorneys were therefore entitled to out-of-district rates that substantially exceeded prevailing in-district rates. Plaintiffs failed to establish that no Mississippi attorneys were willing and able to represent them. They made no attempt to contact any local attorneys to determine whether they would represent them. Instead, they submitted a declaration from a

Mississippi professor who made the hollow assertion that he was not aware of any local attorneys who could or would have handled the case. The minimal evidence submitted by plaintiffs did not support an award of fees calculated at New York and Los Angeles rates.

The second reason: The district court failed to sufficiently reduce the fee request to account for plaintiffs' counsel's failure to exercise proper billing judgment. Plaintiffs' use of seven attorneys resulted in significant overstaffing, duplication of work, and excessive time billed for matters including drafting pleadings, depositions, and internal conference calls and meetings. The district court's largely uncritical acceptance of plaintiffs' attorneys time records was improper.

This Court should vacate the attorneys' fees award.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court entered its final judgment on December 22, 2021, ROA.1459, and its order granting the CANS plaintiffs' motion for attorneys' fees and costs on August 1, 2022. ROA.1565-82. Defendants timely filed a notice of appeal from the attorneys' fees order on August 29, 2022. ROA.1583-1585. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court abuse its discretion in failing to significantly reduce the fee award to account for plaintiffs' limited success and the substantial amount of time that was devoted to their unsuccessful claim?

II. Did the district court otherwise abuse its discretion when it approved out-of-district rates for five of plaintiffs' attorneys and refused to exclude from the fee award excessive and duplicative time entries?

STATEMENT OF THE CASE

1. Two lawsuits in Louisiana preceded but are relevant to this Mississippi case. First, in 2011, nine persons filed suit in Louisiana federal court challenging Louisiana's Crime Against Nature by Solicitation (CANS) statute, La. R.S. §14:89(A)(2). ROA.545-46, 810. Each plaintiff had been convicted under that statute and had been required to register in Louisiana as a sex offender under Louisiana's sex-

offender registry law, La. R.S. § 15:540, *et seq.* ROA.545-46, 810. Those plaintiffs sought a declaration that the requirement that they register as sex offenders as a result of their CANS convictions was unconstitutional because Louisiana did not require individuals convicted of prostitution to register as sex offenders. The Louisiana district court ruled that the plaintiffs' inclusion on the Louisiana sex-offender registry violated their right to equal protection. *See Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012); ROA.546, 810.

Second, after the court entered summary judgment for those plaintiffs in the *Jindal* suit, Brenda Doe (later a plaintiff in this case) and three other registered sex offenders who had CANS convictions filed a separate class-action lawsuit, also in Louisiana federal court, seeking an order requiring Louisiana to remove the named plaintiffs and class members from Louisiana's sex-offender registry. ROA.546. On June 10, 2013, Louisiana settled with these plaintiffs and agreed to remove from the registry nearly 900 persons who had been required to register solely because of a CANS conviction that did not involve the solicitation of a person under the age of 18. ROA.546, ROA.810-811.

Because Brenda Doe had been required to register in Louisiana, she had also (as a Mississippi resident) been required to register with the Mississippi Sex Offender Registry (MSOR). *See* Miss. Code Ann. § 45-33-

23(xxii) (requiring registration for "[a]ny offense resulting in a conviction in another jurisdiction for which registration is required in the jurisdiction where the conviction was had"); ROA.546-47. After she was removed from the Louisiana registry, her attorney asked that she be removed from the MSOR. ROA.546-47. Counsel for the MSOR told her attorney that she was still required to register under Miss. Code. Ann. § 45-33-23(xxi) because her CANS conviction was an offense that, "if committed in this state, would be deemed to be" the crime of unnatural intercourse, a registrable offense. *See* Miss. Code. Ann. § 45-33-23(xi) (requiring registration for convictions under Miss. Code. Ann. § 97-29-59 "relating to unnatural intercourse"); *id.* § 97-29-59 ("Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."); ROA.547.

2. In November 2016, five registered sex offenders living in Mississippi filed this lawsuit against several Mississippi state officials. ROA.29-57.

Four plaintiffs—Brenda Doe, Carol Doe, Diana Doe, and Elizabeth Doe—were convicted of violating Louisiana's CANS statute, La. R.S. § 14:89(A)(2). ROA.545-552. The CANS statute required them to register

as sex offenders under Louisiana's sex-offender registry law, so (as noted above) they were also required to register with the MSOR. ROA.545-552. The fifth plaintiff—Arthur Doe—pleaded guilty in 1978 to violating Mississippi's unnatural-intercourse statute, Miss. Code. Ann. § 97-29-59. ROA.175, 544, 934. Doe was accused of forcibly sodomizing another person. ROA.858-859, 891. He claimed that the sex at issue was consensual. ROA.858-59. Arthur Doe registered with the MSOR in 2008, after he was released from federal prison. ROA.545.

Plaintiffs sought to sue on behalf of a putative class of all persons registered with the MSOR for convictions under Mississippi's unnatural-intercourse statute or an out-of-state equivalent. ROA.43. Plaintiffs brought two claims. First, they brought a due-process claim. ROA.53-54. They claimed that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), "facially invalidated all sodomy statutes, including Mississippi's." ROA.30. The State's unnatural-intercourse statute broadly outlaws sexual acts performed in many different contexts. *E.g.*, *Miller v. State*, 636 So. 2d 391, 394-95 (Miss. 1994) (recognizing the statute prohibits sexual acts with minors and between nonconsenting adults); *Contreras v. State*, 445 So. 2d 543, 545 (Miss. 1984) (statute prohibited father's incestual sex acts with nineteen-year-old daughter). Plaintiffs nevertheless alleged that defendants' "enforcement of the

registry law" violated their constitutional right to due process and "the clear mandate of *Lawrence*." ROA.53. Second, they brought an equal-protection claim. ROA.54-55. They claimed that the "enforcement of the registry law" against them violated their right to equal protection because persons convicted of "materially indistinguishable offenses" such as prostitution are not required to register as sex offenders. ROA.54.

Plaintiffs requested broad declaratory and injunctive relief. ROA.55-57. They sought a declaration that Mississippi's unnatural-intercourse statute, Miss. Code Ann. § 97-29-59, is "unconstitutional on its face as it relates activity between human beings," and that the provision requiring persons convicted of unnatural intercourse to register with the MSOR, *id.* § 45-33-23(xi), is unconstitutional insofar as it applies to unnatural-intercourse convictions "involving activity between human beings." ROA.55. They also sought a declaration that Miss. Code Ann. § 45-33-23(xxi), which requires persons convicted of offenses in other jurisdictions that would be deemed to be a registrable offense if committed in Mississippi, was unconstitutional insofar as it applies to convictions "involving activity being human beings." ROA.55-56. Last, they requested an injunction barring defendants from enforcing the challenged laws "in any situation involving activity between human

beings", and requiring defendants to permanently remove them and all proposed class members from the MSOR. ROA.56.

3. One day after defendants filed their answer, plaintiffs filed a summary-judgment motion, a class-certification motion, and a motion to proceed under pseudonyms and to file documents under seal. ROA.138-271. In support of their summary-judgment motion, plaintiffs submitted a declaration of one of their attorneys to which they attached copies of documents that, they claimed, were plaintiffs' sex-offender registry profiles, printed from the MSOR public website, and court documents related to plaintiffs' convictions. ROA.171-206. All identifying information was redacted. ROA.171-206. Plaintiffs sought to proceed under pseudonyms to protect their identities from both the public and from defendants. ROA.210-228. They claimed that "their identities [we]re immaterial to the legal issues presented by this case and need not be disclosed either publicly or to defendants." ROA.220. Plaintiffs did not provide unredacted versions of the declaration or supporting documentation to defendants. ROA.171-206. Instead, they asked that access to the sealed documents containing their identifying information be limited to the district court, or, in the alternative, to the district court and to defendants' counsel. ROA.215.

In response, defendants moved for discovery and entry of a scheduling order under Fed. R. Civ. P. 56(d), arguing that they could not present evidence sufficient to justify their opposition to the summary-judgment motion without knowing the plaintiffs' identities and the facts underlying the convictions that required them to register with the MSOR. ROA.320-341. Defendants contended that they were entitled to obtain evidence concerning the "named" plaintiffs and other members of the putative class to ensure that persons who had committed sex offenses involving children, forcible sodomy, or other non-consensual sexual activity were not removed from the MSOR. ROA.330-31. Defendants argued that the district court should deny plaintiffs' summary-judgment and class-certification motions as premature and enter a scheduling order allowing defendants to conduct discovery both as to the class-certification requirements and the factual issues raised in the summary-judgment motion and supporting documentation. ROA.333-34.

The district court denied plaintiffs' summary-judgment and class-certification motions without prejudice and granted defendants' motion for discovery, ROA.476-77, finding that defendants "should be afforded an opportunity to confirm the nature of each individual's 'registerable offense(s)." ROA.477. The court added that defendants were entitled to discovery to "confirm" that "(1) the only conviction that would require

plaintiffs and putative class members to comply with Mississippi's Sex Offender Registry was Unnatural Intercourse or its out of state equivalent; and (2) that the facts supporting the conviction involved only consenting adults." ROA.477.

The district court granted plaintiffs leave to proceed under pseudonyms and ordered the parties to consult with the magistrate judge to craft a protective order that would preserve plaintiffs' anonymity but also allow defendants' counsel to access their personally identifying information. ROA.470-75. Upon the entry of a protective order, plaintiffs were instructed to file, under restricted access, unredacted copies of the documents submitted with their motion for summary judgment. ROA.475. An agreed protective order was later entered. ROA.509-14. It permitted defense counsel and certain MSOR personnel to have access to plaintiffs' identifying information. ROA.510-11.

After plaintiffs filed an amended complaint, ROA.528-58, discovery proceeded. Plaintiffs propounded two sets of interrogatories and requests for production of documents, as well as one set requests for admission. ROA.559-67, 597-602. Defendants propounded one set of interrogatories, requests for production, and requests for admission. ROA.591-96. The only other discovery was two depositions taken by plaintiffs. ROA.1519, 1576.

On February 22, 2018, the parties attended a settlement conference conducted by the magistrate judge. ROA.17. At the conference, defendants reached an agreement with the four CANS plaintiffs to remove them from the registry and to remove all others registered solely because of a CANS conviction. ROA.1566. The district court entered an agreed order requiring defendants to remove from the registry all persons who were registered on the basis of a CANS conviction, did not have any other registrable offenses, and had been removed from Louisiana's sex offender registry. ROA.810-16. (Besides plaintiffs, this amounted to 24 persons. ROA.1578.). The district court also entered a partial judgment in favor of the CANS plaintiffs that incorporated by reference the terms of the agreed order. ROA.808-09.

That left one plaintiff—Arthur Doe. Defendants moved for summary judgment on Arthur Doe's claims, arguing, among other things, that *Lawrence v. Texas* did not facially invalidate Mississippi's unnatural-intercourse statute, that Arthur Doe was not entitled to as-applied relief under *Lawrence*, and that his due-process claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because a judgment in his favor would imply the invalidity of his unnatural-intercourse conviction. ROA.657-59, 667-99. Arthur Doe also moved for summary judgment. ROA.726-769. In response to defendants' summary-judgment motion, he

asserted, among other things, that *Heck* did not apply because he was precluded from seeking post-conviction relief in state court. ROA.895-99.

In an order that did not decide any motion, the district court noted that the unnatural-intercourse statute "appears to be unconstitutional" but deferred ruling on the matter and scheduled a hearing for the parties to further address whether Arthur Doe had the ability to seek post-conviction relief in state court. ROA.1094-1114. After hearing oral argument, the district court stayed the case "pending a state court ruling determining whether Doe can vacate his conviction through state court remedies." ROA.1174.

A state court granted Arthur Doe's petition for post-conviction relief and vacated his unnatural-intercourse conviction. ROA.1456. He was then removed from the registry and the district court entered a final judgment dismissing the case with prejudice. ROA.1459.

In this lawsuit, then, the district court never granted summary judgment to any plaintiff, never granted class certification, never granted declaratory relief for any plaintiff, never granted injunctive relief for any plaintiff, and never ruled unconstitutional any Mississippi statute.

4. The four CANS plaintiffs filed a motion for attorneys' fees and costs under 42 U.S.C. § 1988. ROA.1179-1197. They requested an award of $412,109.08: $372,906.25 for work performed through the February

2018 settlement conference, $28,425 for litigating the fee motion, and $10,777.83 in costs. ROA.1442, 1451-52, 1563.

The seven attorneys and one paralegal who worked on the case claimed to have worked 1,089.4 hours on the case. ROA.1451. Four of the attorneys and the paralegal reduced their requested fees by 10% in an effort to show billing judgment. ROA.1451. The other three attorneys' time sheets do not reflect that they wrote off any hours. ROA.1531-44.

The CANS plaintiffs requested hourly rates of $450 and $400 for their two local counsel, who each spent less than 15 hours working on the case. ROA.1447, 1451. Plaintiffs' other attorneys sought out-of-district rates. ROA.1445-47. The four attorneys from the Center for Constitutional Rights in New York asked to be compensated at the following "modified home rates": Shayana Kadidal ($550), Ghita Schwarz ($450), Alexis Agathocleous ($450), and Stephanie Llanes ($250). ROA.1445-46, 1451. Matthew Strugar, an attorney from Los Angeles, requested a "modified" hourly rate of $450. ROA.1446-47, 1451. Last, plaintiffs claimed that an hourly rate of $125 was reasonable for the paralegal who assisted the attorneys from the Center for Constitutional Rights. ROA.1446.

Plaintiffs contended that out-of-state counsel were needed for adequate representation. ROA.1443-45. According to plaintiffs, "[i]t

would have been difficult" to hire Mississippi attorneys who were "willing to represent sex offenders" and had the time, resources, and "necessary expertise to litigate the complex constitutional issues presented by the sex offender registration scheme for pre-*Lawrence* sodomy convictions." ROA.1445. To support this argument, plaintiffs submitted a declaration from Cliff Johnson, a civil-rights attorney and law professor in Mississippi, who stated that he was "not aware of any Mississippi lawyers ... who would have been willing and able to take on a complex, multi-year sex-offender rights case without substantial assistance from out-of-state counsel." ROA.1295.

In response, defendants contended that all hours expended on the unsuccessful due-process claim, summary-judgment motion, and class-certification motion should be eliminated from the fee award, and that the award should be substantially reduced due to the limited relief obtained. ROA.1468-71, 1487-88. Defendants also objected to a significant number of the plaintiffs' attorneys' time entries as excessive, duplicative, vague, or related to clerical or administrative tasks. ROA.1471-78, 1493-1544. Last, defendants argued that the district court should not approve New York and Los Angeles rates for plaintiffs' out-of-state attorneys because they had failed to prove it was necessary to hire them. ROA.1482-87. Defendants contended that an in-district rate of

$300 was reasonable for Kadidal, Schwarz, Agathocleous, and Strugar; and that Llanes should only receive $200 per hour due to her lack of experience. ROA.1485-86. Defendants asked the district court to award the CANS plaintiffs no more than $75,000. ROA.1488.

The district court granted plaintiffs' motion and awarded them attorneys' fees in the amount of $352,143.20 and $10,777.83 in costs. ROA.1582. The court rejected defendants' argument that the hours that plaintiffs' attorneys spent on the unsuccessful due-process claim should be deducted on the ground that that work was unrelated to the successful and more limited equal-protection claim. The court ruled that both "claims center on the same facts and the legal theories are interrelated." ROA.1577-78. So the court considered the "results obtained." ROA.1578. The court observed that "all plaintiffs (and 24 others) were removed from the MSOR through the efforts of plaintiffs' counsel." ROA.1578. The court did conclude that a "downward adjustment [wa]s warranted" because "plaintiffs did not enjoin or otherwise invalidate Mississippi's anti-sodomy law—one of the lawsuit's central issues." ROA.1578. Finding it "impossible to extrapolate the amount of time expended on this issue alone," the district court stated that it would "reduce plaintiffs' total hours expended" by an unspecified amount. ROA.1578.

The district court further ruled that plaintiffs had proved that they "could not have obtained adequate representation in this matter matter—much less representation of the same quality as that of plaintiffs' out-of-state attorneys—from a team comprised exclusively of in-state lawyers." ROA.1571. The court based this finding on the declaration of Cliff Johnson. ROA.1570-71. The district court also thought it significant that plaintiffs' New York attorneys from the Center for Constitutional Rights had successfully litigated the *Doe v. Jindal* case and the follow-on class action. ROA.1571-72. Because this case was expected to be a similar "multi-year, class action suit, requiring significant time and resources," the court ruled that "turning to out-of-district counsel was necessary and thus, reasonable." ROA.1571-72. The court approved the following rates for plaintiffs' out-of-state attorneys: Kadidal ($450), Schwarz ($450), Agathocleous ($450), Strugar ($450), and Llanes ($225). ROA.1572-74.

As for the reasonableness of the hours claimed, the district court did not make any reductions to the time entries flagged by defendants as excessive, duplicative, or vague. ROA.1574-76. And it ruled that the significant number of hours plaintiffs' attorneys billed for conference calls, telephone conversations, and meetings with each other were reasonable because the case "involved numerous attorneys and clients,

located all over the United States, and strategic planning, like considerations to protect plaintiffs' identities and pursue class certification." ROA.1576-77.

The district court noted that plaintiffs had agreed that "22.5 hours should have been billed at a paralegals' rate rather than an attorneys' rate," but "[r]ather than accepting the plaintiffs' reclassification," the court stated that it "would reduce all plaintiffs' hours expended." ROA.1579. The court also found that a "slight reduction [wa]s warranted" for the hours expended on plaintiffs' unsuccessful summary-judgment and class-certification motions, but the court said that, "rather than cosplay as a green-eyeshade accountant," it would "reduce plaintiffs' hours expended by a percentage." ROA.1578-79. At the conclusion of its order, the court only applied a 15% across-the-board reduction to plaintiffs' attorneys' proposed hours "to account for proper billing judgment, *e.g.*, lack of clarity as to whether fees were for clerical or legal work, the results achieved, and work spent on non-prevailing issues." ROA.1581.

The court entered its order on attorney's fees and costs on August 1, 2022. ROA.1565-82. Defendants timely appealed from that order. ROA.1583-85.

SUMMARY OF ARGUMENT

This Court should vacate the district court's award of attorney's fees.

I. In this putative class action, plaintiffs sought broad declaratory and injunctive relief requiring the removal of numerous sex offenders from Mississippi's sex offender registry. They failed to obtain that sweeping relief. Instead, four plaintiffs convicted of soliciting unnatural sex in Louisiana (and other non-parties) were removed from Mississippi's sex offender registry as the result of a settlement agreement. In light of plaintiffs' limited success, the district court's award of $352,143.20 in attorneys' fees is grossly excessive. The district court refused to substantially reduce the hours claimed on the ground that the two claims asserted by plaintiffs were interrelated. This was clear error. The unsuccessful due-process claim alleged that *Lawrence v. Texas*, 539 U.S. 558 (2003), facially invalidated all sodomy statutes, including Mississippi's unnatural-intercourse statute. The equal-protection claim on which plaintiffs succeeded alleged that there was no rational reason to require sex offenders convicted of soliciting unnatural intercourse to register when prostitution is not a registrable offense in Mississippi. The claims were separate and distinct. They both required a purely legal

analysis, and all hours expended on the due-process claim could not have contributed to plaintiffs' success on the equal-protection claim.

II. The fee award should be reversed for two additional reasons. The district court erroneously found plaintiffs met their burden of establishing that it was necessary for them to hire five attorneys from New York and Los Angeles to secure adequate representation, and that their out-of-state attorneys should thus receive out-of-district rates that were substantially higher than the prevailing market rates in Mississippi. Plaintiffs did not submit any evidence that they attempted to contact any local attorneys to see whether they would take on their case. Rather, they presented a single declaration from a Mississippi professor who stated that he was not aware of any local attorneys who would have been willing and able to represent plaintiffs without the assistance of out-of-state attorneys. The district court erred in concluding that this limited evidence was sufficient to justify the approval of New York and Los Angeles rates for plaintiffs' five out-of-state attorneys.

Second, the district court erroneously refused to make any reductions to the number of hours claimed by plaintiffs' counsel that were excessive and duplicative. Plaintiffs' seven attorneys billed excessive amounts of time for drafting pleadings and participating in internal conference calls and meetings. Further, plaintiffs' attorneys' time records

contain numerous entries involving multiple attorneys performing the same tasks, doubling and tripling the number of hours charged to the State. The district court's failure to eliminate any of these hours was plain error.

STANDARD OF REVIEW

A district court's award of attorney's fees is reviewed for abuse of discretion. *Torres v. SGE Mgmt., LLC*, 945 F.3d 347, 352 (5th Cir. 2019). "A district court abuses its discretion if it (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Combs v. City of Huntington*, 829 F.3d 388, 391 (5th Cir. 2016) (internal quotation marks and citation omitted).

ARGUMENT

I. The District Court Abused Its Discretion By Failing To Dramatically Reduce Plaintiffs' Attorney's-Fees Award To Account For The Limited Relief Obtained And The Significant Amount of Time Spent On Plaintiffs' Unsuccessful Claim.

The district court abused its discretion by failing to substantially reduce the fee award. Although the court found that a downward adjustment of the hours claimed by plaintiffs' attorneys was warranted due to their partial success, ROA.1578, it reduced their hours by less than fifteen percent for the "results achieved" and "work spent on non-

prevailing issues," ROA.1581. The district court failed to properly consider the relationship between the fee award in relation to the limited results obtained by plaintiffs. It awarded fees to the CANS plaintiffs' attorneys for nearly all of the work they performed in pursuit of their due-process claim that *Lawrence v. Texas* facially invalidated Mississippi's unnatural-intercourse statute, even though all the hours spent on this claim gained them nothing. The modest relief obtained in this litigation required a dramatic reduction of the fee award, given the substantial time that plaintiffs' attorneys devoted to this unsuccessful claim. This Court should vacate the award of attorney's fees and remand the case for a new determination of fees.

The "degree of success obtained" is "the most critical factor" in determining the reasonableness of an award of attorneys' fees. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). When "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. In that event, the "district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37. A district court abuses it discretion if it "fail[s] to give adequate

consideration to the result obtained relative to the fee award, and the result obtained relative to the result sought." *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1048 (5th Cir. 1998).

Here, the district court failed to account for the result obtained relative to the overall fee award and the relief sought. Plaintiffs did not merely fail to succeed on "one of the lawsuit's central issues." ROA.1578. They failed to succeed on *the central claim* in this case. The central claim was that Mississippi's unnatural-intercourse was invalid under *Lawrence v. Texas* and that every sex offender convicted of unnatural intercourse or an equivalent offense in another state must therefore be removed from Mississippi's sex offender registry. ROA.29-31, 528-30. And the relief they sought on that central claim was sweeping. Plaintiffs sought a court order declaring that Mississippi's unnatural-intercourse statute is "unconstitutional on its face." ROA.554. They also asked for a declaration that Miss. Code Ann. § 45-33-23(h)(xi) is unconstitutional for requiring individuals convicted of unnatural intercourse to register as sex offenders, and that Miss. Code Ann. § 45-33-23(h)(xxi) is unconstitutional for requiring "individuals convicted of an offense resulting in a conviction in another jurisdiction which, if committed in Mississippi, would be deemed to be Unnatural Intercourse ... to register as sex offenders." ROA.555. Plaintiffs also asked the district court to

order Defendants to permanently remove from the MSOR the named plaintiffs and a class consisting of "of all persons who have been or may in the future be subject to the MSOR for convictions for Unnatural Intercourse or convictions ... considered to be out-of-state equivalents to Unnatural Intercourse." ROA.542, 555

Plaintiffs failed to secure most of the relief they set out to obtain. Neither Mississippi's unnatural-intercourse statute nor any other challenged law was declared unconstitutional. A class was never certified. The district court did not order the State to permanently remove all persons convicted of unnatural intercourse or an equivalent out-of-state offense from Mississippi's sex-offender registry. Instead, only the four "named" CANS plaintiffs and twenty-four other persons with CANS convictions were removed from the registry, as the result of a settlement agreement reached by the parties. ROA.1578. Despite the limited relief obtained by plaintiffs relative to the sweeping relief they sought, the district court reduced the fee award based on the results obtained only by an unspecified percentage that was something less than fifteen percent. *See* ROA.1581. This was erroneous.

To start, in considering the relationship between the amount of the fee award and the degree of success obtained, the district court apparently considered the removal of Arthur Doe from the registry as

part of the success achieved in the litigation. ROA.1578 (finding that "*all plaintiffs* (and 24 others) were removed from the MSOR through the efforts of plaintiffs' counsel") (emphasis added). To the extent the district court factored the removal of Arthur Doe into its analysis, it abused its discretion. Arthur Doe was removed from the registry because his unnatural-intercourse conviction was vacated by a state court—not as a result of this litigation. ROA.1456. Vacatur is warranted on this ground alone.

More fundamentally, the district court abused its discretion by failing to soundly assess the significant, excessive number of hours that plaintiffs' counsel worked on the unsuccessful due-process claim and other issues on which they did not prevail. Plaintiffs' attorneys spent hundreds of hours researching and developing the due-process claim, preparing and filing a summary-judgment motion, and drafting and filing a class-certification motion. ROA.1493-1544. But this work gained plaintiffs nothing. They did not succeed on their due-process claim, and their summary-judgment and class-certification motions were denied after the defendants obtained leave to conduct discovery.

Yet the district court ruled that only a "slight reduction" of the hours devoted to summary judgment and class certification was warranted. ROA.1578. The district court refused to exclude or

substantially reduce the hours devoted to the failed due-process claim based on its view that all claims asserted by plaintiffs "center[ed] on the same facts and the legal theories [we]re interrelated." ROA.1578.

This reasoning does not withstand scrutiny. "It is axiomatic that 'work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved and therefore no fee may be awarded for services on an unsuccessful claim.'" *Fessler v. Porcelana Corona De Mexico, S.A. DE C.V.*, 23 F.4th 408, 416 (5th Cir. 2022) (quoting *Hensley*, 461 U.S. at 435). "If unrelated to the successful claims, the unsuccessful ones must 'be treated as if they had been raised in separate lawsuits' and excluded from the fee award." *Id.* (quoting *Hensley*, 461 U.S. at 435–36). Claims are only related if they "involve a common core of facts" or are "based on related legal theories." *Hensley*, 461 U.S. 435.

Although there is "no certain method of determining when claims are 'related' or 'unrelated,'" *Hensley*, 461 U.S. at 437 n.12, "[m]ost circuits addressing the issue take an 'evidentiary approach,' focusing on any overlap in the development of the needed evidence and how such evidence will be presented at trial." *Johnston v. Borders*, 36 F.4th 1254, 1283 (11th Cir. 2022) (citing cases). Other circuits examine whether the hours spent on unsuccessful claims contributed to the plaintiff prevailing on the

successful claim. *See McKenna v. City of Philadelphia*, 582 F.3d 447, 459 (3d Cir. 2009) (holding that, where plaintiff failed to establish "that the time spent pursuing the unsuccessful claims contributed in any way to the success on the false arrest claim, … no fees should be awarded for time spent on those unsuccessful claims"). This Court has endorsed this method of determining relatedness. *See Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 257 (5th Cir. 1990) (holding that plaintiff "should be allowed to recover for time spent on her successful claim as well as for time spent on other issues and claims if that time contributed to her ultimate success in the case").

Under either approach, plaintiffs' due-process and equal-protection claims are not related. They did not arise from a common core of facts. The CANS plaintiffs alleged that the State violated the Equal Protection Clause by requiring individuals with CANS convictions to register as sex offenders, while excusing from registration those convicted of prostitution in Mississippi. ROA.167-69. According to plaintiffs, there was no rational basis for this classification because the two statutes "outlaw identical conduct." ROA.168. Of course, under rational basis review, a statutory classification "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315

(1993). Thus no evidence was needed to resolve this claim. The court only needed to review the texts of the CANS statute and the Mississippi prostitution statute, Miss. Code Ann. § 97-29-49. ROA.405 ("[The text of the statutes alone provides all that is necessary for this court to make a determination of whether a rational basis exists[.]").

Plaintiffs' due-process claim, by contrast, turned on whether *Lawrence v. Texas* facially invalidated all sodomy statutes, including Mississippi's unnatural-intercourse statute. ROA.155-62. Under plaintiffs' interpretation, *Lawrence* "made clear that all state sodomy statutes analogous to the Texas law, whether between same-sex or different-sex partners, are invalid under the Due Process Clause." ROA.156. This claim therefore depended entirely on a purely legal analysis of *Lawrence* and a comparison between Mississippi's unnatural-intercourse statute and the Texas sodomy statute invalidated in *Lawrence*. The two claims did not require the consideration of common facts or even any common evidence. They thus could not involve any common core of facts.

Further, the two claims were based on unrelated legal theories. Again, the equal-protection claim was predicated on the fact that the CANS statute and the Mississippi prostitution statute prohibit identical conduct, but only those with CANS convictions had to register as sex

offenders. ROA.167-69. The CANS plaintiffs argued that this was "precisely the same classification that the *Doe v. Jindal* court found unconstitutional[.]" ROA.168. That court, however, recognized that *Lawrence* had no bearing on the equal-protection claim asserted there. *See Doe v. Jindal*, 851 F. Supp. 2d 995, 1000 n.11 (E.D. La. 2012) ("*Lawrence* does not speak to the solicitation of sex for money."). The *Jindal* court was correct. *Lawrence* held that private sexual activity between consenting adults is constitutionally-protected conduct under the Due Process Clause. 539 U.S. 558, 578 (2003). But in so holding, the Supreme Court emphasized that its decision did not apply to "public conduct or prostitution." *Id.*

The two legal theories were entirely distinct. Plaintiffs' failed efforts to show that *Lawrence* facially invalidated Mississippi's unnatural-intercourse statute could not have contributed in any way to their success on the equal-protection claim. *Norris*, 913 F.2d at 257. Because the due-process claim and equal-protection were unrelated, the district court was required to treat the due-process claim "as if [it] had been raised in [a] separate lawsuit[]," and exclude the time devoted to that unsuccessful claim from the fee award. *Hensley*, 461 U.S. at 435. The district court's arbitrary 15% reduction of the plaintiffs' attorneys' hours could have only eliminated a fraction of the time spent on the due-process

claim. This error rendered the district court's fee award an abuse of discretion. The award should therefore be vacated.

II. The District Court Abused Its Discretion By Approving Out-Of-District Rates And By Refusing To Exclude Excessive And Duplicative Time Entries From Its Fee Award.

A. The District Court Improperly Rested The Fee Award On Inflated Out-Of-District Rates.

When evaluating a fee request, federal courts generally must rely on "reasonable" hourly rates derived from "the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). This Court "has interpreted rates 'prevailing in the community'" as usually requiring the district court to apply prevailing rates in the district where the suit is filed. *McClain v. Lufkin Industries, Inc.*, 649 F.3d 374, 381 (5th Cir. 2011). The district court below departed from that usual rule and approved New York and Los Angeles hourly rates at $450 per hour for all but one of plaintiffs' out-of-state attorneys. ROA.1571; *see* ROA.1572-74. Defendants contended that $300 per hour was a reasonable in-district rate for their services. ROA.1488. That was even more than usual, approved in-district rates for the Southern District of Mississippi, which often range between $150 and $275 per hour. *See*, *e.g.*, *Jarrell v. Shelter Mut. Ins. Co.*, 2019 WL 3521328, at *4 (S.D. Miss. Aug. 1, 2019) (noting the court's "familiar[ity] with the prevailing rates in the

community" and awarding rates of $150/hr and $175/hr); *Lewis v. Smith, Rouchon & Assoc., Inc.*, 2018 WL 11313781, at *2-3 (S.D. Miss. Dec. 17, 2018) (surveying hourly rates and awarding $275/hr for counsel with extensive experience and $175 for less experienced counsel). The district court's award of out-of-district rates ($450 instead of $300 per hour) inflated plaintiffs' overall fee recovery by at least approximately $150,000. Allowing plaintiffs that extra recovery was error.

Plaintiffs and the district court justified the out-of-district rates based on an exception to the general forum-district rule recognized in *McClain*, 649 F.3d at 383-84. ROA.1571. In that case, this Court noted that, "in an unbroken and consistent line of precedent, ... [it] ha[d] interpreted rates 'prevailing in the community' to mean what it says." 649 F.3d at 381. But an exception exists: when "abundant and uncontradicted evidence prove[s] the necessity of ... turning to out-of-district counsel," a district court should consider "the co-counsel's 'home' rates ... as a starting point for calculating the lodestar amount." *Id.* at 382; *see also id.* at 383 ("[I]n the unusual cases where out-of-district counsel are proven to be necessary to secure adequate representation for a civil rights plaintiff, the rates charged by that firm are the starting point for the lodestar calculation."). In *McClain*, extensive evidence supported counsel's out-of-district rates. The record was "replete with

affidavits from a variety of expert employment lawyers" that established "no Texas attorneys were willing and able to assist in such a large case that might drag on for years without any guarantee of financial remuneration." *Id.* at 383. This Court also emphasized the "atypical" nature of the case and the "avalanche of unrebutted evidence" showing that "no lawyers within the district or state were available to assist on this particular case." *Id.* Relying on *McClain*'s exception, the district court in this case concluded that "plaintiffs could not have obtained adequate representation" for their case from a "team" made up solely of "in-state lawyers." ROA.1571.

That was erroneous. The record here contains nothing like the evidence needed to depart from *McClain*'s usual rule. The district court's determination rested on a declaration of Cliff Johnson, a civil-rights attorney and law professor at the University of Mississippi. ROA.1293-97, 1570-71. Professor Johnson's opinions do not support an award of out-of-district rates. Johnson attested that, while there were Mississippi lawyers "willing to assist as local counsel in case involving the rights of sex offenders," he was not "aware of any Mississippi lawyers with the combination of the necessary skills, experience, time, and resources who would have been willing and able to take on a complex, multi-year sex-offender rights case without substantial assistance from out-of-state

counsel." ROA.1295. He admitted that there are "law firms in Mississippi with the time and resources to handle complex litigation," but added that he was "not aware of any such firm that would have been willing to handle a complex pro bono matter for sex offenders." ROA.1296. And he opined that "[m]any Mississippi lawyers would not represent sex offenders for personal reasons or because they are concerned about losing paying matters from clients or potential clients." ROA.1296.

Johnson's opinion testimony is not the "abundant" evidence needed to justify plaintiffs' out-of-district-rate request. *McClain*, 649 F.3d at 382. Plaintiffs failed to make a record—such as one "replete with affidavits from a variety of expert" lawyers—demonstrating that no local "attorneys were willing and able to assist" them. *Id.* at 383. Further, the professor's conclusion that he was "not aware" in 2021 of any Mississippi attorneys who would have been willing and able to take plaintiffs' case does not establish that no local attorneys would have done so in 2016 when it was filed. In fact, Johnson's declaration fails to indicate whether he ever asked any Mississippi attorneys whether they would have been willing to handle this case.

One declaration by a law professor, who merely stated that he was unaware of any Mississippi attorneys who could or would have been willing to handle this case, does not satisfy *McClain*'s exception. The

district court abused its discretion by building plaintiffs' higher, out-of-district rates from New York and Los Angeles into their award.

B. The District Court Improperly Based Its Fee Award On Excessive And Duplicative Time Entries.

Section 1988 and other fee-shifting statues authorize an award only of "reasonable" attorneys' fees and are "not designed" to afford "economic relief" that "improve[s] the financial lot of attorneys." *Pennsylvania v. Delaware Citizens Council*, 478 U.S. 546, 565 (1986). Fee-shifting is not a vehicle to impose unreasonable or punitive compensation upon losing parties. *Leroy v. City of Houston*, 831 F.2d 576, 585 (5th Cir. 1988) ("*Leroy IV*"). "Fee awards" thus must "be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims." *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989).

The fee applicant bears the burden of demonstrating the reasonableness of a fee request. *Von Clark v. Butler*, 916 F.2d 255, 259 (5th Cir. 1990); *see Leroy IV*, 831 F.2d at 586 ("[T]he burden of proof of reasonableness of the number of hours is on the fee applicant ... and not on the opposing party to prove their unreasonableness."). That burden obligates counsel for the prevailing party to "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours

from his fee submission." *Hensley*, 461 U.S. at 434. Counsel's request thus must reflect "[b]illing judgment," which "requires documentation of the hours charged and of the hours written off as unproductive, excessive, or redundant." *Saizan v. Delta Concrete Prod. Co.*, 448 F.3d 795, 799 (5th Cir. 2006). When evaluating the reasonableness of a fee request, the district court must review and scrutinize the hours claimed even where no objection to specific hours is made. *Leroy IV*, 831 F.2d at 586.

In the district court, defendants maintained that counsel's fee request included excessive and duplicated time entries. *See* ROA.1475-77, 1493-1544. The district court failed to reduce its fee award on either of those grounds. That was error.

First, the district court overlooked the excessive hours that plaintiffs' attorneys spent on many tasks. Excessive time entries were baked into to their claim to over 1000 hours of attorney and paralegal time. ROA.1493-1544. Plaintiffs' time records show that their counsel exercised no billing judgment in that regard. Counsel spent excessive amounts of time drafting motions and participating in conference calls and meetings. Other time records showed a significant number of entries for multiple attorneys performing similar tasks. Yet the district court determined that no reductions were warranted for overbilling or overstaffing. ROA.1574-75. That conclusion is not sustainable.

For example, plaintiffs' fee request included at least 77.4 hours of work performed by four attorneys on their motion to proceed anonymously and file documents under seal. ROA.1501-02, 1504-08, 1522-26, 1535-38. The motion filings consisted of less than thirty substantive pages. ROA.207-08, 214-227, 434-442. The number of hours that counsel devoted were plainly excessive and the fee award should have been reduced accordingly. But the district court's fee award failed to account for that problem. Instead, the court faulted the defendants for playing "hardball" and challenging the motion "vigorously" and concluded defendants should "bear the cost of their strategy." ROA.1574-75 (cleaned up).

As another example, plaintiffs' attorneys spent at least 98.6 hours preparing a preliminary-injunction motion that was converted into the motion for summary judgment and supporting brief that they filed early in the case. ROA.1497-98, 1500-05, 1521-24, 1528, 1534-36. The brief was less than twenty-five pages long. ROA.146-69. And the district court denied this motion without prejudice when it granted defendants' motion for discovery.

In perhaps the most egregious example of excessive time entries approved by the district court, counsel spent at least 149.7 hours, made up of over 200 separate time entries, for internal conference calls,

meetings, and telephone conversations. ROA.1493-1544. Many of those entries merely described those events as "Call with [X]," "Call with [X] re next steps," or "Team call." ROA.1493-1544. The district court ruled that none of the entries or time expended was unreasonable. ROA.1576. In its view, that this "case involved numerous attorneys and clients, located all over the United States, and strategic planning" such as "considerations to protect plaintiffs' identities and pursue class certification," justified counsel's numerous internal meetings. ROA.1576.

But while a certain amount of coordination and communications between co-counsel was appropriate, the sheer number of strategy calls and meetings for which plaintiffs' attorneys sought to be compensated was plainly excessive—particularly when placed against the modest success achieved. District courts within this Circuit routinely reduce the number of claimed hours spent on telephone conversations and meetings between co-counsel when fashioning a reasonable fee award. *See, e.g.*, *Olivia Y. v. Barbour*, 2017 WL 11329889, at *5 (S.D. Miss. July 21, 2017) (reducing excessive hours spent on telephone calls between co-counsel by 35%); *Gros v. New Orleans City*, 2014 WL 2506464, at *11 (E.D. La. June 3, 2014) (reducing by 75% large number of hours expended on co-counsel communications). The district court's refusal to eliminate any of these excessive time entries was a manifest abuse of discretion.

Second, the district court's fee analysis and award did not discount plaintiffs' duplicative time entries. When multiple counsel seek recovery in a fee-shifting case, the district court must scrutinize the fee application for duplication of effort. *Abrams v. Baylor College of Medicine*, 805 F.2d 526, 536 (5th Cir. 1986); *see Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir. 1974) ("the time of two or three lawyers in a courtroom or conference when one would do may be obviously discounted").

Defendants objected to over 500 time entries where recovery was sought for two or more attorneys who performed the same task. ROA.1475-76, 1493-1544. For example, plaintiffs sought recovery for three of their out-of-state attorneys' attendance at two depositions taken in Mississippi. ROA.1519, 1527, 1541. The district court allowed recovery based on the depositions by crediting "plaintiffs' explanation that there were only two depositions taken in this case, and that the case potentially rested on their outcome." ROA.1576. But even if that explanation for plaintiffs' triple recovery were sufficient, the court failed to address defendants' remaining objections to plaintiffs' duplicative billing. Instead, after reviewing the billing records, the court allowed a recovery for duplicated efforts by simply asserting that "this category of objections does not warrant a reduction." ROA.1576.

That was error. Even if that triple fee for the depositions was reasonable, there were numerous other instances of double-, triple-, and even quintuple-billing that accounted for thousands of dollars of fees that plaintiffs were wrongly awarded. For example, five of plaintiffs' attorneys participated in a conference call with the magistrate judge on November 21, 2016, and each attorney sought compensation for the call. ROA.1506, 1524, 1526, 1537, 1543. Then, after that half-hour call, four attorneys convened a conference call to discuss the case and sought a total 2.4 hours for the second call. ROA.1506, 1524, 1526, 1537.

In other multi-lawyer-billing examples, on October 25, 2016, five attorneys participated in a team call for which all of them sought compensation for a total of 3 hours. ROA.1505, 1523, 1525, 1536, 1543. Earlier, on October 6, 2016, four attorneys participated in another team call that produced 1.8 hours of time for which plaintiffs sought compensation. ROA.1503, 1523, 1536, 1542. In September 2016, before the complaint was even filed, three attorneys traveled to Mississippi to meet with the named plaintiffs. That multi-lawyer trip resulted in approximately one hundred hours of requested compensation (almost 10% of plaintiffs' total fee request) for that time spent traveling and in meetings. ROA.1502, 1522, 1535-36.

None of those duplicative efforts—or the many others that defendants objected to (ROA.1493-1544)—should have been allowed in plaintiffs' fee award. Defendants flagged all of these hours as duplicative. The district court abused its discretion by casually rejecting that "category of objections" and failing to reduce the overall fee award for counsel's duplication of effort. It conferred an unjustified windfall on plaintiffs' attorneys at the expense of the Mississippi taxpayers. That should not stand.

CONCLUSION

This Court should vacate the district court's order on attorneys' fees and costs and remand the case for a proper determination of a reasonable fee.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wilson D. Minor, hereby certify that the foregoing brief has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: December 7, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32, it contains 8,374 words. This brief 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 proportionally-spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font, except for footnotes, if any, which have been prepared the same way except in 12-point font.

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