Case No. 20-10249

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHIYANG HUANG, *et al.*,
Objectors-Appellants,

v.

BRIAN SPECTOR, *et al.*,
Plaintiffs-Appellees.
and
EQUIFAX INC., *et al.*,
Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Georgia,
No. 1:17-md-02800-TWT

Brief of Jay Edelson as Amicus Curiae in support of Objector-Appellants Frank and Watkins and Reversal

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INTEREST OF AMICUS CURIAE[1]

Amicus Jay Edelson is an accomplished class-action practitioner, with nearly two decades of experience representing plaintiff classes. *See* www.edelson.com/team/jay-edelson. He has been referred to by Law360 as a "Titan of the Plaintiff's Bar," and by the *New York Times* as "Tech's Least Friended Man" for his innovation and success in bringing privacy class actions. *Id.*

In the privacy space, Mr. Edelson and his firm have litigated pathmaking cases, *see, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), negotiated landmark settlements under privacy statutes, *see, e.g.*, *In re Facebook Biometric Information Privacy Litig.*, No. 15-cv-03747-JD, 2020 WL 4828608 (N.D. Cal. Aug. 19, 2020) ($650 million privacy settlement), and obtained historic verdicts in privacy cases, *see Wakefield v. ViSalus, Inc.*, Judgment, ECF No. 383 (D. Or. Aug. 27, 2020) (trial verdict of over $925 million). As Law360 noted, he has "fostered a reputation for his uncanny ability to come up with

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *amicus curiae* states that no counsel for any party to this appeal authored this brief in whole or in part, and no person, other than *amicus curiae*, made any monetary contribution to its preparation or submission.

creative standing and damages arguments" leading to "momentum-shifting rulings in challenges to the data security and information-gathering practices of companies."

Proposed *amicus* has served as an adjunct professor of law at the University of California-Berkeley and the Illinois Institute of Technology-Chicago-Kent College of Law, where he has taught courses on privacy and class actions, respectively. Mr. Edelson is the host the legal commentary podcast Non-Compliant and is also a frequent speaker and writer on issues related to class actions and privacy issues, including discussing need for reform within the plaintiff's bar.

One pressing issue in contemporary class action practice is class member participation at the claims stage. As a leading class action lawyer, Amicus is acutely aware of the negative stigma surrounding class actions and class-action lawyers. *See* Robert Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 732 (2013) (discussing class device's poor reputation in light of "isolated--but highly publicized--instances of abuse in which class attorneys obtained handsome fees while class members received meager recoveries or worthless coupons"). Despite the work put in by firms like Amicus's, many absent class

members simply don't submit claims, perhaps because they believe the trope that class actions generate lots of money for lawyers, but very little for the victims of widespread frauds. This settlement affected nearly every American and for many people it will be their most significant experience with a class action. The settlement reached here therefore represents a real problem for class-action attorneys who, like Amicus, wish to improve class member participation in settlements.

While Class Counsel, and the district court, tout the $380.5 million Consumer Restitution "Fund" created by this settlement, by and large interested class members will receive little or no actual monetary relief. That is because the principal settlement benefit here is credit monitoring, not cash compensation for the serious invasion of privacy that resulted from Equifax's conduct. While that is par for the course in data breach litigation, here there were valuable statutory claims that were simply abandoned without justification by Class Counsel or scrutiny from the district court.

A second problem is that the $125 in monetary relief here received outsized publicity, and class members plainly preferred a cash payout, rather than years of free credit monitoring. Indeed, Amicus spoke to

scores of class members in the wake of the settlement who were excited for their $125 payments. But it was apparent almost immediately that no one would get anywhere near that amount. Class Counsel attempts to blame the outsize publicity and resultant small payments on a *New York Times* reporter, but the real problem was the initial notice that was sent to class members. Now the class members Amicus spoke to believe class actions are fraudulent and the resulting class member confusion and miniscule payouts are sure to deter class action participation for years to come. Amicus, the Plaintiff's bar, the victims of Equifax's data breach, and consumers generally are worse off when settlements like this are not only approved, but lauded by courts in the process.

STATEMENT OF ISSUES

Did the district court abuse its discretion in concluding that the settlement at issue in this appeal is fair, reasonable, and adequate, in light of the court's inadequate consideration of statutory damages claims, and the confusing claims process?

SUMMARY OF ARGUMENT

Although Class Counsel touts the settlement here as worth $380.5 million to the 147-million-person class, only 8% of this figure (or $31 million) is available to individuals who simply want to submit a claim and receive money. True enough, class members with documented out-of-pocket losses can recover at least some of those losses. But millions of class members, like objector-appellants Theodore H. Frank and David R. Watkins, come from states with consumer protection laws that permit recovery of liquidated statutory damages amounts. These types of claims have real value and were simply abandoned by Class Counsel with the district court never inquiring about their value or why they were abandoned.

The end result is that only a small slice of this settlement is allocated for simple cash payments. Even then, this money is only available to people who already had purchased credit-monitoring services before making a claim. But there are real harms here and statutory claims with significant set damages, which shouldn't have been discarded so cavalierly by Class Counsel or the district court. Indeed, this Court requires that these claims should have been

explicitly accounted for during the district court's fairness analysis, but they weren't.

Worse, the settlement was touted as providing $125 cash payments to those who already had purchased credit-monitoring services. But that number was never really true. This data breach affected 147 million Americans. The $31 million alternative cash fund could pay out $125 to only 248,000 claimants, less than 0.2% of the class. Any reasonable notice program should have generated many more claims for payment than that. And, indeed, millions more people submitted claims for this alternative cash payment within days. (Dkt. 903, at 8.) So many, in fact, that additional steps were added to the claims process in an apparent attempt to *discourage* class members from claiming the cash option. *See* David Dayen, *Another Equifax Bait and Switch*, The Am. Prospect, *available at* https://prospect.org/economy/another-equifax-settlement-bait-switch/ (Sept. 9, 2019). Undoubtedly many felt misled by this unfair, ad hoc process, and many others will feel misled when they receive a check worth far less than $125. This is not good for class-action practice.

These issues could, and should, have been avoided with a more rigorous analysis of this settlement's fairness.

ARGUMENT

I. The relief made available to class members, combined with the misleading initial notice sent to Class Members, resulted in a problematic claims process.

The principal relief secured for class members in the settlement at issue in this appeal is credit monitoring. But the settlement also makes available, as "alternative compensation" to individuals who already had credit-monitoring services, a one-time cash payment. (Dkt. 739-2, ¶ 7.5) At this point, neither class members nor the Court knows what the size of that one-time payment will be. Objectors Frank and Watkins asserted, based on information about claims rates and basic arithmetic, that it appears the ultimate figure will be a few dollars. Thus far, Class Counsel has suggested that that assertion is misleading, but has refused to put in the record any evidence correcting objectors' impression.

But that dispute should not distract the Court from the fact that errors in the negotiation and presentation of this relief require a closer look from the district court. Problematically, in the initial short-form

summary notice sent to class members, class members were promised "Free Credit Monitoring or [a] $125 Cash Payment." Dkt. 739-2, Ex. A, Email 1. *Nothing* in the initial summary notice indicated that class members might receive less than $125 if they selected the alternative compensation. A follow-up email conveyed the same (incorrect) message in "visual images … prepared and formatted by the Federal Trade Commission." Dkt. 739-2, Ex. A, Email 2. And a second follow-up, proposed to be sent with just two weeks left in the claims period, repeated the misrepresentation. Dkt. 739-2, Ex. A, Email 3.

To be fair, the long-form notice does at least partially correct this error, telling the reader on page one that alternative compensation will be in an amount "up to $125" (the words "up to" did not appear on the initial short-form summary notice), and stating on page 12 that the total alternative compensation award may go down if many people claim. But the short-form summary notice let the cat out of the bag.

This "alternative" cash payment is to be paid out of a $31 million fund. (Dkt. 739-2.) At $125 per alternative-compensation award, the settlement contains enough cash to pay out to 248,000 claimants. But on what basis did Class Counsel estimate that 248,000 eligible class

members would claim the alternative $125 payment? We are never told, and this estimate makes almost no sense. It's quite simple, for instance, to obtain a free credit monitoring service through Credit Karma. Claims rates make perfectly clear in hindsight that Class Counsel badly miscalibrated the relief offered here. But even without the benefit of hindsight, the idea that only a miniscule portion of the class would want cash now over credit monitoring was a miscalculation anyone could see coming.

Almost immediately, it seems, Class Counsel realized they had a problem on their hands. An amended notice was prepared and disseminated, and eventually a process was set up through which alternative-compensation claimants would need to verify (for a second time) that they had credit monitoring services. As impartial observers noted, this step was quite clearly taken to "throttle" and reduce claims. Dayen, *supra*, *Another Equifax Bait and Switch*.

In the end it seems likely that the eventual alternative-compensation payouts will be far less than $125. It bears noting, however, that neither Class Counsel nor the district court has ever even

attempted to estimate what these claimants will receive. That omission, frankly, is baffling.

Class Counsel and the district court attempted to shift blame for all of this onto an opinion writer for the *New York Times*. (*See* Dkt. 1029, at 37 n.3.) With all due respect to Class Counsel and the district court, this is appalling. Settlement notices are supposed to be written clearly precisely so that this sort of thing doesn't happen. If there was a failure here, it doesn't fall on the people who relied upon Class Counsel and the district court to provide easily understood information about the settlement.

And the consequences will be borne by the entire class-action bar. This case involved an issue that affected nearly every (if not every) adult American. The whole country was watching. And when the class-action bar stepped up to do its part to help right this wrong, our representatives provided inadequate compensation, misleading notice, and an ad hoc and confusing claims process. It seems no understatement to say that, because of what happened here, no class action notices for some time will carry any air of credibility. This will harm our entire system of justice.

Fortunately, there is still time and reason to correct Class Counsel's errors. The amount of "alternative reimbursement compensation" made available to class members was never justified by any evidence submitted to the district court, and the $125 figure is a *cap* on the alternative-compensation payouts, not an estimate of recovery (as is typically provided in settlement notice documents). As explained next, an appropriately rigorous fairness analysis would have caught these errors before the absent class got embroiled in an unduly messy claims process.

II. Millions of class members had valuable statutory damages claims.

Fed. R. Civ. P.23(e)(2) required the district court to determine whether Class Counsel's proposal was "fair, reasonable, and adequate." The reasons for judicial review of a class-action settlement are many, but "the main judicial concern is that the rights of the passive class members not be jeopardized by the proposed settlement." *See* Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1797.1 (3d ed.). Critical here, the settlement essentially throws away valuable statutory damages claims.

In the underlying class action complaint, Plaintiffs and Class Counsel alleged that Defendant Equifax Inc.'s inability to adequately

safeguard the personal information of essentially every adult American violated several state consumer protection laws. Lead Class Counsel was appointed with these claims prominently featured in their pleadings. In fact, the consolidated complaint, (Dkt. 374), alleges claims under the law of every state as well as under the law of three U.S. territories. Claims under 35 of these statutes survived a motion to dismiss. (Dkt. 540.) And several of these statutes permit consumers to recover damages in a preset amount once a violation is proved, including the District of Columbia, where objector-appellant Frank lives, *see* D.C. Code § 28-3905(k)(2)(A)(i) (providing for recovery of $1,500 per violations), or once a cognizable injury occurs, as in Utah, where objector-appellant Watkins lives, *see* Utah Code 13-11-19(2) (providing for recovery of $2,000). These claims were not further tested adversarially, as through oral discovery or a motion for summary judgment, following the denial of the motion to dismiss. In other words, at the time the case was settled, the district court had at least tentatively determined that these claims were worth hundreds of dollars and nothing had occurred in the litigation to diminish their worth.

These claims, which were released by the class-action settlement, therefore should have been discussed in both Class Counsel's defense of the settlement and in the district court's analysis (beyond, at the very least, the half-sentence and footnote the Utah statute received, *see* Dkt. 1029, at 63 & n.31). One critical factor a district court must consider when assessing a class action settlement's fairness is "the range of possible recovery." *Faught v. Am. Home Shield Co.*, 668 F.3d 1233, 1240 (11th Cir. 2011); *see also Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977) (requiring a district court to assess the "probable rewards of that litigation"). The circuits have articulated a range of approaches to this part of settlement review. *See Marshall v. Nat'l Football League*, 787 F.3d 502, 516-19 (8th Cir. 2015) (collecting and reviewing cases). All circuits agree that mathematical precision is not required, and, indeed, may be impossible. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012). The degree of precision required in a particular fairness analysis, most agree, is an issue to be approached on a case-by-case basis. *Marshall*, 787 F.3d at 517. But all agree that a judge must make *some* assessment of the probable recovery. The Seventh Circuit has said that lawyers for a settlement

class should "present evidence" that would enable a judge to reach a "ballpark valuation" of the class's claims. *Synfuel Techs., Inc. v. DHL Express (USA) Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quotation omitted). The Third Circuit, similarly, has called an assessment of the value of a class's claims "required" and has vacated a judgment approving a settlement after the settling parties "failed to provide the District Court with estimations of recoverable damages for the Purchase Claims including sales information quantifying the amount of recalled pet food sold to consumers and the amount of refunds already paid to consumers." *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 355 (3d Cir. 2010).

III. Neither Class Counsel nor the District Court made any effort to ascertain the value of the live statutory damages claims held by absent class members.

Even though case law requires some consideration of a class's probable recovery, Class Counsel never produced this information, the district court never asked for it, and the final approval order barely begins to discuss the value of the class's probable recovery.

This omission is particularly startling here given that many class members held very valuable claims. Many states permit recovery under

consumer protection statutes without requiring a demonstration of "actual" harm. *See, e.g.*, D.C. Code § 28-3905. Many others require some allegation of "actual" harm, but this is not always a demanding requirement. *See In re Marriott Int'l, Inc. Customer Data Security Breach Litig.*, 440 F. Supp. 3d 447, 494-95 (D. Md. 2020) (rejecting argument for dismissal based on failure to plead damages, noting that plaintiffs alleged damages stemming from data breach, including "loss of value of personal information," and holding that this was sufficient to allege actual injury). Because these statutes frequently permit recovery in a predetermined amount, the total damages figure can add up quickly. *Cf. In re Facebook Biometric Info. Privacy Litig.*, No. 15-cv-03747-JD, 2020 WL 4818608 (N.D. Cal. Aug. 19, 2020). True enough, many privacy cases settle shortly after the motion to dismiss stage, with the class accepting a steep discount. But even at a steep discount these claims should still generate real monetary recovery for claiming class members. And, of course, if counsel actually litigates these claims for any length of time, the benefits for the absent class can be enormous. This is not to say that a district court can necessarily second-guess Class Counsel's decision to settle rather than further litigation. But it is

to say that a district court needs to at least figure out what kind of discount class counsel is forcing a class to accept by settling early, and to determine whether that decision adequately protects the absent class.

The record does not contain much, if any, evidence of the discount class members were forced to accept here. But a recent filing from Equifax suggests that the discount is enormous—and almost certainly unjustified. (*See* Dkt. 1168.) In an "Emergency Motion to Enforce the Judgment," Equifax disclosed that dozens of class members had pressed individual claims in Mississippi state court and recovered thousands of dollars after the cases quickly proceeded to judgment. (Dkt. 1168, at 8.) This is powerful evidence that the settlement, which doesn't even permit most class members to recovery monetary damages, seriously, likely fatally, undervalues the statutory claims held by class members. *See Lane*, 623 F.3d at 833 (Kleinfeld, J., dissenting) ("Arguably, no harm would be done if all claims of wrongdoing to Facebook users from the Beacon program were frivolous. … [But] [t]here is reason to believe that Facebook needed the shield its $9.5 million bought. Facebook got

customer complaints and bad publicity from the opt-out Beacon program. The class had colorable claims.").

In response to objections regarding the value of the Settlement, Class Counsel focused on the supposed value of credit-monitoring services, and the potential for class members who suffered identity theft to recover thousands of dollars. (Dkt. 902, at 8-10.) That analysis completely shortchanges class members who have statutory damages claims. Later on, Class Counsel highlighted the "substantial barriers" to recovery that any statutory damages claimant would face. (Dkt. 902, at 14.) The implication, of course, is that these claims that survived a motion to dismiss and were not further vetted through discovery are valueless. But there was no explanation provided for that assumption.

Likewise, the district court barely addressed these claims, only briefly parroting Class Counsel's assertion that *some* of the statutory claims lack value. (Dkt. 1029, at 63.) Its analysis focused instead on the fact that this is the largest data breach settlement. (Dkt. 1029, at 15.) With respect to the district court, it would have been a major red flag if this *wasn't* the largest data breach settlement in history, simply because this appears to be the most impactful data breach in history.

That Class Counsel were able to negotiate "the largest" data breach settlement shouldn't really have moved the needle in any direction.

Citing to Class Counsel's brief in support of final approval, the Court did say "the Court finds that much of the relief afforded by the settlement likely exceeds what could be achieved at trial." (Dkt. 1029, at 17.) But this appears also to be a reference to credit monitoring, which Class Counsel's expert averred "may not" be recoverable in an action for compensatory damages. (*See* Decl. of Robert Klonoff, Dkt. 858-2, ¶ 73 ("[E]very class member is eligible for credit monitoring worth almost $2,000, a remedy that may not have been achievable at trial.").)

At the very least, the district court should have required Class Counsel to submit evidence of the "range of possible recovery" that either estimated, in good faith, or provided information with which class members could estimate, the value of statutory damages claims held by class members. That it failed to do so is an abuse of discretion. That failure is especially stark in light of strong evidence that the particular claims at issue here had significant value.[2]

[2] Objector-appellants Frank and Watkins frame this issue on appeal in terms of certification, suggesting that class members with valuable statutory damages claims should be included in their own

IV. Class Counsel's decision to abandon statutory damages claims ill-serves the present class and will deter participation in future class actions.

The sparse analysis provided by the district court papers over the obvious fact here that Class Counsel abandoned statutory damages claims that helped it get appointed to lead the case and which it successfully defended at the motion to dismiss stage. Amicus strongly disagrees with Class Counsel's decisions here: the exfiltration of petabytes worth of personal information is a serious invasion of privacy. Courts have recognized for at least a century now that invasions of privacy are legally cognizable injuries. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 72 (Ga. 1905). More recently, courts have begun accepting the notion, which is more and more true today in the era of Big Data, that an individual's personal information, by itself, is valuable. *See In re Facebook Internet Tracking Litig.*, 956 F.3d 589, 599-

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class. (Watkins Br. 19-45.) But as this Court recognized long ago, even if a class includes members with conflicting interests, a settlement that is fair to all can be reached, at which point intra-class conflicts are mooted. *See In re Corrugated Contained Antitrust Litig.*, 643 F.2d 195, 207-08 (5th Cir. 1981). But the resulting agreement must be fair, and the record here reveals instead that class members with valuable claims were shortchanged, which should weigh against settlement approval.

600 (9th Cir. 2020). Therefore, at the time of settlement, millions of class members held viable statutory damages claims.

What could possibly justify Class Counsel's decision to walk away from those claims? Among the "evidence" Class Counsel submitted during the approval process, two sentences in the declaration of Geoffrey Miller arguably bear on the value of the statutory claims released here: "In pursuing their claims, counsel faced many potential hurdles, any one of which could have proved fatal or severely damaging. For example, plaintiffs needed to prove that they suffered legally cognizable injuries proximately caused by the Equifax data breach." Miller Decl., Dkt. 900-3, ¶ 23.

But beyond this brief statement, which does not even apply in places like D.C. where a showing of actual harm is unnecessary to obtain an award of statutory damages, Class Counsel never presented any evidence showing how serious an issue this was for class recovery, or the extent to which total abandonment of the claims warranted. Indeed, one half paragraph in the Miller Declaration is the extent of Class Counsel's treatment of the issue, which received similarly brief treatment from the district court. Objector-Appellant Watkins presents

some argument that the issue was not insurmountable. (Watkins Br. at 30.) But that's an issue that the district court should have explored below. [3]

That the court did not explore this issue further during the settlement approval process is all the more troubling because the court *did* conduct an analysis of this issue in its order denying the motion to dismiss. (*See* Dkt. 540, at 15-21.) In that order, the district court exhaustively explained why, at least under Georgia law, compromise of personally identifiable information by criminal hackers is a legally cognizable injury. So what changed between the motion to dismiss and the agreement to settle? The record does not say. Perhaps the court's conclusions would not translate to states like Utah or the District of Columbia, or even others that permit recovery of statutory damages like New York, *see* N.Y. GBL §§ 349, 350, or Rhode Island, *see* R.I. Stat. § 6-13.1-5.2(a). Perhaps the law changed between the order on the motion

[3] Despite the terminology, it does not appear that this language is intended to address standing to sue: On the motion to dismiss, Equifax declined to move to dismiss for lack of standing, conceding that the plaintiffs had suffered concrete injuries-in-fact, but contending instead that these injuries were not compensable under any legal theory. (Dkt. 540, at 15 n.70.)

to dismiss and the time of settlement. *See* Dkt. 900-3, ¶ 23. Whatever the change, Class Counsel did not provide evidence or argument concerning it, and the district court ignored the issue entirely.

V. Class member reaction to the settlement favored *dis*approval.

In one sense, Class Members did *not* ignore the issue. At final approval, Class Counsel touted the "positive" response from the class (Dkt. 903, at 1), but Class Counsel declined to provide hard claims rates for each type of relief offered under the settlement, but we do know that only around 3.3 million of the 15 million submitted claims were for credit monitoring, which Class Counsel repeatedly touted as a centerpiece of their deal. We do not know how many claims were made for reimbursement of expenses but given that an "extended claims period" was opened for these claims, it seems likely that the number was low. Therefore, based on the little information that is available, the Court can and should assume that the majority of claims made on this settlement were for a cash payment from the "alternative compensation" piece of the deal. (And given class member choices, calling this "alternative" compensation seems incorrect.)

As currently constituted, then, it would appear that the absent class largely disagrees with how Class Counsel chose to allocate the funds within the settlement pot. *See* Fed. R. Civ. P. 23(e)(2)(D). It is a serious red flag that only 0.44% of the class bothered submitted a claim for the credit-monitoring relief that Class Counsel held out as the valuable centerpiece of its deal. This generally unfavorable reaction to the settlement should have weighed in favor of disapproval. *See Faught*, 668 F.3d at 1240.

The district court cited the low number of objections and opt outs in approving the settlement. (Dkt. 1029, at 25-26.) True, this is typically how district courts gauge a class's reaction to a proposed class-action settlement. Yet at the same time, "the court needs to be careful not to infer too much from a small number of objectors to a sophisticated settlement." *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002). Here, class member behavior is just as strong an indication that class members are not satisfied with this settlement. There is a particularly stark divergence between Class Counsel's decision to emphasize credit-monitoring relief, and the class's decision to reject that relief. The claims process here says something significant:

Class members value their privacy. They deserve a settlement that reflects that. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) ("the inference of approval drawn from silence may be unwarranted").

Perhaps the most confusing part of all of this is that, because the deal is non-reversionary, Equifax itself has no interest in how the $380.5 million gets allocated. It was Class Counsel's decision to emphasize credit-monitoring relief within that framework. No explanation ever was provided for that choice. The reaction of the class suggests it is not the choice the class would make if it were given an option.

CONCLUSION

Amicus urges the Court to vacate the judgment approving this settlement, and to remand for further consideration, in light of the arguments raised by the Objector-Appellants.

Dated: September 11, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: September 11, 2020 s/ J. Aaron Lawson

Attorney for Amicus Curiae