NO. 17-1853

In the United States Court of Appeals for the Fourth Circuit

Ross Abbott, College Libertarians at the University of South Carolina, and Young Americans for Liberty at the University of South Carolina,

Plaintiffs-Appellants,

v.

Harris Pastides, Dennis Pruitt, Bobby Gist, and Carl R. Wells,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of South Carolina, Columbia Division

BRIEF OF THE ACLU OF SOUTH CAROLINA, THE DKT LIBERTY PROJECT, THE INDIVIDUAL RIGHTS FOUNDATION, THE NATIONAL COALITION AGAINST CENSORSHIP, REASON FOUNDATION, AND STUDENT PRESS LAW CENTER IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

The ACLU of South Carolina, The DKT Liberty Project, The Individual Rights Foundation, The National Coalition Against Censorship, Reason Foundation, and The Student Press Law Center (collectively, the "Free Speech Advocates"), represent a broad coalition of organizations from across the political and ideological spectrum united by a common belief in the importance of promoting and protecting constitutional rights, including the rights to freedom of expression and due process of law enjoyed by our nation's public college students. This case is of deep concern to the Free Speech Advocates. Despite the clarity of the jurisprudence governing their rights, students continue to suffer from unjust inquisitorial investigations triggered by the exercise of speech protected by the First Amendment, as did the students in this case. The Free Speech Advocates believe that to safeguard student civil liberties, courts must hold public universities accountable for their unconstitutional actions.

The American Civil Liberties Union ("ACLU") of South Carolina is a state affiliate of the national ACLU. The ACLU of South Carolina's mission is to advance the cause of civil liberties in South Carolina, with emphasis on rights of free speech, free assembly, freedom of religion, and due process of law, and to take all legitimate action in the furtherance of such purposes without political partisanship.

The DKT Liberty Project ("DKT") is a nonprofit organization founded to promote individual liberty against encroachment by all levels of government. DKT is committed to protecting privacy, guarding against government overreaching, and protecting the freedom of all citizens to engage in expression without government interference. DKT has filed numerous friend-of-the-court briefs supporting free speech rights.

The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center (founded in 1988 as the Center for the Study of Popular Culture). IRF is dedicated to supporting free speech, associational rights, and civil rights issues, including student rights on campuses, and its lawyers participate in educating the public about the importance of constitutional protections. One of the Freedom Center's major initiatives involves promoting academic freedom for university students. To further these goals, IRF attorneys participate in litigation and file *amicus curiae* briefs in appellate cases raising important constitutional issues. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and dissent, which are basic components of individual rights in a free society.

The National Coalition Against Censorship ("NCAC") formed in response to the 1973 Supreme Court decision in *Miller v. California*, which narrowed First Amendment protections for sexual expression and opened the door to obscenity prosecutions. Its mission is to promote freedom of thought,

inquiry and expression and oppose censorship in all its forms. Over 40 years, as an alliance of more than 50 national non-profits, including literary, artistic, religious, educational, professional, labor, and civil liberties groups, NCAC has engaged in direct advocacy and education to support First Amendment principles.

Reason Foundation was established in 1978 as a nonpartisan and nonprofit public-policy organization dedicated to advancing a free society. Reason develops and promotes policies that advance free markets, individual liberty, and the rule of law—which allow individuals and private institutions to flourish. To support these principles, Reason publishes *Reason* magazine, produces commentary on its websites, and issues policy research reports. And in significant public-policy cases, Reason selectively files *amicus curiae* briefs.

The Student Press Law Center ("SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating student journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics. SPLC is a recognized authority on the law governing the rights of student speakers, it tracks reported instances of censorship nationally on the www.splc.org website, and its staff of attorneys have authored the most widely used reference book in the field, *Law of the Student Press* (4th ed. 2014).

AUTHORSHIP STATEMENT

This brief is authored by in whole by the Free Speech Advocates and their counsel. No party and no other person—other than the Free Speech Advocates and their counsel—contributed money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a)(4)(D), the Free Speech Advocates state that the authority to file this brief will be derived from an Order of this Court, if granted, on the Motion for Leave to File an Amici Curiae Brief, which attaches this brief.

SUMMARY OF THE ARGUMENT

For decades, the Supreme Court has recognized the crucial importance of ensuring that students attending our nation's public colleges and universities enjoy the full protection of the First Amendment to speak freely without fear of punishment or retribution. In recent years, however, many public universities, facing pressure from constituencies that disagree with the Supreme Court's interpretation of the First Amendment, have established procedures that subject students to inquisitorial investigations triggered by the exercise of speech that is unquestionably protected by the First Amendment.

In response to criticism that public universities should not be subjecting students to an inquisitorial process for exercising their First Amendment rights, many universities, including the University of South Carolina in this case, have brushed off the criticism by claiming that if the process does not result in any punishment or retribution for protected speech, then the process is proper. This response completely ignores that the "process is the punishment."[1] The protections of the First Amendment would be of little value if university officials can with impunity subject students to

[1] *See generally,* Malcolm M. Freeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979) (arguing that the real cost of the criminal justice system is not the fines and sentences meted out, but the costs incurred before the case even comes before the judge, including lost wages, bail costs, attorneys' fees, and wasted time).

unreasonable and burdensome procedures simply for exercising their First Amendment right to free speech. This Court should make clear that public universities violate the First Amendment by subjecting public university students to investigations for exercising their First Amendment rights, and "no harm, no foul" is not a defense to the unconstitutional conduct.

ARGUMENT

I. The expressive activity of public college students is protected by the First Amendment.

In compliance with the University of South Carolina's time and place regulations governing non-commercial solicitations on campus, Plaintiffs-Appellants displayed posters and handouts referencing censorship incidents at other universities. JA 573-74. This conduct is classic expressive activity at the core of the First Amendment. *Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

The fact that the expressive activity occurred on a public university campus did not diminish the students' rights under the First Amendment. The Supreme Court has long held that public college students are entitled to the full protection of the First Amendment. *Healy v. James*, 408 U.S. 169, 180 (1972) ("the precedents of this Court leave no room for the view that, because

of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large"). The Supreme Court has not only clarified that public college students are entitled to full expressive rights, but has emphasized the importance of safeguarding these rights. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

II. The free speech rights of public university students is threatened.

While the Supreme Court has consistently reiterated that the expressive rights of public college students are fully protected by the First Amendment, the message of the Supreme Court is all too frequently ignored by public university administrators, who often believe that competing values trump the First Amendment rights of students. This clash between students and administrators is not new. *Healy v. James*, 408 U.S. at 197 ("[Students] often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated. When they ask for change, they, the students, speak in the tradition of Jefferson and Madison and the First Amendment.") (Douglas, J., concurring).

What is new is the brazenness of administrators knowingly and willfully refusing to follow Supreme Court precedent. As fast as lower courts invalidate university policies that unconstitutionally restrict student speech,[2]

[2] *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010)

new policies are imposed that are designed to restrict protected speech. On a regular basis, public university students are now subject to blatantly unconstitutional inquisitorial investigations triggered by the exercise of rights fully protected by the First Amendment. In recent years, public university students have been improperly subjected to investigation, retribution, denial of benefits, and even arrest, for distributing copies of the United States

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(invalidating university speech policies, including harassment policy); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 1:12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) (invalidating "free speech zone" policy); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) (finding university "cosponsorship" policy to be overbroad); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003) (declaring university policy regulating "potentially disruptive" events unconstitutional); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 2:96-CV-135, 1998 WL 35867183 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy).

Constitution,[3] distributing pro-choice flyers,[4] writing an article critical of a faculty member,[5] placing a campaign sign on a dorm room window,[6] defending the view that hate speech is protected speech,[7] displaying in text examples of harassment for a sexual assault awareness program,[8] performing

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[3] Cecilia Capuzzi Simon, *Want a Copy of the Constitution? Now, That's Controversial*, The New York Times (August 1, 2016), *available at* https://www.nytimes.com/2016/08/07/education/edlife/constitution-free-speech-first-amendment.html?mcubz=1.

[4] Ed Enoch, *University of Alabama at center of free speech debate*, Tuscaloosa News July 11, 2013), available at http://www.tuscaloosanews.com/news/20130711/university-of-alabama-at-center-of-free-speech-debate.

[5] Glenn Coin, *How an email to three college coaches led to a near suspension for SUNY Oswego student*, syracuse.com (Nov. 12, 2012), *available at* http://www.syracuse.com/news/index.ssf/2012/11/how_an_email_to_three_college.html.

[6] Sara Gonzalez, *University tried to make student remove Trump sign from his dorm window, but the student fought back*, The Blaze (April 17, 2017), *available at* http://www.theblaze.com/news/2017/04/17/university-tried-to-make-student-remove-trump-sign-from-his-dorm-window-but-the-student-fought-back/.

[7] Matthew Kelly, *SGA votes against recognizing controversial Young Americans for Liberty group*, The Sunflower (April 6, 2017), *available at* https://thesunflower.com/16806/news/student-government-association/sga-votes-against-recognizing-controversial-young-americans-for-liberty-group/.

[8] Patrick McNeil, *This College Student Put Up a Street Harassment Display. It Was Immediately Censored*, Huffington Post (April 1, 2017), *available at* http://www.huffingtonpost.com/entry/this-college-student-put-up-a-street-harassment-display_us_58dfde09e4b0d804fbbb7363.

a play satirizing racial stereotypes,[9] sharing thoughts of self-harm on social media,[10] selling t-shirts with a message advocating marijuana legalization,[11] publishing an April Fools' Day edition of a student newspaper,[12] encouraging

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[9] Andrew R. Chow, *A Charged Title. A Canceled Show. Now a Cal State Official Resigns*, The New York Times (September 13, 2016), *available at* https://www.nytimes.com/2016/09/14/theater/a-charged-title-a-canceled-show-now-a-cal-state-official-resigns.html?mcubz=1.

[10] Jesse Singal, *A University Threatened to Punish Students Who Discussed Their Suicidal Thoughts With Friends*, New York Magazine, *available at* http://nymag.com/scienceofus/2016/09/a-school-is-threatening-to-punish-its-suicidal-students.html.

[11] Zach Baker, *NORML chapter clashes with MU over proposed T-shirt designs*, Missourian (June 20, 2016), *available at* https://www.columbiamissourian.com/news/local/norml-chapter-clashes-with-mu-over-proposed-t-shirt-designs/article_550a7524-3724-11e6-82e0-3729602dd5d8.html.

[12] Lisa Kaczke, *UWS closes investigation into April Fools' Day issue of student paper*, Duluth News Tribute, (April 22, 2016), *available at* http://www.duluthnewstribune.com/news/4016207-uws-closes-investigation-april-fools-day-issue-student-paper.

students to write thoughts on a "free speech ball,"[13] holding an ethnically themed recruitment event,[14] and telling a joke with a sexual innuendo.[15]

These inquisitorial investigations are having the intended effect of restricting and narrowing the viewpoints voiced on college campuses. *See generally*, Jonathan R. Cole, *The Chilling Effect of Fear at America's Colleges*, The Atlantic (June 9, 2016), *available at* https://www.theatlantic.com/education/archive/2016/06/the-chilling-effect-of-fear/486338/. According to a 2015 survey of college students' free-speech attitudes, 49 percent of survey participants admitted that they felt intimidated to share beliefs that differ from their professors, and fully half of respondents said they had "often felt intimidated" to express beliefs different from those of their classmates. Press Release, McLaughlin & Associates, *The William F. Buckley, Jr. Program at Yale: Almost Half (49%) of U.S. College Students "Intimidated" by Professors when Sharing Differing Beliefs: Survey* (Oct. 26, 2015),

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[13] Scott Jaschik, *Dispute Over Phallic Drawing on Beach Ball*, Insider Higher Ed (April 18, 2016), *available at* https://www.insidehighered.com/quicktakes/2016/04/18/dispute-over-phallic-drawing-beach-ball.

[14] Chris Haire, *Cal State Fullerton sorority sanctioned for 'Taco Tuesday' party*. The Orange County Register (September 19, 2014), *available at* http://www.ocregister.com/2014/09/19/cal-state-fullerton-sorority-sanctioned-for-taco-tuesday-party/.

[15] Saul Hubbard, *Letter says UO drops case against student*, The Register-Guard (August 29, 2014), available at http://projects.registerguard.com/rg/news/local/32076078-75/uo-drops-charges-against-student-for-sexual-comment.html.csp.

available at http://mclaughlinonline.com/2015/10/26/the-william-f-buckley-jr-program-at-yale-almost-half-49-of-u-s-college-students-intimidated-by-professors-when-sharing-differing-beliefs-survey. A 2016 survey yielded similar results, with a majority (54 percent) of college students surveyed agreeing that "[t]he climate on my campus prevents some people from saying things they believe because others might find them offensive." Gallup, *Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*, *available at* https://www.knightfoundation.org/media/uploads/publication_pdfs/Free Speech_campus.pdf.

III. The First Amendment prohibits inquisitorial investigations of protected expressive activity.

The First Amendment not only prohibits governmental action that restricts or prohibits protected expressive activity, but also prohibits action that can chill or discourage protected expressive activity. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 793-94 (1988); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("[T]he fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474, 499-500 (4th Cir. 2005).

The Supreme Court has long recognized that the power of the government to subject individuals to investigation for exercising expressive activity can have the effect of chilling or discouraging free speech protected by the First Amendment. Therefore, the Supreme Court has held that the power to investigate is no greater than the power to restrict or prohibit expressive activity. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source."). Consequently, "it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963).

The Supreme Court has further held that inquisitorial investigations in a university setting require even greater scrutiny. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) ("It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.").

Assuming that the government can establish a compelling interest warranting an investigation of protected expressive activity, the government

power to investigate is still subject to strict scrutiny to ensure that the interference with protected activity is minimized. Among other restrictions, the government must ensure that its investigations are not prompted by frivolous accusations or accusations that are not within the compelling interest, which requires that the government screen accusations before commencing an inquisitorial investigation. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014); *White v. Lee*, 227 F.3d 1214, 1233 (9th Cir. 2000) ("Because the plaintiffs' lawsuit could have been actionable under the FHA if and only if it were a sham, the officials were obligated to first determine that the suit was objectively baseless before proceeding with any potentially chilling investigation into the plaintiffs' protected speech and other petitioning activity - even for the stated purpose of determining whether the plaintiffs had filed the suit with an unlawful discriminatory intent.").

The First Amendment limitation on inquisitorial investigations is critical to the functional application of the First Amendment. Without such limitation, the government could subject targets to frivolous investigations. While the targets might ultimately be vindicated, the vindication will only come after the expenditure of great expense and time, and that assumes the target has resources to challenge the government's actions. In effect, the process is the punishment. *See, e.g., Gordon v. Marrone,* 155 Misc. 2d 726, 736, 590 N.Y.S.2d 649, 657 (Sup. Ct. 1992) ("Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory.

Those who lack the financial resources and emotional stamina to play out the 'game' face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. To [sic] ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.").

In recognition that the process should not be the punishment, most states provide procedural protections against "SLAPP" lawsuits commenced by private citizens intended to interfere with free speech rights.[16] When it comes to government action, including action by public university administrators, the First Amendment provides no less protection to targets of inquisitorial investigations.

IV. Failure to correct the district court's erroneous grant of summary judgment will encourage further abuse of student First Amendment rights.

The investigation of the students in this case was triggered by complaints of discrimination filed by three other students. JA 574-75. In response to the complaints, the University sent a letter to Plaintiffs instructing Plaintiffs to arrange a meeting with the University's Office of Equal Opportunity

[16] Public Participation Project, *State Anti-SLAPP Laws*, *available at* https://anti-slapp.org/your-states-free-speech-protection/.

Programs "to fully discuss the charges as alleged." JA 575. The University also directed Plaintiffs "not to contact any of the complainants" and "not to discuss the issue with other members of the campus community." JA 575. One month later, after Plaintiffs met with an administrator as instructed, the administration notified Plaintiffs that the administration "will not move any further in regard to this matter." JA 576.

The District Court correctly held that Plaintiffs' expressive activity was unquestionably protected by the First Amendment. JA 585. The District Court correctly held that the University's investigation plausibly caused a chilling effect resulting in self-censorship, which suffices as a colorable claim for a violation of the First Amendment. JA 586-87. However, the District Court found no First Amendment violation because the investigation "was a narrowly drawn solution that was necessary to serve USC's compelling interest in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes." JA 588.

The District Court's holding effectively eviscerates the First Amendment right of Plaintiffs and other students to be free from inquisitorial investigations triggered by protected expressive activity. As set forth above, if the government cannot prohibit the expressive activity, it cannot investigate the expressive activity. The District Court cited no case that a university's interest in preventing discrimination permits a university to prohibit protected expressive activity that is at the core of the First Amendment. *See*

generally, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993) ("The University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint."); *White v. Lee*, 227 F.3d 1214, 1229-30 (9th Cir. 2000) (intent to enforce anti-discrimination provisions of Fair Housing Act did not justify investigation of protected expressive activity).

The Supreme Court has held that a university does have the right to regulate conduct "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). Accordingly, a university is entitled to establish procedures for investigating allegations of severe harassment. However, the First Amendment requires that the university screen the allegation of severe harassment ***prior*** to burdening the student alleged to have committed wrongdoing by engaging in protected expressive activity. In this case, while the complainants alleged that Plaintiffs' speech was "offensive," the complainants did not allege any severe harassment that could be punished consistent with the First Amendment. Nevertheless, the University of South Carolina still required Plaintiffs to participate in the investigation and justify their behavior. By failing to screen the complaints before subjecting the students to an investigation, and then requiring the students to participate in the investigation and justify their behavior notwithstanding the absence of

any colorable allegation justifying a punishment permitted by the First Amendment, the University violated the students' First Amendment rights. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014); *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000).

If the District Court's ruling is not reversed, public university administrators will learn the lesson that they have an absolute privilege to subject students to investigations so long as the investigation is triggered by an allegation of "discrimination," no matter how frivolous the allegation. The process will become the punishment, and the First Amendment rights of students will be significantly diminished.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

RESPECTFULLY SUBMITTED this 13th day of September, 2017.

By: /s/ Ryan W. Marth

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies under Fed. R. App. P. 32(g) that the foregoing brief meets the formatting and type-volume requirements set by Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B). This brief is printed in 14 point, proportionately-spaced typeface utilizing Microsoft Word 2016 and contains 3,744 words, including headings, footnotes, and quotations, and excluding all items identified under Fed. R. App. P. 32(f).

/s/Ryan W. Marth
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on September 13, 2017, he caused the foregoing motion to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to counsel-of-record for all parties to this case. The undersigned counsel also certifies that counsel-of-record for all parties to this case are registered as ECF Filers and will thus be served by the CM/ECF system.

/s/Ryan W. Marth
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